
Nova Scotia Utility and Review Board

DSM Non-Energy Benefits
Nova Scotia Power

Book of Authorities

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DSM Non-Energy Benefits – Book of Authorities
NON-CONFIDENTIAL

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Tab 1

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

**Alberta Energy and Utilities Board,
Ontario Energy Board, Enbridge Gas
Distribution Inc. and Union
Gas Limited** *Intervenors*

**INDEXED AS: ATCO GAS AND PIPELINES LTD. v.
ALBERTA (ENERGY AND UTILITIES BOARD)**

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

**Alberta Energy and Utilities Board,
Commission de l'énergie de l'Ontario,
Enbridge Gas Distribution Inc. et
Union Gas Limited** *Intervenantes*

**RÉPERTORIÉ : ATCO GAS AND PIPELINES LTD. c.
ALBERTA (ENERGY AND UTILITIES BOARD)**

Référence neutre : 2006 CSC 4.

N° du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonabilité. Lorsqu'elle

that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349;

Canada (Ministre de la Citoyenneté et de l'Immigration), [1998] 1 R.C.S. 982; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19; *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, conf. par [1977] 2 R.C.S. 822; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n° E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, conf. par (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601; *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182, conf. par [1985] 1 R.C.S. 174; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n° E84113, 12 octobre 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, autorisation de pourvoi refusée, [1981] 2 R.C.S. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, 23 mars 1987; *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2

Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

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Atco Ltd. c. Calgary Power Ltd., [1982] 2 R.C.S. 557; *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353; *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos liée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, 1^{er} mars 1991; *Re Natural Resource Gas Ltd.*, C.É.O., RP-2002-0147, EB-2002-0446, 27 juin 2003; *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84116, 12 octobre 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n° E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84115, 12 octobre 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n° E84113, 12 octobre 1984.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Brian K. O’Ferrall and Daron K. Naffin, for the appellant/respondent on cross-appeal.

Clifton D. O’Brien, Q.C., Lawrence E. Smith, Q.C., H. Martin Kay, Q.C., and Laurie A. Goldbach, for the respondent/appellant on cross-appeal.

J. Richard McKee and Renée Marx, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh and Michael W. Lyle*, for the intervener the Ontario Energy Board.

Written submissions only by *J. L. McDougall, Q.C., and Michael D. Schafner*, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by *Michael A. Penny and Susan Kushneryk*, for the intervener Union Gas Limited.

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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d’appel de l’Alberta (les juges Wittmann et LoVecchio (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, qui a infirmé une décision de l’Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O’Ferrall et Daron K. Naffin, pour l’appelante/intimée au pourvoi incident.

Clifton D. O’Brien, c.r., Lawrence E. Smith, c.r., H. Martin Kay, c.r., et Laurie A. Goldbach, pour l’intimée/appelante au pourvoi incident.

J. Richard McKee et Renée Marx, pour l’intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh et Michael W. Lyle*, pour l’intervenante la Commission de l’énergie de l’Ontario.

Argumentation écrite seulement par *J. L. McDougall, c.r., et Michael D. Schafner*, pour l’intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny et Susan Kushneryk*, pour l’intervenante Union Gas Limited.

The judgment of Bastarache, LeBel, Deschamps and Charron JJ. was delivered by

BASTARACHE J. —

1. Introduction

At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, “The Consumer Interest and Regulatory Reform”, in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d’un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l’organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l’investissement étranger, l’assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l’élaboration des politiques des organismes administratifs, mais son étendue varie d’un organisme à l’autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l’exercice de son pouvoir discrétionnaire, l’organisme créé par voie législative doit s’en tenir à son domaine de compétence : il ne peut s’immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l’énergie et des services publics n’y échappe pas. En l’espèce, l’intimée est un service public albertain de distribution de gaz naturel. Il ne s’agit en fait que d’une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l’émission d’actions et d’obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudence of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficacité de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land. According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners, who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed. The Board was of the view that the test had been satisfied. It was

1.1 *Aperçu des faits*

ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

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In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad mandate to protect consumers in the public interest" (p. 16).

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The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

1.2.1.2 *Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*): [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « formule *TransAlta* » :

[TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In the Board's view, no question of retrospective rate-making arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit :

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaldrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

The Board determined that from the gross proceeds of \$6,550,000, ATCO should receive \$465,000 to cover the cost of disposition (\$265,000) and the provision for environmental remediation (\$200,000), the shareholders should receive \$2,014,690, and \$4,070,310 should go to the customers. Of the amount credited to shareholders, \$225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, \$3,045,813 was allocated to ATCO Gas - South customers and \$1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

Elle a décidé de répartir le produit brut de la vente (6 550 000 \$) comme suit : 465 000 \$ à ATCO pour les frais d'aliénation (265 000 \$) et la dépollution (200 000 \$), 2 014 690 \$ aux actionnaires et 4 070 310 \$ aux clients. Un montant de 225 245 \$ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 \$ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 \$ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

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matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled “Remainder to be Shared” to ATCO. For the reasons that follow, the Court of Appeal’s decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal’s decision, the Board had jurisdiction to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board’s jurisdiction to allocate any of ATCO’s proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company’s asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board’s allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague’s reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body’s decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board’s

Commission, lui enjoignant d’attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d’attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d’appel, qui n’a pas eu tort de statuer que la Commission n’avait pas le pouvoir d’attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d’un pourvoi et d’un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu’a estimé la Cour d’appel, la Commission avait le pouvoir d’attribuer aux clients une partie du gain net résultant de la vente d’un bien affecté au service public même si elle avait conclu, au moment d’autoriser la vente, qu’aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d’attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n’a pas le pouvoir de leur attribuer l’équivalent de l’amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l’espèce à décider si la Commission a le pouvoir d’attribuer le gain net tiré de la vente d’un bien d’une entreprise de services publics.

Vu la conclusion à laquelle j’arrive, point n’est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l’exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l’origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l’organisme qui l’a rendue. S’exprimant au nom de la Cour d’appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l’application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n’y a pas lieu de faire preuve de

decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

In the case at bar, one should avoid a hasty characterizing of the issue as “jurisdictional” and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

- (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
- (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

- a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou
- b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

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Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

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In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction"

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d de la GUA et 15(3)d de l'AEUBA) et la

(*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

... plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

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must “adhere to the confines of their statutory authority or ‘jurisdiction’[; and t]hey cannot trespass in areas where the legislature has not assigned them authority”: Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board’s decision that it had the jurisdiction to allocate proceeds from the sale of a utility’s asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger’s modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction that has been

[TRADUCTION] « s’en tenir à son domaine de compétence et ne peut s’immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3^e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu’elle avait le pouvoir d’attribuer le produit de la vente des biens d’un service public, je dois interpréter le cadre législatif à l’origine de ses attributions et de ses actes.

2.3.1 Principes généraux d’interprétation législative

Depuis un certain nombre d’années, notre Cour fait sienne l’approche moderne d’E. A. Driedger en matière d’interprétation des lois (*Construction of Statutes* (2^e éd. 1983), p. 87) :

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution : il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d’Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l’octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d’autoriser la vente des biens d’un

conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be “implied” from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO’s submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board’s jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and

service public englobe — implicitement et explicitement — celui de décider de l’attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n’est pas expressément prévu par la loi, mais qu’on ne peut « déduire » du régime législatif qu’il découle nécessairement du pouvoir exprès. Je suis d’accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

La Ville soutient à titre préliminaire qu’en lui demandant d’autoriser la vente des biens *et* l’attribution du produit de l’opération, ATCO a reconnu le pouvoir de la Commission d’imposer, comme condition de l’autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l’argument ne tient pas. D’abord, la demande d’autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d’attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu’ATCO lui a demandé d’autoriser l’attribution du produit de la vente pour le cas où elle rejeterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d’autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d’attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n° E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84116, 12 octobre 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

L’analyse exige au départ qu’on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l’al. 15(3)d) de l’AEUBA et l’art. 37 de la

s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

GUA

26. . . .

(2) No owner of a gas utility designated under subsection (1) shall

. . . .

(d) without the approval of the Board,

- (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them

. . . .

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

AEUBA

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any enactment or by law.

. . . .

(3) Without restricting subsection (1), the Board may do all or any of the following:

. . . .

- (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

. . . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . . .

d) sans l'autorisation de la Commission,

- (i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . . .

- d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . . .

PUBA

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

Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i); GUA, s. 22(1); see Appendix).

There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

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test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of “public interest” found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4^e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms.

2.3.3 Implicit Powers: Entire Context

The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: “each legal provision should be considered in relation to other provisions, as parts of a whole”

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). “[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments”: *Bristol-Myers Squibb Co.*, at para. 102.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l’analyse car on peut néanmoins soutenir que les dispositions sont jusqu’à un certain point ambiguës et incohérentes.

Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d’une disposition n’est pas déterminant et ne met pas fin à l’analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l’objet et l’esprit des lois habilitantes, l’intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d’un cadre législatif plus large dont on ne peut faire abstraction :

Œuvre d’un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l’ensemble et l’ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d’un ensemble complet » . . .

(P.-A. Côté, *Interprétation des lois* (3^e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d’un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L’objectif ultime consiste à dégager l’intention manifeste du législateur et l’objet véritable de la loi tout en préservant l’harmonie, la cohérence et l’uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l’*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l’annexe). « L’interprétation législative est [. . .] l’art de découvrir l’esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

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Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

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The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

[TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1 *Historical Background and Broader Context*

The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accéssoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

Suivant *The Public Utilities Act*, la première commission des services publics, composée de

three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

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The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

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In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA, the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));
2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));
3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));
4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));
2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a);
3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));
4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n° E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

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community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, “the union” of existing systems and facilities. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [Emphasis added.]

In fact, even the Board itself, on its website (<http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm>), describes its functions as follows:

We regulate the safe, responsible, and efficient development of Alberta’s energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City’s first argument.

2.3.3.2 *Rate Setting*

62 Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:

... the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future. ... Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive “too low” a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be “too high”.

(R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the “regulatory

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l’expression du législateur, « l’union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d’ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (<http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm>) :

[TRADUCTION] La Commission réglemente l’exploitation sûre, responsable et efficiente des ressources énergétiques de l’Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l’acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d’électricité et d’eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s’impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

[TRADUCTION] ... l’entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [...] L’équité est liée à la redistribution de la richesse dans la société. L’objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l’investissement continu dans l’entreprise), alors que celui de l’équité implique qu’ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l’origine d’un arrangement économique et social appelé « pacte

compact”, which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 (“*Northwestern 1929*”), at pp. 192-93).

Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix “just and reasonable . . . rates” (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to “determine a rate base for the property of the owner” and “fix a fair return on the rate base” (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 (“*Northwestern 1979*”), at p. 691, adopted the following description of the process:

The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of “forecast revenue requirement”. These rates will remain in effect until changed as the result of a further application or complaint or the Board’s initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

- (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
- (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process:

il faut établir la nécessité dans l’exploitation de l’entreprise. C’est également à cette première étape qu’est calculé le revenu nécessaire pour couvrir les dépenses d’exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d’exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu’ils ne sont pas modifiés à la suite d’une nouvelle requête ou d’une plainte, ou sur intervention de la Commission. C’est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu’un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n° E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

- a) du coût du bien lors de son affectation initiale à l’utilisation publique et de sa juste valeur d’acquisition pour le propriétaire du service de gaz, moins la dépréciation, l’amortissement et l’épuisement;
- b) du capital nécessaire.

Le fait que l’on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d’un juste rendement de son actif ne peut ni ne devrait l’empêcher d’encaisser le bénéfice résultant de la vente d’un élément d’actif. L’entreprise n’est d’ailleurs pas non plus à l’abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l’entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L’investisseur s’attend à toucher le produit net, une fois tous les frais payés, soit l’équivalent de la valeur actualisée de l’investissement initial. Le versement aux clients d’une partie du produit net restant, à l’issue d’une nouvelle répartition, sape le processus d’investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory

Wittmann J.A., at the Court of Appeal, said it best when he stated:

Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

[TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'équité n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

[TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'équité ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

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Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case,

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3 *The Power to Attach Conditions*

As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

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

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

(See also Brown, at p. 2-16.3.)

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In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include “by necessary implication” all that is needed to enable the official or agency to achieve the

peut assortir de toute condition l’ordonnance autorisant la vente. Je ne suis pas d’accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s’applique tout autant aux pouvoirs « définis largement » qu’à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers’ Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l’énergie de l’Ontario a énuméré les situations dans lesquelles s’applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

- * la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l’exécution du mandat de la Commission;
- * la loi habilitante ne confère pas expressément le pouvoir de réaliser l’objectif législatif;
- * le mandat de la Commission est suffisamment large pour donner à penser que l’intention du législateur était de lui conférer une compétence tacite;
- * la Commission n’a pas à exercer la compétence alléguée en s’appuyant sur des pouvoirs expressément conférés, démontrant ainsi l’absence de nécessité;
- * le législateur n’a pas envisagé la question et ne s’est pas prononcé contre l’octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s’appliquer qu’à ce qui est rationnellement lié à l’objet de la réglementation. C’est ce qu’explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l’analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;
2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and
3. It specifically seeks to prevent favoritism toward investors.

Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;
2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;
3. éviter précisément que les investisseurs ne soient favorisés.

Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

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carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

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In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

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It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 Other Considerations

Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 Autres considérations

Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?

Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

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the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

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I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest?*); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how to allocate it* (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

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In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public?*). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.

(Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

[TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

88 BINNIE J. (dissenting) — The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnable.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

ATCO's argument boils down to the proposition announced at the outset of its factum:

In the absence of any property right or interest and of any harm to the customers arising from the

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.

(Respondent's factum, at para. 2)

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For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "consider necessary in the public interest".

A. *The Board's Statutory Authority*

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The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them . . .". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juger[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.

(Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory

(Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

[TRADUCTION] Nul droit issu de la loi ou de l'équité n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

making”. But Alberta is an “original cost” jurisdiction, and no one suggests that the Board’s original cost rate making during the 80-plus years this investment has been reflected in ATCO’s ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of “all gas utilities, and the owners of them” were matters squarely within the Board’s statutory mandate.

B. *The Board’s Decision*

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ATCO argues that the Board’s decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board’s general regulatory responsibilities. ATCO argues in its factum that

the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).

(Respondent’s factum, at para. 98)

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It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

« tarification rétroactive ». Or, l’Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l’investissement d’ATCO pour l’établissement de sa base tarifaire. La Commission a proposé de tenir compte d’une partie du profit escompté pour fixer les tarifs ultérieurs. L’ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *La décision de la Commission*

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l’organisme en matière de tarification. Toutefois, je ne crois pas que l’audience tenue pour l’application de l’art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d’organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

[TRADUCTION] . . . la demande d’[ATCO] n’avait rien à voir avec l’approbation de tarifs et la Commission n’était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).

(Mémoire de l’intimée, par. 98)

Il semble que la Commission ait entendu la demande d’autorisation fondée sur l’art. 26 indépendamment d’une demande d’approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l’instance et, deuxièmement, de l’approbation de cette démarche par la Cour d’appel de l’Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s’agit de l’arrêt de principe albertain en ce qui concerne l’attribution du profit réalisé lors de l’aliénation d’un bien affecté à un service public, et la Cour d’appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l’espèce. Voici ce qu’a dit le juge Kerans à ce sujet (p. 174) :

[TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.]

(Decision 2002-037, at para. 13)

In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

[TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure. Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

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In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called “the regulatory compact” (Decision 2002-037, at para. 44). In the Board’s view:

- (a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;
- (b) decisions made about the utility should be driven by both parties’ interests;
- (c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and
- (d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

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For purposes of this appeal, it is important to set out the Board’s policy reasons in its own words:

To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.

Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.

The Board believes that some method of balancing both parties’ interests will result in optimization

Au cours de la deuxième étape de l’audition de la demande fondée sur l’art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l’intérêt public. Elle a expliqué qu’il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu’elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

- a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l’entreprise de services publics;
- b) les décisions visant l’entreprise doivent tenir compte des intérêts des deux parties;
- c) attribuer aux clients la totalité du profit tiré de la vente n’inciterait pas l’entreprise à accroître son efficacité et à réduire ses coûts;
- d) en attribuer la totalité à l’entreprise pourrait encourager la spéculation à l’égard de biens non amortissables ou l’identification des biens dont la valeur s’est accrue et leur aliénation pour des motifs étrangers à l’intérêt véritable de l’entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d’améliorer son rendement et de réduire ses coûts de manière constante.

À l’inverse, attribuer à l’entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l’égard de biens non amortissables ou l’identification des biens dont la valeur s’est déjà accrue et leur aliénation.

La Commission croit qu’une certaine mise en balance des intérêts des deux parties permettra la

of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

The Court's modern approach to this vexed question was recently set out by McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose “in the public interest” on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to “impose any additional conditions that the Board considers necessary in the public interest” (s. 15(3)(d) of the AEUBA).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

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The identification of a subjective discretion in the decision maker (“the Board considers necessary”), the expertise of that decision maker and the nature of the decision to be made (“in the public interest”), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase “the Board considers necessary”, Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

The question as to whether or not the respondent’s lands were “necessary” is not one to be determined by the Courts in this case. The question is whether the Minister “deemed” them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: “‘Objective’ and ‘Subjective’ Grants of Discretion”.

105 The expert qualifications of a regulatory Board are of “utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal’s decision in the absence of a full privative clause”, as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

Even where the tribunal’s enabling statute provides explicitly for appellate review, as was the case in *Bell Canada [v. Canada (Canadian Radio-Television and Telecommunications Commission)]*, [1989] 1 S.C.R. 1722, it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

— conféré à la Commission — d’[TRADUCTION] « imposer les conditions supplémentaires qu’elle juge nécessaires dans l’intérêt public » (al. 15(3)d) de l’AEUBA). L’élément subjectif de ce pouvoir (« qu’elle juge nécessaires »), l’expertise du décideur et la nature de la décision (« dans l’intérêt public ») appellent à mon avis la plus grande déférence et l’application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l’élément « qu’elle juge nécessaires », le juge Martland a dit ce qui suit dans l’arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

[TRADUCTION] En l’espèce, il n’appartient pas à une cour de justice de déterminer si les terrains de l’intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu’ils l’étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « “Objective” and “Subjective” Grants of Discretion ».

Comme l’a dit le juge Sopinka dans l’arrêt *Fraternité unie des charpentiers et menuisiers d’Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l’expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l’intention du législateur quant au degré de retenue dont il faut faire preuve à l’égard de la décision d’un tribunal en l’absence d’une clause privative intégrale ». Il a ajouté :

Même lorsque la loi habilitante du tribunal prévoit expressément l’examen par voie d’appel, comme c’était le cas dans l’affaire *Bell Canada [c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)]*, [1989] 1 R.C.S. 1722, on a souligné qu’il y avait lieu pour le tribunal d’appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.

(Cette opinion incidente a été citée avec approbation dans l’arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

A regulatory power to be exercised “in the public interest” necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is “in the public interest” is not really a question of law or fact but is an opinion. In *TransAlta* (1986), the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words “public interest” and the well-known phrase “public convenience and necessity” in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

[T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest [Emphasis added.]

This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta* (1986), la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

[TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

[TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2^e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

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... when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 “Patent unreasonableness” is a highly deferential standard:

A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.

(*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board’s response is well within the range of established regulatory opinions. Hence, even if the Board’s conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order “In the Public Interest”?*

111 ATCO says the Board had no jurisdiction to impose conditions that are “confiscatory”. Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO’s investment of \$83,000 was added in increments to its regulatory cost base as the land was acquired from

[TRADUCTION] ... lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l’intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l’étendue de son pouvoir discrétionnaire puisse un jour l’inciter à l’exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l’existence de ce pouvoir une mauvaise chose en soi et n’exige pas l’annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l’arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu’il n’y a qu’une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s’appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d’intervenir.

D. *La Commission avait-elle le pouvoir d’assortir son autorisation des conditions en cause « dans l’intérêt public »?*

ATCO prétend que la Commission n’avait pas le pouvoir d’imposer des conditions ayant un effet « confiscatoire ». Or, en s’exprimant ainsi, elle présume de la question en litige. La bonne démarche n’est pas de supposer qu’ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L’investissement de 83 000 \$ d’ATCO a graduellement été pris en

time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

I do not think the legal debate is assisted by talk of “confiscation”. ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board’s jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered “Necessary in the Public Interest”?*

There is no doubt that there are many approaches to “the public interest”. Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta’s grant of authority to its Board is more generous than most. ATCO concedes that its “property” claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers

compte dans sa base tarifaire réglementaire puisque l’acquisition du terrain s’est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l’organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l’immobilier.

Je ne crois pas que l’allégation d’effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l’autorisation de la Commission et investit cette dernière du pouvoir d’assortir son autorisation de conditions. Ce n’est donc pas l’*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l’a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu’elle jugeait « nécessaires dans l’intérêt public »?*

Il y a évidemment de nombreuses façons de concevoir « l’intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d’un ressort à l’autre et qu’aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s’est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l’intention contraire du législateur, mais elle affirme qu’une telle intention ne ressort pas des lois.

La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l’attribution du profit tiré d’un bien dont le coût historique est inclus dans la base tarifaire, mais qui n’est plus nécessaire pour fournir le service. Lorsqu’elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d’une foule de précédents provenant de nombreux ressorts. Trouver le bon

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and investors is a common preoccupation of comparable boards and agencies:

First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.

(P. W. MacAvoy and J. G. Sidak, “The Efficient Allocation of Proceeds from a Utility’s Sale of Assets” (2001), 22 *Energy L.J.* 233, at p. 234)

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The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers’ Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over \$2 million. The Board stated:

The Station “B” property was not purchased by Consumers’ for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board’s opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

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Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

[TRADUCTION] D’abord, cela permet d’éviter que l’entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l’entreprise maximisera l’ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d’intérêt ou à d’autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l’opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility’s Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n’est pas d’hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers’ Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l’énergie de l’Ontario s’est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d’un terrain par une entreprise de services publics. Elle a dit :

[TRADUCTION] Consumers’ n’a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d’un service public. Même si cet investissement n’était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu’à ce que l’usine de production de gaz ne devienne obsolète, l’aliénation du bien-fonds n’était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d’un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l’organisme de réglementation a attribué aux clients le profit tiré de la vente d’un terrain :

The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a \$1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta* (1986), at pp. 175-76, including *Re Boston Gas Co.*

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1^{er} mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

[TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

[TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

Dans *TransAlta* (1986), p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

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mentioned earlier. In *TransAlta* (1986), the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

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A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.

Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

[TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

[TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquiescent aucun droit sur le bien, y compris en équité.

D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.

(P. S. Cross, “Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?” (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility’s stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility’s rates. [Emphasis in original.]

Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the “enduring enterprise” theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

Working from the principle of the “enduring enterprise”, the gain-on-sale from this transaction should remain within the utility’s operations rather than being distributed in the short run directly to either ratepayers or shareholders.

The “enduring enterprise” principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at

justice sur la question ne permet pas de dégager l’exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n’a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d’autres ressorts, s’il en est, sont les suivants : (1) les actionnaires d’une entreprise de services publics n’ont pas *automatiquement* droit au gain réalisé lors de toute vente d’un bien affecté au service public; (2) les clients n’ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d’un bien qui n’a jamais été pris en compte pour l’établissement des tarifs. [En italique dans l’original.]

La composition de l’actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l’entreprise, elle, demeure. La démarche de la Commission en l’espèce est tout à fait compatible avec le principe de la « pérennité de l’entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l’autorisation de vendre un vieil établissement, et la commission devait décider de l’attribution du profit tiré de l’opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l’entreprise », le profit tiré de l’opération doit être affecté à l’exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n’est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d’une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu’une entreprise de services publics réalise un profit en vendant un bien qu’elle remplace par un autre ou par un titre de créance,

the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

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In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. ATCO's Arguments

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Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

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Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount to a confiscation of the corporation's property.

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Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

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Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. L'argumentation d'ATCO

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquiescent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. The Confiscation Issue

In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable property over time through depreciation

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayaient la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter.

1. La question de l'effet confiscatoire

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer :

[TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

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ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis — sometimes articulated, sometimes implicit — that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalent* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

In *New York Telephone*, the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return. . . . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

[TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'équité, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

[TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

[TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas*, the regulator disposed of this point as follows:

No one seriously argues that ratepayers acquire title to the physical property assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'équité, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

[TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

This “risk” theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO’s “confiscation” point is rejected as an oversimplification.

My point is not that the Board’s allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a “case-by-case” basis. My point simply is that the Board’s response in this case cannot be considered “confiscatory” in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board’s decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

The Board referred in its decision to the “regulatory compact” which is a loose expression suggesting that in exchange for a statutory monopoly

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l’immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l’espèce*.

L’approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *SoCalGas* :

[TRADUCTION] Même si les actionnaires et les détenteurs d’obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d’entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l’entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [p. 110]

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l’effet « confiscatoire » avancée par ATCO est rejetée au motif qu’elle est simpliste.

Je ne prétends pas que l’attribution du profit en l’espèce convient nécessairement en toute circonstance. D’autres organismes de réglementation ont jugé que l’intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu’elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l’attribution du profit tiré de la vente d’un terrain dont l’entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s’impose en l’espèce et, à mon avis, la décision de la Commission n’aurait pas dû être annulée.

2. Le pacte réglementaire

Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d’un monopole

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and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

The ratemaking process involves fundamentally “a balancing of the investor and the consumer interests”. The investor’s interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer’s interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board’s allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to “retroactive rate making”. In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

It is clear from many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate-making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

If land is sold at a profit, it is required that the profit be added to, i.e., “credited to”, the depreciation reserve, so

conféré par la loi et d’un revenu calculé suivant la méthode du coût d’achat majoré, l’entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C’est ce qui ressort de l’arrêt *Washington Metropolitan Area Transit* de la Cour d’appel des États-Unis (circuit du district de Columbia) :

[TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l’intérêt de l’investisseur et celui du consommateur ». L’intérêt de l’investisseur est de protéger son investissement et d’avoir une possibilité raisonnable de toucher un rendement acceptable. L’intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l’appréciation d’un bien, l’équilibre optimal est atteint lorsque les intérêts de l’un et de l’autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu’il s’agit d’une « tarification rétroactive ». Dans l’arrêt *Northwestern Utilities Ltd. c. Ville d’Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n’agit que pour l’avenir et ne peut fixer des tarifs qui permettraient à l’entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n’avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devaient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l’organisme de réglementation a statué que le profit réalisé lors de la vente d’un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

[TRADUCTION] Lorsqu’un terrain est vendu à profit, le gain doit être ajouté à l’amortissement cumulé, c.-à-d.

that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

... we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in rate-base. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of \$83,720 whereas the original \$596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of \$141,525.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit :

[TRADUCTION] ... nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce.

3. Le terrain en tant que bien non amortissable

La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 \$, les bâtiments, payés initialement 596 591 \$, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 \$.

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141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta* (1986), at p. 176), the regulator held:

... the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

In short, whether an asset is depreciated for rate-making purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

Our decisions generally find no reason to treat gain on the sale of nondepreciable property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta* (1986), p. 176), par exemple, l'organisme a conclu :

[TRADUCTION] ... les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

[TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

[TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. L'absence de réciprocité

ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

[TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n° E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n° E84113, 12 octobre 1984, p. 23.)

Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n° E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (p. 12) :

[TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

III. Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

[TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

- (a) make any order that the ERCB or the PUB may make under any enactment;
- (b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
- (c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
- (d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
- (e) make an order granting the whole or part only of the relief applied for;
- (f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17

[TRANSDUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

- a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;
- b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;
- c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;
- d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;
- e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;
- f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

- (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
- (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

- a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou
- b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

Gas Utilities Act, R.S.A. 2000, ch. G-5

[TRANSLATION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

. . .

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

- (a) issue any
 - (i) of its shares or stock, or
 - (ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

- (b) capitalize
 - (i) its right to exist as a corporation,
 - (ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or
 - (iii) a contract for consolidation, amalgamation or merger,
- (c) without the approval of the Board, capitalize any lease, or
- (d) without the approval of the Board,
 - (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
 - (ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

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Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

- a) émettre
 - (i) d'actions,
 - (ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

- b) capitaliser
 - (i) son droit d'exister en tant que personne morale,
 - (ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,
 - (iii) un contrat de fusion ou de regroupement;
- c) sans l'autorisation de la Commission, capitaliser un bail;
- d) sans l'autorisation de la Commission,
 - (i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,
 - (ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

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Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

. . .

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

- (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,
- (b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,
- (c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,
- (d) require an owner of a gas utility to establish, construct, maintain and operate, but in

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

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Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détiennne plus de 50 % des actions en circulation du propriétaire du service de gaz.

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Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

- a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;
- b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;
- c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;
- d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

- (e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

- (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
- (b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

- (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
 - (i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

- e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

- a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;
- b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

- a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :
 - (i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

fixing of rates, tolls or charges, or schedules of them,

- (ii) a subsequent fiscal year of the owner, or
- (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

- (b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
- (c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and
- (d) the Board shall by order approve
 - (i) the method by which, and
 - (ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

- (ii) un exercice ultérieur,
- (iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

- b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;
- c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;
- d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

Public Utilities Board Act, R.S.A. 2000, ch. P-45

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

- (a) to deal with public utilities and the owners of them as provided in this Act;
- (b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

- (a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or
- (b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

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

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

- (a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature

- a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;
- b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

- a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou
- b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

- a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

and quality of the service or the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

- (b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and
- (c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

. . .

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

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

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

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

- b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;
- c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

- (a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;
- (b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;
- (c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;
- (d) repealed;
- (e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

- (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

- a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;
- b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;
- c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;
- d) abrogé;
- e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

- a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

- (b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

- (a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of
 - (i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
 - (ii) a subsequent fiscal year of the owner, or
 - (iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,
 and need not consider the allocation of those revenues and costs to any part of such a period,
- (b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,
- (c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,
- (d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

- b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

- a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :
 - (i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;
 - (ii) un exercice ultérieur;
 - (iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;
- b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;
- c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;
- d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

- (e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

- (a) issue any
 - (i) of its shares or stock, or
 - (ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

- (b) capitalize
 - (i) its right to exist as a corporation,
 - (ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or
 - (iii) a contract for consolidation, amalgamation or merger,
- (c) without the approval of the Board, capitalize any lease, or
- (d) without the approval of the Board,
 - (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or
 - (ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

- e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

- a) émettre
 - (i) d'actions,
 - (ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

- b) capitaliser
 - (i) son droit d'exister en tant que personne morale,
 - (ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,
 - (iii) un contrat de fusion ou de regroupement;
- c) sans l'autorisation de la Commission, capitaliser un bail;
- d) sans l'autorisation de la Commission,
 - (i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,
 - (ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLACHLIN C.J. and BINNIE and FISH JJ. dissenting.

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRANSLATION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLACHLIN et les juges BINNIE et FISH sont dissidents.

Procureurs de l'appelante/intimée au pourvoi incident: McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident: Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

Tab 2

Federal Court of Appeal

Citation: National Energy Board Act (Can.) (Re)

Date: 1986-06-24

Heald, Urie and Ryan JJ.

Counsel:

Ian Blue, Q.C., and *Elizabeth E. May*, for Flamborough Residents Against Propane Inc. and David L. Hitchcock

H. Dahme, for Corporation of the Town of Flamborough and the Regional Municipality of Hamilton-Wentworth.

John A. Olah, for Halton Regional Conservation Authority.

John S. Tyhurst, for Consumers Association of Canada.

John W. Brown, Q.C., and *Philippe Lalonde*, for Interprovincial Pipe Line Ltd.

Barbara McIsaac, for Attorney-General of Canada.

A. J. Jordan, for Independent Petroleum Association

C. C. Black, for Trans Canada Pipe Line Ltd.

Loyola Keough, for National Energy Board

The judgment of the Court was delivered by

[1] HEALD J.:—This is a reference by the National Energy Board (the Board) pursuant to s-s. 28(4) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), in respect of the following questions:

1. Does the National Energy Board, in connection with a public hearing held pursuant to subsections 17(1) and 20(3) of the National Energy Board Act for the purpose of reviewing a portion of an order made pursuant to section 49 of the Act, have the jurisdiction to award costs to one party payable by another party to the public hearing?
2. If the answer to Question 1 is in the affirmative, does the National Energy Board, where costs are awarded, have the jurisdiction to establish a scale of costs or otherwise to fix or to limit the amount of costs to be paid?

[2] The order of the Board referring the above questions to the Court included findings of fact and other material on which the Board would have based itself if it were determining the questions submitted. Those facts in summary form follow. The reference arises out of motions made respecting costs during and following a lengthy hearing before the Board on an application by Interprovincial Pipe Line Limited (I.P.L.) for an exemption order in respect of proposed modifications to an I.P.L. pipeline for the purpose of converting it from crude oil service to exclusive propane service. The plan was to transport propane in the line from the Sarnia area to the vicinity of Westover, Ontario, where it would be loaded into tank trucks and rail tank cars for transportation to market. The proposal involved, *inter alia*, the construction of truck and rail loading facilities. By order dated May 4, 1983, the Board exempted, subject to certain conditions, the facilities applied for from certain provisions of the *National Energy Board*

Act, R.S.C. 1970, c. N-6.

[3] In response to the concerns expressed by local authorities and landowners in the Township of Flamborough, Ontario, about the proposed location of the truck and rail loading facilities, the Board directed that a public hearing be held for the purpose of reviewing that portion of the May 4th order approving the location of the loading facilities. The hearing commenced at Burlington, Ontario on August 16, 1983. At that time, the Corporation of the Township of Flamborough (Flamborough Township) filed a notice of motion with the Board raising preliminary questions as to the Board's jurisdiction. Subsequently, the Regional Municipality of Hamilton-Wentworth (Hamilton-Wentworth Municipality) made a submission to the Board that one of the Board members should disqualify himself from hearing the subject application on the ground of bias or reasonable apprehension of bias. On September 8, 1983, the Board decided that this submission was without any foundation. Later in September, the Board ruled against the attack on its jurisdiction. Both of these decisions were appealed to this Court and were dismissed (*Flamborough v. National Energy Board et al.*, 55 N.R. 95) on June 15, 1984. An application for leave to appeal to the Supreme Court of Canada was dismissed on December 17, 1984 [59 N.R. 79n].

[4] On July 13, 1984, the Board directed that a new panel of the Board be constituted for the public hearing which commenced at Burlington on April 22, 1985, before the Board, as newly constituted. The hearing was held on 34 days and ended at Ottawa on August 29, 1985. The Board heard the evidence of many witnesses, including expert witnesses, called not only by I.P.L. but by other parties as well. Some fourteen different entities were listed as parties to the hearing. Additionally, many other interested persons made submissions and written comment to the Board. On final argument, several parties, and, in particular, Flamborough Township, Hamilton-Wentworth Municipality, the Halton Region Conservation Authority (Halton Conservation) and Flamborough Residents Against Propane Inc. (F.R.A.P.) asked that the Board make an award of costs, payable by I.P.L. in their favour. This reference is a consequence of that request.

[5] At the hearing of the reference before us, counsel argued in favour of jurisdiction to award costs on behalf of F.R.A.P., Flamborough Township, Hamilton-Wentworth Municipality, Halton Conservation, and the Consumers' Association of Canada (C.A.C.). Counsel on behalf of I.P.L., the Attorney-General of Canada, Trans Canada Pipelines Limited (T.C.P.L.) and the Independent Petroleum Association (I.P.A.) all made submissions against such jurisdiction.

[6] Counsel for F.R.A.P. was the first counsel to make submissions in support of the Board's jurisdiction to award costs. His submissions were generally endorsed by counsel for those other parties who supported the Board's jurisdiction. There were, however, some additional submissions by the other supporting counsel. I will discuss these submissions later. In the submission of counsel for F.R.A.P., the Board has jurisdiction to award costs on three grounds:

1. the Board has express power pursuant to subsection 10(3) of the Act;
2. the Board has power to award costs by necessary implication; and

3. the Board has power to award costs because of subsections 29.6 and 75.21 of the Act, the purpose of which is to limit an otherwise full discretion to award costs.

1. EXPRESS JURISDICTION

[7] Section 10 of the Act reads as follows:

10(1) The Board is a court of record.

10(2) The Board shall have an official seal, which shall be judicially noticed.

(3) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and *other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.*

(Emphasis added.)

[8] It is the submission of counsel for F.R.A.P. that costs are "other matters" which are "necessary or proper" for the "due exercise" of the Board's jurisdiction. Applying the *ejusdem generis* rule, he submits that the words "other matters" as used in s-s. 10(3), being general words must be read in light of the particular and specific words immediately preceding them so as to be confined to things of the same class or kind as those specified. In his view, even accepting the constraints which application of the *ejusdem generis* rule places upon the phrase "other matters" as used in s-s. 10(3), costs are within the same class as the specific subjects mentioned in s-s. 10(3), namely, the power to subpoena, the power to compel document production, the right to enter and inspect and the right to enforce. Counsel for I.P.L., on the other hand, submits that the

. . . preceding phrases and specific grants of power are all of the class or category relating to the ability of the Board to obtain material, evidence and information necessary for it to reach reasoned decisions. These powers are obviously necessary and proper for the due exercise of the Board's jurisdiction.

(Accordingly, in his view, the "matters" contemplated by s-s. 10(3) are restricted to such additional powers as the Board requires to obtain all such information and evidence as it may require in order to reach a proper decision. In my view, the characterization by I.P.L.'s counsel is more accurate than that suggested by counsel for F.R.A.P. The specific provisions of s-s. 10(3) empower the Board to compel the production of all relevant evidence, oral and documentary, and to take a view of and inspect such property as may be necessary for its decision. Such powers may be characterized as evidence-gathering powers. I do not think of the power to award costs as being *ejusdem generis* with such powers. Counsel for F.R.A.P. sees the power to award costs as but another example of the power to control persons and proceedings and, as such, being *ejusdem generis* with the specific powers enumerated in s-s. 10(3). While an award of costs may, undoubtedly, affect persons and proceedings, I do not

view the exercise of that power as being in the same category as the exercise of powers to gather the necessary evidence in a proceeding. I do not consider that the primary purpose of an award of costs is as an instrument of control. The jurisprudence establishes that the principal purpose of costs is the indemnification of the successful party in a proceeding. This matter was thoroughly canvassed and discussed in the recent decision of the Supreme Court of Canada in *Bell Canada v. Consumers' Ass'n of Canada* (1986), 26 D.L.R. (4th) 573, [1986] 1 S.C.R. 190, 65 N.R. 1. The issue raised in that appeal was whether, in the exercise of the discretion to award costs conferred by s. 73 of the *National Transportation Act*, the C.R.T.C. was bound by the principle of indemnification as it is applied in an award of costs by the courts. Section 73 reads as follows:

73(1) The costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.

(2) The Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.

(3) The Commission may prescribe a scale under which such costs shall be taxed.

At p. 586 D.L.R., p. 21 N.R., Le Dain J., speaking for the court, concluded as follows:

I would agree that the words "costs" in s. 73 must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. *Thus I am of the opinion that the word "costs" must carry the general connotation of being for the purpose of indemnification or compensation.*

(Emphasis added.)

[9] Dealing now with the second part of this submission, I am likewise not persuaded that the power to award costs, assuming that it is an "other matter", is a matter "necessary or proper" for the due exercise of the Board's jurisdiction. As was pointed out by some of the counsel opposing the Board's jurisdiction, the Board has effectively operated for many years without awarding costs. It can, therefore, hardly be said that such a power is "necessary" for the exercise of its jurisdiction. It might well be argued that the Board would operate more effectively with that power but such a circumstance does not make such a power necessary to its exercise of jurisdiction.

[10] In addition to concluding that the power to award costs falls outside any jurisdiction conferred upon the Board pursuant to s-s. 10(3) because such a power is not *ejusdem generis* with "other matters" and because such a power is not "necessary or proper" to the exercise of the Board's jurisdiction, I have the further view that the kind of costs which arise in proceedings before this Board are not the kind of costs which are customarily awarded by "a superior court of record". In the normal course of events, the court, after hearing a *lis inter partes* adjudicates

upon the various issues before the court. In the majority of cases where there is a clear winner and a clear loser, the court will award costs to follow the event, that is to say, the loser will be ordered to pay the winner's costs. In other cases, where success is divided, costs may be apportioned between the parties. However, in regulatory cases, as was pointed out by counsel, there is not always a clear winner or a clear loser. Furthermore, when a regulatory tribunal has the power to award costs, in its discretion, it is quite possible that a successful applicant would be ordered to pay the costs of some of the intervenors. While in some circumstances, such an award might be a proper exercise of the Board's discretion, it is, nevertheless, an abrupt departure from the normal rule in superior courts that costs are to follow the event. As was submitted by counsel for I.P.L., what is actually being sought by those parties who assert jurisdiction is "intervenor funding" rather than costs as they are awarded in a superior court of record. The difference between the traditional concept of "court costs" and "intervenor funding" was carefully considered and analyzed by the Ontario Divisional Court in *Re Regional Mpty of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 19 D.L.R. (4th) 356, 51 O.R. (2d) 23, 17 O.M.B.R. 411. In that case, a regulatory board constituted under the *Consolidated Hearings Act* of Ontario to consider a request to construct a new road, made orders in advance of its hearing, granting two citizen groups opposing the highway, costs in advance to enable them to participate in the hearing. The Divisional Court quashed the orders on the ground that the board lacked jurisdiction to make them. The headnote to the reports [D.L.R. & O.R.] accurately reflects the court's reasons for so deciding and reads as follows:

The board does have jurisdiction to order costs by virtue of the *Consolidated Hearings Act*, s. 7, but there is nothing in that Act to suggest that the Legislature intended to grant the joint board any special powers beyond those traditionally exercised by courts when granting costs. The characteristics of costs are well defined as an award to be made in favour of a successful or deserving litigant payable by the loser at the conclusion of the proceeding by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding. As success or entitlement cannot be determined before the conclusion, the award must follow the proceeding and costs are not payable for the purpose of assuring participation in the proceedings. Although the word "costs" is used in a statute dealing with an administrative tribunal, it should be given its normal legal meaning not extended in the way attempted by the board which is not to award costs but rather to compel a party to provide intervenor funding, something the statute does not provide for.

[11] Accordingly, and for the above reasons, I have the view that express jurisdiction to award costs is not conferred upon the Board by s-s. 10(3) of the Act.

[12] I said earlier that counsel other than the counsel for F.R.A.P. made additional submissions in support of the Board's jurisdiction to award costs. Counsel for Flamborough Township and Hamilton-Wentworth Municipality, as well as counsel for Halton Conservation submitted that since the Board is entitled to exercise the inherent jurisdiction of a superior court of record and since a superior court of record in Canada has inherent jurisdiction in respect of costs, the Board has a like power. The problem with this submission is that, even accepting its validity, the Board's jurisdiction to award costs would be "court costs" in the traditional sense and not "intervenor funding". In the *Hamilton-Wentworth* case cited, *supra*,

Holland J., speaking for the Divisional Court of Ontario, provides an accurate and useful discussion as to the normal legal meaning of "costs". He states at p. 365 D.L.R., p. 32 O.R.:

The characteristics of costs, developed over many years are:

- (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
- (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
- (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
- (4) They are *not* payable for the purpose of assuring participation in the proceedings.

The intervenor funding being asked for on this reference does not meet the criteria set out in numbers (1) and (4). In my view, those criteria represent a correct analysis of the necessary characteristics of "court costs" and since, in this case, those criteria are not met, I do not think a case has been made out for inherent jurisdiction to provide intervenor funding.

2. JURISDICTION BY NECESSARY IMPLICATION

[13] In the alternative, counsel for F.R.A.P. submitted that the powers conferred by an enabling statute such as the *National Energy Board Act* include not only expressly granted powers but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured. In his view, the National Energy Board, just as much as other tribunals and courts, needs the practical power to award costs to control these proceedings. Counsel then gave examples of instances where this Court has invoked the doctrine of necessary implication to fill legislative lacunae. The first decision of this Court to which he referred was the case of *Re Interprovincial Pipe Line Ltd. and National Energy Board* (1977), 78 D.L.R. (3d) 401 at p. 406, [1978] 1 F.C. 601 at p. 608, 17 N.R. 56. In that case, the Board sought to compel a regulated company to prepare and file a report containing relevant information concerning its operations in the U.S.A. The Court decided that "while there was no explicit authority in the statute for the exercise of such a power, it existed nevertheless by necessary implication from the nature of the regulatory authority that has been conferred on the Board" (*per Le Dain J.*). The second decision referred to was the case of *Canadian Broadcasting League v. Canadian Radio-television & Telecommunications Com'n et al.*, [1985] 1 F.C. 195. In that case, the Court imputed jurisdiction in the C.R.T.C. to regulate cable television subscriber and installation fees by necessary implication and in the absence of express authority in the *Broadcasting Act*.

[14] In my view, each of the cases relied on by F.R.A.P.'s counsel are distinguishable on the basis that, in both cases, there was evidence of practical necessity for the exercise of the power to enable the regulatory body to attain the objects expressly prescribed by Parliament. In the case at bar there is no evidence of practical necessity for implying a general costs

power. As noted by counsel for I.P.L. the Board has, since its inception in 1959, operated without such a power, held innumerable hearings, and exercised the jurisdiction conferred upon it under the statute in a satisfactory manner without purporting to exercise any alleged jurisdiction in respect of costs. Accordingly, the rationale for the invocation of the necessary implication doctrine in the two cases relied on, is not present in this case. In my view, there is an additional reason for not invoking the doctrine of necessary implication in the present circumstances. That reason has to do with the fact that the Parliament of Canada and the provincial legislatures have demonstrated their ability in various pieces of similar legislation to explicitly confer on regulatory tribunals a general power to award costs. Counsel for I.P.L. as well as the other counsel in opposition to the Board's jurisdiction to award costs have cited numerous federal and provincial statutes where a tribunal is given not only a general power similar to the power conferred upon the Board pursuant to s-s. 10(3) but *also* a specific and separate power to award costs.¹ From this I think it possible to infer that in the absence of an express statutory provision conferring the power to award costs, such power should not be implied.

3. SECTIONS 29.6 AND 75.21

[15] Counsel for F.R.A.P. submits that ss. 29.6 and 75.21 are consistent with a full discretion over costs because they limit that discretion. It is his submission that Parliament intended that costs in the situations described in ss. 29.6 and 75.21 be handled in the way those sections require. In his view, those sections limit a full discretion over costs and are, therefore, consistent with the existence of a full discretion in respect of costs. Put another way, it is his submission that these sections merely limit the otherwise unfettered discretion the Board has to award costs. The *National Energy Board Act* speaks to the questions of costs in three specific sections only. In ss. 29.6 and 37(4), express power to award costs is given to the *Board*. In s. 75.21, Parliament has provided for an award of costs in proceedings before an arbitration committee where the committee has determined compensation for a landowner whose lands are acquired by a pipeline company. Those sections read as follows:

29.6 The Board may fix such amount as it deems reasonable in respect of the actual costs reasonably incurred by any person who made representations to the Board at a public hearing under subsection 29.2(3) and the amount so fixed shall be payable forthwith to that person by the company whose pipeline route is affected by the public hearing.

• • • • •

37(1) The Board may, upon such terms and conditions as it considers proper, direct a company to divert or relocate its pipeline if the Board is of the opinion that the diversion or relocation is necessary

(a) to facilitate the construction, reconstruction or relocation of a highway or a railway

¹ See for example: *National Transportation Act* R.S.C. 1970, c. N-17, as amended, ss. 45(3) and 73; *Tax Court of Canada Act*, 1980-81-82-83 (Can.), c. 158, as amended, ss. 13, 18, and 20(1); *Dominion Controverted Elections Act*, R.S.C. 1970, c. C-28, ss. 40 and 72.

or any other work effecting a public interest, or

(b) to prevent or remove an interference with a drainage system,

and may direct by whom and to whom the costs of the diversion or relocation shall be paid.

(2) The Board shall not direct a company to divert or relocate any section or part of its pipeline unless the procedures set out in sections 29.1 to 29.5 have been complied with in respect of the section or part to be diverted or relocated.

(3) For the purposes of ensuring that the procedures set out in section 29.1 to 29.5 are complied with, the Board may order the company to carry out such of those procedures as the company would be required to carry out if the company has prepared and submitted to the Board a plan, profile and book of reference pursuant to subsection 29(1) and those sections shall apply, with such modifications as the circumstances require, in respect of any matter related to the carrying out of those procedures.

(4) The Board may fix such amount as it deems reasonable in respect of the actual costs reasonably incurred by any person who made representations to the Board under this section and may direct by whom and to whom the amount so fixed shall be paid.

• • • • •

75.21(1) Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting his claim for compensation.

(2) Where the amount of compensation awarded to a person by an Arbitration Committee does not exceed eighty-five per cent of the amount of compensation offered by the company, the legal, appraisal and other costs incurred by that person in asserting his claim for compensation are in the discretion of the Committee, and the Committee may direct that the whole or any part of such costs be paid by the company or by any other party to the proceedings.

It will be seen that s. 29.6 expressly empowers the Board to fix costs where the Board holds a public hearing into any proposed pipeline construction pursuant to s. 29.2. Subsection 37(4) empowers the board to fix costs where the Board holds a public hearing into the diversion or relocation of pipelines. As noted, s. 75.21 empowers an arbitration committee to award costs in respect of certain proceedings before it.

[16] In my view, far from assisting the parties asserting jurisdiction, the fact that Parliament has expressly conferred the power on the Board to award costs in specific situations, strengthens the position of those parties who argue against the Board's general jurisdiction. In

my view, the maxim, *expressio unius est exclusio alterius* would apply to this situation. Since this maxim has been interpreted to mean "Express enactment shuts the door to further implication",² I think it clear that when Parliament expressly dealt with costs in this Act in three separate sections dealing with three distinctly different factual situations, then it must have intended to limit the power to award costs only to those specific situations. I therefore reject the submissions of counsel for F.R.A.P. with respect to the significance of the presence of ss. 29.6 and 75.21 in the statute.

CONCLUSION

[17] I have concluded, for all of the foregoing reasons, that except in the very special circumstances referred to, the Board has no jurisdiction to award costs and, more particularly, no jurisdiction to award the more extraordinary form of costs contemplated by this reference. In my view, authority cannot be found either in the express words of the statute nor by necessary implication pursuant to the scheme of the Act. Likewise, I can find no basis upon which it can be concluded that the Board has inherent jurisdiction to award the type of costs being asked for herein.

[18] I am quite aware of the persuasive arguments in favour of intervenor funding. There is much to be said for the view that public-interest intervenors and possibly others should be encouraged to participate in the proceedings before regulatory boards. One of the obvious benefits from such participation will be the assistance given to the tribunal as a result of the informed input from concerned, interested and informed groups and individuals. Another benefit may well be a resultant increase in public confidence in the regulatory process as conducted before the many boards and tribunals in existence.

[19] However, on the basis of this statute, and in the absence of more specific enabling language, it is not for the Court to determine that the Board has the necessary jurisdiction, simply because it may feel that the Board should have such jurisdiction. This is a policy question to be decided by Parliament. As noted, Parliament has conferred such specific jurisdiction in the case of some regulatory boards. In others it has not chosen to do so. The National Energy Board falls into the latter category.

[20] Accordingly, I would answer Q. 1 in the negative. Under the circumstances, it is not necessary to answer Q. 2.

[21] Judgment accordingly.

² Craies on Statute Law, 7th ed. (1971), p. 259.

Tab 3

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.....	}	APPELLANTS;	1909 *Dec. 16, 17.
AND			
THE DEPARTMENT OF AGRI- CULTURE OF THE PROVINCE OF ONTARIO.....	}	RESPONDENTS.	1910 *Feb. 15.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Appeal—Limitation of time—Railway Commissioners—Question of jurisdiction—Leave by judge—Powers of Board—Completed railway—Order to provide station—R.S. [1906] c. 37, ss. 26, 151, 158-9, 166-7, and 258.

Except in the case mentioned in Rule 59 there is no limitation of the time within which a judge of the Supreme Court may grant leave to appeal under sec. 56(2) of the "Railway Act," on a question of the jurisdiction of the Board of Railway Commissioners.

The Board of Railway Commissioners has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road. *Idington and Duff JJ. dissenting.*

APPEAL from an order of the Board of Railway Commissioners by leave of the Board on a question of law and by leave of Mr. Justice Duff on a question of jurisdiction.

On July 22nd, 1909, the Railway Board granted an application from the Ontario Department of Agriculture for an order directing the Grand Trunk Railway

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, *Idington*, *Duff* and *Anglin JJ.*

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Co. to provide station accommodation for traffic at a place in the County of Lincoln, where the Department owns and conducts an experimental fruit farm. The railway company on August 7th obtained leave from the Board to appeal from said order to the Supreme Court of Canada, and on October 13th the Board made an order extending the time generally for an application to the Supreme Court for leave to appeal on a question of jurisdiction, and on October 28th such time was extended to November 10th, and leave to appeal was granted by Mr. Justice Duff on November 5th.

The question of law on which the appeal was taken by leave of the Board was stated as follows in the application for such leave.

That the decision is wrong as a matter of law in holding that the railway company must provide and construct a station which requires the acquirement by the railway company of additional lands which they have no immediate power to take.

The question of jurisdiction was whether or not the Board had power under the provisions of the "Railway Act" to make such order.

By the order of Mr. Justice Duff the question of jurisdiction of the Supreme Court to hear the appeal on the ground that the leave of the judge was not asked for within sixty days from the date of the order of the Board was left open and was discussed in connection with the argument on the merits of the appeal.

Chrysler K.C. for the appellants. The Board has no power to compel a railway company, whose line is completed and already provided with stations, to erect

a new station at any point, and especially so when it would require the company to acquire additional land when its powers of expropriation are exhausted. See *Hastings Town Council v. South Eastern Railway Co.*(1); *Harris v. London & North Western Railway Co.*(2).

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Lancaster K.C. for the respondents. Leave to appeal on a question of jurisdiction cannot be granted after the expiration of sixty days from the date of the order.

On the merits see Am. & Eng. Encyc. of Law, 635-8; Maxwell on Statutes (4 ed.), p. 78; *Winnipeg Jobbers and Shippers Association v. Canadian Pacific Railway Co. et al.*(3).

THE CHIEF JUSTICE.—The majority are of opinion that this court is competent to hear this appeal. As to the order complained of, I am of opinion that the Board has authority to order the company to establish a station at the place indicated. Section 151 of the "Railway Act" empowers the company (sub-sec. g) to construct, erect and maintain all necessary stations for the accommodation and use of the traffic and business of the railway; (sub-sec. p), from time to time to alter, repair or discontinue any station and substitute another in its stead. When the line is located and the location is approved of by the Minister of Railways the company must prepare (section 158) a plan to shew, among other things (c) "the station grounds." This plan is made subject to the approval of the Board (section 159), which may require any

(1) 3 Ry. & Can. Traf. Cas. 179.

(2) 3 Ry. & Can. Traf. Cas. 331.

(3) 8 Can. Ry. Cas. 151.

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further information they may deem expedient (section 166), and this would include detailed plans of the station to be erected so as to enable the Commission to decide if they are sufficient for the accommodation and business of the railway, and the company shall not commence the work of construction until these plans have been submitted to and approved of by the Board (section 168). Section 258, par. 1, provides that every station shall be so erected and maintained as to provide suitable and sufficient accommodation and facilities for traffic, and par. 2, that the location of every station shall be approved of by the Board before the company proceeds to erect it.

From all this it appears that every station with respect to its location, plan of construction and maintenance is completely under the control and subject to the approval of the Board. Section 151, sub-sec. (p), empowers the company to alter, repair or discontinue a station and to substitute one station for another; but by section 167 all such changes and alterations must be approved of by the Board ("railway" includes stations, section 2, sub-sec. 21), with which lies the duty to require that all stations are so located, erected and maintained as to provide good and sufficient accommodation and facilities for traffic.

The argument pressed upon us by the appellant was that all this pre-supposes action by the company and in the absence of such action the Board is without jurisdiction. It necessarily follows, therefore, in that view that however great may be the necessity which exists in any particular locality for additional station accommodation to satisfy the requirements of the traffic that the road is intended to serve and which it may have helped to create, the Board is without

power to give relief. When under construction the Board has absolute power to fix the location of all stations so as to meet the expected requirements of the community to be served, but when the necessities of traffic are made apparent, by the operation of the railway, the Board is powerless to interfere. Such a conclusion is absolutely inconsistent with the purpose and object of the Act.

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I am of opinion that the jurisdiction conferred by section 28 is wide enough to meet this case. That section, par. 1, and sub-sec. 2, gives the Board full jurisdiction of its own motion to order and require any company to do anything which such company is or may be required or authorized to do under this Act, so far as it is not inconsistent with the Act. The company could not locate or build a station, or alter, substitute or discontinue an existing station without the approval of the Board. From this it necessarily follows, in my opinion, that if nothing can be done by the company with respect to the location, erection or substitution of one station for another without the authority of the Board, the Board may order what it alone can authorize.

In addition, sub-section 3, of section 258, gives the Board absolute power to direct stations to be erected on certain provincial railways subsidized by the Dominion Government from which I infer that this power would not be conferred with respect to those railways if it does not exist as to all others. Why should the Board have with respect to this very limited number of roads, which come by exception under its jurisdiction, a power which they have not in connection with those roads which are completely and absolutely under their control from the time the line is

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located? The best explanation I can find of this ambiguous sub-section is that it is intended to meet the case of railways which are not otherwise under the Board's jurisdiction and to which sections 151, 158, 159, 166 and 167, do not apply. To say that all railways subsidized after July, 1900, are subject to the jurisdiction of the Board absolutely as to the erection and maintenance of stations and that, as to others, the Board is without jurisdiction to do more than to approve of those that in the opinion of the company are necessary does seem to be singularly unreasonable.

As to the power to expropriate, which was the chief question discussed before the Commissioners, if the power of the Board to order the erection of a station is admitted, section 178 is quite wide enough to cover this objection. As to the English cases, it must be borne in mind that the powers conferred upon the Canadian Board extend to a greater number of subjects than are brought within the jurisdiction of English and American Boards.

If it be true that the action of the company in the exercise of its powers with respect to stations may be controlled by the Board, but that no power or authority is reserved to or conferred by section 26 upon the Board by which it is enabled to compel the company to act, then I would say that the appeal should be dismissed for the reasons given by Sir Louis Davies. A station is necessarily incidental to the conveyance of goods and of passengers, and the Board has undoubtedly the power to order the company to give adequate facilities for both.

I would dismiss the appeal with costs.

GIROUARD J.—I believe the appeal is properly before this court and, moreover, that the Board had

jurisdiction to pass the order appealed from under sections 28, 258, 284 and 317, of the Dominion Railway Act.

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DAVIES J.—This appeal raises the substantial and important question whether the Board of Railway Commissioners has jurisdiction and power to order a company having a completed and running railway to provide and establish new stopping places and stations along its line of railway so as to afford adequate and suitable accommodation from time to time for increased traffic upon the road.

A preliminary question was raised as to our jurisdiction to hear the appeal on the ground that it is an appeal upon a question of law and that the necessary leave to bring it had not been obtained from the Board within the prescribed time or within any legal extension of that time. The facts were that on the 7th of August, 1909, the Board of Railway Commissioners granted the appellants leave to appeal to this court from the order of the Board complained of, and that, on the 13th of October, 1909, the appeal allowed not having been brought, an extension of time was granted by the Board after hearing the parties. This extension was in general terms merely extending the time without saying for how long, but, on the 28th of October, a further extension was granted up to the 10th of November, 1909.

On the 5th of November, Mr. Justice Duff granted leave to appeal from the order of the Board on the ground of alleged want of jurisdiction, subject to terms and conditions, one of which was that his right to make the order when he did should remain open for disposition on the hearing of the appeal.

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I have reached the conclusion that there being no limitation in the "Railway Act" upon the power of a judge of this court to grant an order allowing an appeal from an order of the Board of Railway Commissioners on the ground of want of jurisdiction, and no rule of this court limiting the exercise of such power, it remains untrammelled, so far as time is concerned, unless there is something in the rules and practice applicable to appeals from the Exchequer Court, which must be held to limit it. These rules are, under sub-section 7, of section 56, of the "Railway Act" (3 Edw. VII. ch. 58), made applicable to appeals such as this until special rules are made with respect to such appeals. I have not been able to find any limitation of time upon the power of a judge of this court to grant an appeal upon a question of jurisdiction, apart from the question whether there has been a legal extension of time by the Board of Railway Commissioners as would support an appeal from their order on a question of law. I am of opinion that the whole question being litigated is properly before us under the order of Mr. Justice Duff on the question of want of jurisdiction in the Board and that we have jurisdiction to hear this appeal.

On the merits of the appeal I have reached the conclusion that the Board of Railway Commissioners had power to make the order complained of. By sub-section 31, of section 2, of the "Railway Act," "traffic" is defined to mean "the traffic of passengers, goods and rolling stock." By sub-section 1, of section 284, it is enacted that:

The company shall, according to its powers:

(a) Furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for

the receiving and loading of all traffic offered for carriage upon the railway;

(b) Furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic;

(c) Without delay, and with due care and diligence, receive, carry and deliver all such traffic; and

(d) Furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering such traffic.

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The other sub-sections go on to make further provisions as to what "adequate and suitable accommodation" shall include and confer special powers on the Board to make orders respecting the same, and for the construction and carrying out of specific works or acquiring of property necessary under the circumstances.

But the controlling words upon the meaning to be given which the construction of the entire section rests are to be found in sub-section (a) above quoted:

The company shall * * * furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, etc.

Here are three distinct places dealt with, first, starting places, secondly, junctions with other railways, and, thirdly, stopping places established for the purposes of receiving, loading, unloading and forwarding traffic. The question arises on the threshold of the argument: Do these places refer *only* to those which existed at the moment the railway was completed and running? By way of testing it I asked Mr. Chrysler, during the argument, whether he would contend that "the junction of the railway with other railways" was confined to junctions which existed at the time of the completion of the railway. He did not desire to commit himself on that point contenting himself with strenuously contending that "stopping places estab-

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lished for such purpose" of giving adequate and suitable accommodation for traffic purposes applied exclusively to such "stopping places" as had been sanctioned and approved of when the railway plans were submitted to and approved of by the Board, and did not confer a power upon the Board of establishing such stopping places from time to time along the railway as increasing or changing trade and railway traffic might call for. Such additional stopping places for stations he submitted were left to the control and determination of the railway company itself. I confess the language of the statute is somewhat ambiguous. To sustain his argument I think the learned counsel would have to insert after the words "established for such purpose" in the third line of the subsection the words "when the railway was completed," and to sustain my conclusion I have to insert the words "from time to time."

A fair and not an unreasonable test as to whether the section should be read with respect to such conditions only as existed when the plans of the road were approved and the road fully completed is to attempt to apply such a construction to the second of the three places dealt with, namely, at "the junction of the railway with other railways." Such junctions are constantly being made under the orders of the Board under conditions fair to both railways and the protection of the public. It would be a narrow construction indeed which would limit the "junctions" mentioned in this section, and as to which the Board could exercise its powers of ordering a stopping place to be established and a station built to those only which existed at the time the railway was completed. No such construction would, in my judgment, be sound. The law must be interpreted as always speak-

ing, and when it vests in the Board power to make the necessary orders to ensure "adequate and suitable accommodation" for the traffic on the road at the junctions of the railway with other railways it evidently means such junctions as are from time to time with the approval and sanction of the Board permitted. If the conclusion is once reached that the section refers as well to junctions existing on the completion of the road as to those subsequently established, then it would seem to follow, in the absence of clear and definite language shewing a contrary intention with regard to stations, that the same rule of construction was applicable to the language "all stopping places established for such purpose." The section would, in this construction, carry out what one would suppose, looking at the main purpose and object of the Act, must have been the intention of Parliament. As the Chief Justice suggested, during the argument, the Act was an effort to combine private ownership with public control. But Mr. Chrysler suggested that the right of expropriation on the part of the company ceased with the completion of their road and that a construction would not be put upon the section involving a right on the part of the Board to make an order establishing a station upon a particular spot by a railway incompetent for want of statutory powers of expropriation to carry it out. The special conditions made in this order for the furnishing by the company of the lands necessary for the purposes of the station ordered might not, of course, necessitate the exercise of any compulsory powers. But that accident or fact cannot, of course, determine the jurisdiction of the Board. I find, however, in the 178th section the fullest powers given the railway

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companies for the compulsory taking of lands required by them, at any point, for (*inter alia*),
 the construction or taking of any works or measures ordered by the Board, etc.

I see no ground for limiting the construction of this section to such requirements as the railway company may, of its own motion, deem necessary, and excluding such as the Board may order against the company's wish. I think it fairly includes the latter. Looking, therefore, at the "Railway Act" as a remedial measure, establishing a public board of commissioners with powers to be used for the public protection in providing against abuses and preventible dangers and ensuring, amongst other things, adequate and suitable accommodation for the reception, delivery and forwarding of traffic, and construing section 284 with that knowledge, I can only conclude either that it does vest in the Board the authority claimed and exercised by it in this case of establishing a stopping-place within the meaning of those words in sub-section (a), or that there has been a *casus omissus* and one of the most necessary powers to ensure adequate and suitable traffic requirements overlooked. My construction of the language of the section saves me from accepting the latter conclusion.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—I regret to be driven to the conclusion that the Board has not jurisdiction to make the order in question.

Section 284 of the "Railway Act" relied upon does not, to my mind, furnish such power as claimed.

The language of the first group of sub-sections of that section evidently pre-supposes established stop-

ping-places, and proceeds accordingly to direct and render it possible for the Board further to direct the necessary details for executing its purposes.

It does not, except in sub-section 5, empower the establishment of new stopping-places.

Sub-section 5 expressly provides power for the Board to fix, under the circumstances therein specified, new stopping-places in such limited cases.

If there existed already anywhere the power to direct new stopping-places, that sub-section was quite unnecessary.

Its existence seems to exclude any reasonable ground for attributing to any part of the whole section, or elsewhere in the Act, any general power to create new stopping-places.

It is urged that orders of a like kind have been made and obeyed as of course. I cannot see any force in that. It simply means the company so directed comprehended the importance of a public demand of which the official notice was thus given.

Railway managers know these orders of the Board are not made for amusement and that it is an unwise thing, as mere business expediency, needlessly to antagonize the public.

Of course, cases arise when such expediency may be overborne by other considerations.

As to the right to hear this appeal, I think the Board has, acting within its power, very properly, so placed the matter that there is no doubt of our jurisdiction to answer the question submitted.

The second part of Mr. Biggar's application, as adopted by the Board, is but a reason or ground of objection and does not necessarily cover the essence thereof.

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I submit we should not be astute to find a means of evading answers to the submissions of the Board. The sooner any defect in jurisdiction is declared, the better so, that Parliament may act, if it find it expedient to do so.

DUFF J. (dissenting).—The question raised by this appeal is whether the Board of Railway Commissioners has authority to order a railway company having a railway in operation to establish a stopping-place where none exists.

In discussing the question it will be convenient to consider first the provisions of the Act which expressly deal with the establishment of the sites of stations and stopping-places generally. By sub-section (g) of section 151 which defines the general powers of the company, the company is empowered itself to

construct, erect and maintain all necessary and convenient * * * stations, depots, * * * and other structures necessary for the accommodation and use of the traffic and business of the railway;

and by sub-section (p) from

time to time discontinue such works or any other of them * * * and substitute others in their stead.

By section 158, sub-sec. 2, it is provided that the plan of the railway, which by that section the company is directed to make, shall shew amongst other things the names of terminal points, and "the station grounds"; and by section 159

such plan, profile, and book of reference shall be submitted to the Board which if satisfied therewith may sanction the same.

By section 258, sub-sec. 2, it is enacted, that

before the company proceeds to erect any station upon its railway the location of such station shall be approved by the Board.

These are the only provisions of the Act which deal

generally in express words with the assignment of sites for stations and stopping-places, and the result appears to be that all such sites are to be shewn upon the plan of the railway filed pursuant to section 158, and that no station other than those whose sites are exhibited upon this plan shall be subsequently established until the Board shall have approved the proposed site of it.

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There is nothing in any of these provisions investing the Board with authority to compel the company against its will to establish any station or stopping-place at any site other than the sites shewn upon this plan or afterwards selected by the company with the approval of the Board under section 158(2). These I have said are the provisions which deal with the sites of stations and stopping-places generally. There is one other provision providing for a special case; and that is sub-section 5 of section 284. That sub-section is as follows:—

Where a company's railway crosses or joins or approaches, in the opinion of the Board, sufficiently near to any other railway, upon which passengers or mails are transported, whether the last-mentioned railway is within the legislative authority of the Parliament of Canada or not, the Board may order the company so to regulate the running of its trains carrying passengers or mails, *and the places and times of stopping them, as to afford reasonable opportunity for the transfer of passengers and mails between its railway and such other railway, and may order the company to furnish reasonable facilities and accommodation for such purpose.*

These being all the provisions of the Act dealing expressly with the establishment of such sites, it is at once observable that while no general power is expressly conferred upon the Board to establish a site against the will of the company, there is such a power conferred in the specific case provided for in the enactment last quoted. If these were all the

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provisions of the Act having a bearing upon the question the result would I think be very clear. We should then have before us simply one of those cases in which a power is conferred to be exercised in a specific case, and there is no provision conferring a more general power. As a general rule when authority is given by statute to some person or body to do something in a specified case and no power is expressly given to do that thing generally it may be taken that any such general power has been withheld; for the simple reason that if the general power existed the grant of the special power would be superfluous.

The provisions to which I have referred are not, however, those upon which the respondent mainly relies in support of its contention. It invokes chiefly section 284, sub-secs. (a), (b), (c), (d), 2, 3, and 6, and section 317. Sub-sections (a), (b), (c), (d) of section 284, are as follows:—

284. The company shall, according to its powers,—

(a) furnish, at the place of starting, and at the junction of the railway with other railways, and *at all stopping-places established for such purpose*, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;

(b) furnish *adequate and suitable accommodation* for the carrying, *unloading and delivering of all such traffic*;

(c) without delay, and with due care and diligence, receive, carry and *deliver all such traffic*; and

(d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and *delivering such traffic*.

Sub-section 6 of the same section provides that for the purposes of the section the Board may order “that specific works be constructed or carried out,” and by sub-section 3 it is enacted that “if in any case such accommodation” (*i.e.*, the accommodation mentioned in sub-sections (a), (b), (c), (d)), “is not in the

opinion of the Board furnished by the company the Board may order the company to furnish the same."

I am not able to find in any of these provisions any grant of authority to make such an order as that under appeal. The subject matters dealt with in these provisions are the facilities and accommodation to be furnished by the railway in the reception, loading, carrying and delivering of traffic. The application of these provisions necessarily presupposes in each case traffic in the course of transit or offered for carriage or at the end of transit between a terminus *a quo* and a terminus *ad quem*. These provisions of the Act invest the Board with the supervision of the accommodation and facilities furnished by the company for the handling of such traffic; that is to say the reception and loading of traffic at places established for that purpose, the transport of it to places established for the delivery of it, and the delivery of it when it reaches its destination. Sub-section (a) which deals with reception and loading is confined in its application expressly to the place of starting, to the junction of the railway with other railways and to establish stopping-places. I do not think sub-sections (b), (c) and (d) have as regards stopping-places any wider application. Sub-section 2 applies only to junctions with private sidings or private branch railways; and sub-sec. 4 is in its operation expressly confined "to the places aforesaid" which would seem to include only the places mentioned in sub-section (a) and sub-section 2. In a word, with the single exception of sub-section 5 already dealt with, no part of section 284 appears to be directed to the establishment of stopping-places, but only to the facilities and accommodation to be afforded at such stopping-places, at the

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termini of the railway, and at its junction either with other railways generally or with private sidings or private railways.

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It remains to deal with section 317, and a like remark applies to that section. The subject of it is the provision of proper facilities for the receiving, forwarding and delivering of traffic, but it presupposes, I think, traffic offered for carriage from one point at which the railway is bound to receive traffic to another point at which the railway is bound to deliver it or in transit between such points or at its destination ready for unloading or delivery. In these two sections (284 and 317), moreover, the legislature had in contemplation these subjects of accommodation and facilities. The subject of the establishment of stopping-places is specifically dealt with, as I have already pointed out, in other sections of the Act. It would, I think, involve some departure from sound principles of construction to treat the general language used in these two sections (assuming it to be broad enough to embrace the subject of the establishment of stopping-places) as applicable to a subject which has been specifically dealt with elsewhere, and which the legislature had not immediately in view in framing these provisions.

One further point requires notice.

It was strongly pressed upon us by Mr. Lancaster in his able argument that the scheme of regulation provided for by the Railway Act is the embodiment of a policy to apply public regulation to railways privately owned and that no such scheme could be beneficial or effective which did not involve the grant to the regulating authority of the power to dictate the establishment from time to time of stopping-places

for the reception and discharge of traffic. I think there is some danger in giving effect to considerations of this kind. A court of justice has no means of ascertaining the views of policy upon which legislation is based except through the interpretation of the language which the legislature had used, and indeed we are not concerned with the ultimate motives which have induced the legislature to pass the enactment to be construed, but only with the meaning of the legislative provisions themselves by which the legislature has seen fit to give legal effect to its views. "Intention of the legislature," said Lord Watson, in *Salomon v. Salomon* (1), at page 38,

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is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

The appeal should in my opinion be allowed. There should be no costs.

Since the above was written a new point not raised in the argument has been suggested based upon section 28, sub-sec. 1, and section 26, sub-sec. 2 of the Act. It is said that the effect of these two sections is that whatever the Board may authorize a company to do under the Act, that the Board may require a company to do. It is then argued that since, under sub-section 2 of section 258 and under section 167, the Board is authorized to approve the establishment of new stations, by the combined operation of these different provisions the Board acquires authority to direct the company *in invitum* to establish a new stopping-place and sta-

(1) [1897] A.C. 22.

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tion. I am disposed to think that this construction of section 26, sub-section 2 is altogether too broad. The authority conferred upon the Board to require the company to do something it may authorize would seem to be intended to be exercised as ancillary only to the power to authorize. However that may be it seems to me there are two further answers to the argument:—First, such general enactments as section 26, sub-section 2 when found in statutes containing a great variety of provisions relating to diverse subjects cannot be applied mechanically in every case in which the words read literally might appear to justify such application. They must be read with the other parts of the Act; and subject to the implied condition that they are only applicable where neither by express words nor by necessary implication arising out of the subject matter or the context a contrary intention is made to appear. Where the provisions relating to a specific subject matter in themselves shew that the legislature did not intend the power to authorize to include the power to require—then according to well-established rules of construction the specific provision must prevail over the general. The foregoing discussion of the provisions relating to stations and facilities sufficiently indicates the grounds of my view that this subject of the establishment of stations has been dealt with in such a way as to exclude the application of any such rule as that said to be found in section 26, sub-sec. 2.

Again, giving to the words of section 26, sub-sec. 2, the wider signification, they could only be held to empower the Board to require something to be done (merely on the ground that the Board has power to approve such a thing) in circumstances in which approval by the Board is authorized. Sub-section

1 of sec. 28 does not help us in the least. That is only a section dealing with procedure; the substantial conditions of the jurisdiction of the Board to empower or authorize any given thing cannot be affected by it. Now sub-section 2 of section 258 involves not merely an application by the railway company which is a mere matter of procedure, but behind and giving rise to it a determination by the company to erect a station on its railway. The initiative of the company in that substantial sense is the essence of the whole provision. That condition is wanting here. So the condition of the operation of sec. 167 is that some alteration shall be required by the company to be made; that is the substantial condition on which the Board's jurisdiction rests. The application of section 28, subsecs. 1 and 2, to these provisions in the sense proposed seems to me for these reasons not to be permissible.

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ANGLIN, J.—I am of opinion that the sixty-day limitation imposed by section 69 of the "Supreme Court Act" does not apply to appeals from the Board of Railway Commissioners under section 56 of the "Railway Act." Sections 36 *et seq.* of the "Supreme Court Act" confer rights of appeal from provincial courts. To these appeals section 69 applies. A right of appeal from the Board of Railway Commissioners is, in certain cases, conferred by the "Railway Act," which imposes the condition that in cases where the appeal is upon a question of jurisdiction the leave of a judge of this court shall first be had, and, in cases where the appeal is on a question of law, the leave of the Board shall be obtained. I see no reason for holding that section 69 of the "Supreme Court Act" applies to these appeals so as to add another con-

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dition. Sub-section 7, of section 56, of the "Railway Act"—which makes applicable to appeals from the Board of Railway Commissioners the rules and practice applicable to appeals from the Exchequer Court—tends to confirm this view.

If section 82 of the "Exchequer Court Act" applies, the Board probably had jurisdiction to make the order pronounced by it, extending the time for appealing. If section 69 of the "Supreme Court Act" were applicable, in so far as this appeal involves a question of law, the Board would probably have the like power under section 71 of the "Supreme Court Act." But I find nothing to warrant the view that an appeal will not lie under sub-section 2, of section 56, of the "Railway Act," unless the leave of a judge of this court be obtained and the appeal brought within sixty days from the date of the judgment appealed from. The preliminary objection, therefore, in my opinion, fails.

By sub-section 2, of section 258, of the "Railway Act," it is provided that

before the company proceeds to erect any station upon its railway, the location of such station shall be approved of by the Board.

There is nothing to confine the application of this sub-section to railways projected or in course of construction; nothing to exclude from it railways already in operation.

By section 167, it is provided that

if any deviation, change or alteration is required by the company to be made in the railway or any portion thereof as already constructed,
 * * * a plan, etc., shall be submitted for the approval of the Board.

And, upon approval and deposit of such plan, etc., the company is authorized to make such deviation, change or alteration.

By section 2(21), "railway" is declared to include "stations." The establishment of a new station or stopping-place is a change or alteration in the railway.

It is reasonably plain from these provisions that the Board has jurisdiction to *authorize* the construction by the company of stations at new or additional stopping-places upon its lines already constructed and that, without such authorization, the company cannot lawfully establish a new station.

These provisions, however, seem to contemplate authorization on the application of the railway company.

But, by section 28(1), the Board is empowered to determine "of its own motion," any matter or thing which it may determine upon application, and it is, when so acting, given "the same powers as upon any application."

It may, therefore, of its own motion authorize the construction by the company of stations at new or additional stopping-places.

Then, by section 26(2), it is provided that

the Board may order and require any company or person to do forthwith, and within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required or authorized to do under this Act.

Being empowered to *authorize* the company to erect stations at new or additional points and being clothed by the sub-section last quoted with authority *to order and require* the company to do that which it may be *authorized* to do, it would seem to follow that the Board has jurisdiction to *order and require* the erection of a station at a new and additional stopping-place upon a railway already constructed.

These provisions suffice, in my opinion, to sup-

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port the order in appeal. Reference may also be made to sections 158(2c) and 159.

Sections 177 and 178 confer powers of expropriation quite sufficient to enable the company to carry out any order of the Board such as that in appeal.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *E. A. Lancaster.*

Tab 4



SUPREME COURT OF CANADA

CITATION: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

APPEAL HEARD: December 4, 5, 6, 2018
JUDGMENT RENDERED: December 19, 2019
DOCKET: 37748

BETWEEN:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe (paras. 1 to 197) and Martin JJ.

JOINT CONCURRING REASONS: Abella and Karakatsanis JJ. (paras. 198 to 343)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

CANADA (CITIZENSHIP AND IMMIGRATION) v. VAVILOV

Minister of Citizenship and Immigration

Appellant

v.

Alexander Vavilov

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and
Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,**

**Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada** *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) v. Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was

representative or employee in Canada of foreign government at time of child's birth
— *Whether Registrar's decision to cancel certificate of citizenship was reasonable* —
Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of “a diplomatic or consular officer or other representative or employee in Canada of a foreign government” from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was

dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner C.J.** and **Moldaver, Gascon, Côté, Brown, Rowe** and **Martin JJ.:** The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldy and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the

applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's

jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word “appeal” in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature’s institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance

to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would

have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and

legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and

elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized

where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for

applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of

judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and

immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and

immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per Abella and Karakatsanis JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for

deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to

administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting

de novo review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional

circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling.

The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion

effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court

evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may

legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

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By Abella and Karakatsanis JJ.

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[1971] S.C.R. 756; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219; *Canada*

(Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53, [2011] 3 S.C.R. 471; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708; *R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897; *Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149; *Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331; *Payne v. Tennessee*, 501 U.S. 808 (1991); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Bernard*, [1988] 2

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Michael H. Morris, Marianne Zorić and John Provart, for the appellant.

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Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

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Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

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Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

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Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

THE CHIEF JUSTICE AND MOLDAVER, GASCON, CÔTÉ, BROWN, ROWE
AND MARTIN JJ. —

[1] This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to

maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision

making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

[5] Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

[6] In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping*

Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (“CHRC”), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, “Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness” (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding “undue interference” in the face of the legislature’s intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v.*

Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to “simplify the standard of review labyrinth we currently find ourselves in” and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

[10] This process has led us to conclude that a reconsideration of this Court’s approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[11] The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between “good enough” and “not quite wrong”. These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison

administration and social security entitlements to labour relations, securities regulation and energy policy.

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a

culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness”: the Rt. Hon. B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, “Proportionality and Justification” (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to

carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 849-50.

[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at naught decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty

and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778. In such circumstances, “following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law”: *Bernard*, at p. 858. These considerations apply here.

[21] Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

[J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied If litigants do take the plunge, they may find the court’s attention focussed not on their complaints, or the government’s response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] A victory before the reviewing court may be overturned on appeal because the wrong “standard of review” was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, “[t]he contextual approach

can generate uncertainty and endless litigation concerning the standard of review.” While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants “still find the merits waiting in the wings for their chance to be seen and reviewed”: *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court “has for years attempted to simplify the standard of review analysis in order to ‘get the parties away from arguing about the tests and back to arguing about the substantive merits of their case’”: para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature’s intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now

appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v.*

Southam Inc., [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court’s jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the “pragmatic and functional” approach, which was first set out in *Bibeault*, a decision maker’s expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body’s members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

[28] Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

[29] Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in

order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that “with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts”: para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review “respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts”: para. 22. And in *CHRC*, Gascon J. explained that “the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review”: para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid “undue interference” with the administrative decision maker’s discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This

consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

[33] This Court has described respect for legislative intent as the “polar star” of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature’s choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker.

Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C.

Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court.

This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] “[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place”: para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court’s jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker’s authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court’s recent jurisprudence. However, after careful

consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court’s recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, “What is a ‘reasonable decision’?” (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016), 42 *Queen’s L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-

dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[41] Second, there is no satisfactory justification for the recent trend in this Court’s jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, “Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence” (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former “pragmatic and functional” approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal

was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

[43] Yet as, in *Dunsmuir, Alberta Teachers, Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word “appeal” in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word “appeal” refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word “appeal” also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further

support for giving effect to statutory rights of appeal. Our colleagues’ suggestion that our position in this regard “hinges” on what they call a “textualist argument” (at para. 246) is inaccurate.

[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative

expertise — what it called the “specialization of duties” principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature’s institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature’s choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature’s choice of a more involved role for the courts in supervising administrative decision making.

[47] The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

[48] Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada’s judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied “sparingly” (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was “all but complete”: reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

[49] In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal

mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and

determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta’s *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply “[w]here a decision of an assessment review board is the subject of an application for judicial review”: s. 470(1).

[52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in

reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that

an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are “of central importance to the legal system as a whole”. However, a return to first principles reveals that it is not necessary to evaluate the decision maker’s specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law “require uniform and consistent answers” as a result of “their impact on the administration of justice as a whole”: *Dunsmuir*, para. 60. In these cases, correctness

review is necessary to resolve general questions of law that are of “fundamental importance and broad applicability”, with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (“*Mowat*”), at para. 22; *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law “of central importance to the legal system as a whole” has implications beyond the decision at hand, hence the need for “uniform and consistent answers”.

[60] This Court’s jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an

administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state’s duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is “of wider public concern” is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per

Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a

comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was “without question” (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or

vires). True questions of jurisdiction were said to arise “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”: see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and “expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law”: *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of “jurisdiction” in the administrative law context is inherently “slippery”: para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as “jurisdictional” in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court’s jurisprudence contemplates that only a much narrower class of “truly” jurisdictional questions requires correctness review, it has observed that there are no “clear markers” to distinguish such questions from other questions related to the interpretation of an administrative decision maker’s enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of “truly” jurisdictional questions, there is general agreement that “it is often difficult to distinguish between exercises of delegated

power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute”: *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a “truly”

or “narrowly” jurisdictional issue and without having to apply the correctness standard.

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker’s interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature’s intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is “jurisdictional”

E. *Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review*

[69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, “get the parties away from arguing about the tests and back to arguing about the substantive merits of their case”: *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be

understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the

identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both “yes” and “no” — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, this Court held that “a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals”: p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law’s meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to “legal incoherence” and require a court to step in is not obvious. Given these practical

difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness

review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is “eminently variable”, inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the

process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[78] In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate

that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L’Heureux-Dubé J. noted in *Baker*, “[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given”: para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, “public decisions gain their democratic and legal authority through a process of public justification” which includes reasons “that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate”: “Can Pragmatism Function in Administrative Law?” (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the “discipline of reasons”: *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3

S.C.R. 708, the Court reaffirmed that “the purpose of reasons, when they are required, is to demonstrate ‘justification, transparency and intelligibility’”: para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning

process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, “as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did”: at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with “respectful attention” and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court’s jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of “high policy”

on the one hand and “pure law” on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision’s context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that “[r]easonableness is a single standard that takes its colour from the context”: *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one

decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker’s strength within its particular and specialized domain. “Administrative justice” will

not always look like “judicial justice”, and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker’s demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker’s reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker’s work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker’s reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency.

Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to

abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner’s delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to “reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result”: para. 54, quoting *Petro-Canada v. British Columbia (Workers’ Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that “deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided”: para. 54. Where a

decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a “line-by-line treasure hunt for error”: *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”: *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” will rarely assist a reviewing court in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis,

inference and judgment”: R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point (see *Blas v. Canada (Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation

to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context.

They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply “with the rationale and purview of the statutory scheme under which it is adopted”: *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, “there is no such thing as absolute and untrammelled ‘discretion’”, and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins*

de Jéhovah de St-Jérôme-Lafontaine, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of “truly” jurisdictional questions that are subject to correctness review. Although a decision maker’s interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues’ concern (at para. 285), this does not reintroduce the concept of “jurisdictional error” into judicial review, but merely

identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, “in the public interest” — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a “fictitious” system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties’ rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of “reasonable grounds to suspect” in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body’s decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the

same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without

adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada’s international obligations, and the legislature is “presumed to comply with . . . the values and principles of customary and conventional international law”: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance

or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or “ask itself what the correct decision would have been”: *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the “modern principle” as the proper approach to statutory interpretation, because legislative intent can be understood only by reading

the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision

maker interprets a provision. Where, for example, the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker’s task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required “to explicitly address all possible shades of meaning” of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their

reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the “correct” interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision

maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must

be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker’s approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however

subordinate, leading to its final conclusion” (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, “a lack of unanimity is the price to pay for the decision-making freedom and independence” given to administrative decision makers, and the mere fact that some conflict exists among an administrative body’s decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this

sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is “persistent discord” on questions of law in an administrative body’s decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body’s decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable

among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst; Green; Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the

record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, “[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw”: para. 29. In that case, not only were “the reasons [in the sense of rationale] for the bylaw . . . clear to everyone”, they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker’s reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court’s common law or statutory jurisdiction and the great diversity of

elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

[140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and “the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place”: *Alberta Teachers*, at para. 55.

[141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada*

(*Fisheries and Oceans*), 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court’s jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases—including those on the effect of statutory appeal mechanisms, “true” questions of jurisdiction or the former contextual analysis—will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

[144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

[145] Before turning to Mr. Vavilov’s case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an “encomium” for correctness, and a turn away from the Court’s deferential approach to the point of being a “eulogy” for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for “line-by-line” reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov’s Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar’s decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of

the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

[147] Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a “deep cover” espionage network under the direction of the SVR. The United States Department of Justice refers to it as the “illegals” program.

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and

worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his

surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

[151] However, Mr. Vavilov never received a passport. Instead, he received a “procedural fairness letter” from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov’s Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar’s Decision

[152] In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

- a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.
- b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.
- c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".
- d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent

residence and either parent was “a diplomatic or consular officer or other representative or employee in Canada of a foreign government.”

[153] For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar’s letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

[154] In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov’s file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR’s “illegals” program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov’s application for judicial review. The analyst’s ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been “working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov’s birth”, and that “[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*”: A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

[155] In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a);
or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[156] The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term “diplomatic or consular officer” is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase “other representative or employee in Canada of a foreign government.”

[157] The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, excluded from citizenship children whose “responsible parent” at the time of birth was:

- (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
- (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
- (iii) an employee in the service of a person referred to in subparagraph (i).

[158] The analyst reasoned that because s. 3(2)(a) “makes reference to ‘representatives or employees of a foreign government,’ but does not link the representatives or employees to ‘attached to or in the service of a foreign diplomatic mission or consulate in Canada’ (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of ‘diplomatic and consular staff’”: A.R., vol. I, at p. 7.

[159] Although the analyst acknowledged that “Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions”, she concluded that they were nonetheless “unofficial employees or representatives” of Russia at the time of Mr. Vavilov’s birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian

Registrar of Citizenship “recall” Mr. Vavilov’s certificate on the basis that he was not, and had never been, entitled to citizenship.

(2) Federal Court (Bell J.), 2015 FC 960, [2016] 2 F.C.R. 39

[160] Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar’s decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

[161] The Federal Court rejected Mr. Vavilov’s argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court’s view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

[162] The Federal Court also rejected Mr. Vavilov’s challenge to the Registrar’s interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase “diplomatic or consular officer or other representative or employee in Canada of a foreign government” in s. 3(2)(a). In the Federal Court’s view, to interpret s. 3(2)(a) in any other way would render the phrase “other representative or employee in Canada of a foreign government” meaningless and would lead to the “absurd result” that “children

of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth”: para. 25.

[163] Finally, the Federal Court was satisfied, given the evidence, that the Registrar’s conclusion that Mr. Vavilov’s parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

- (3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75

[164] A majority of the Federal Court of Appeal allowed Mr. Vavilov’s appeal from the Federal Court’s judgment and quashed the Registrar’s decision.

[165] The Court of Appeal unanimously rejected Mr. Vavilov’s argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal’s view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

[166] The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

[167] The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

[168] The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

[169] Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the

Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

[171] The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*.

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government

representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

[173] Our review of the Registrar’s decision leads us to conclude that it was unreasonable for her to find that the phrase “diplomatic or consular officer or other representative or employee in Canada of a foreign government” applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov’s parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were “other representative[s] or employee[s] in Canada of a foreign government” within the meaning of s. 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) provides that children of “a diplomatic or consular officer or other representative or employee in Canada of a foreign government” are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14,

1977 acquire Canadian citizenship by birth. The analyst observed that although the term “diplomatic or consular officer” is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov’s parents, the phrase “other representative or employee in Canada of a foreign government” is not so defined, and may apply to them.

[175] The analyst’s attempt to give the words “other representative or employee in Canada of a foreign government” a meaning distinct from that of “diplomatic or consular officer” is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase “other representative or employee in Canada of a foreign government” were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

- (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
 - (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
 - (b) an employee in the service of a person referred to in paragraph (a); or
 - (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities

certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[176] As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are “employee[s] in Canada of a foreign government” — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

[177] Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (“*FMIOA*”), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 (“*VCDR*”). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

[178] To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that “[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State”. Mr. Vavilov made the following submission to the Registrar:

The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.

Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in

mind. The term “employee in Canada of a foreign government” must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.

(A.R., vol. IV, at pp. 449-50)

[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L. R. (3d) 67, a case which was referred to in the analyst’s report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

Of particular interest are the special rules relating to the *jus soli*, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: ‘This article is believed to be declaratory of an established rule of international law’. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: ‘Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.’

In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: ‘Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State’.

Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]

(Brownlie, at pp. 392-93).

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as “conform[ing] to international custom” and as having been drafted with the intention of “exclud[ing] children born in Canada to diplomats from becoming Canadian citizens”: Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, “a number of other people would be affected such as those working for large foreign corporations”: *ibid.* Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

[181] In attempting to distinguish the meaning of the phrase “other representative or employee in Canada of a foreign government” from that of the term “diplomatic or consular officer”, the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered “diplomatic or consular officer[s]” under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov’s submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[182] It is well established that domestic legislation is presumed to comply with Canada’s international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament’s purpose in enacting s. 3(2) and did not respond to Mr. Vavilov’s submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of

compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to “individuals whose parents maintained diplomatic status in Canada at the time of their birth”. But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov’s case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which

Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR: Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an “extraordinary array of privileges under the *Foreign Missions and International Organizations Act*”: *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that “[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship”: para. 63. In its analysis under s. 1 of the

Charter, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is “tightly connected” to a pressing government objective of ensuring “that no citizen is immune from the obligations of citizenship”, such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court’s key finding that s. 3(2)(a) applies only to “children born of foreign diplomats or an equivalent”, a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

[186] In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that “[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status”: *Lee*, at para. 77. The court found in *Lee* that the “functional duties of the applicant’s father” were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant’s birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

[187] *Hitti*, the third case cited in the analyst’s report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the

applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

[188] What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) *Possible Consequences of the Registrar's Interpretation*

[189] When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

Well, usually the way we use section 3(2)(a) is for -- you're right, for diplomats and that they don't -- because they are not -- they are not obliged . . . to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.

(R.R. transcript, at pp. 87-88)

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court

Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: “I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship”: para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, in which this Court unanimously held that “[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty”: para. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada’s international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual’s birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar’s interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of

citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

[193] Moreover, we would note that despite following a different legal process, the Registrar’s decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as “a kind of ‘political death’” — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, “Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien” (2014), 40 *Queen’s L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada’s position with respect to Mr. Vavilov’s citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual’s citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. Conclusion

[194] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted

diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily “one reasonable interpretation” of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children’s birth.

[196] Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

[197] The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

ABELLA AND KARAKATSANIS JJ. —

[198] Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to

provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation’s evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

[200] We support the majority’s decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of “true questions of jurisdiction”. These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[201] But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court’s jurisprudence for the last four decades. The majority’s reasons are an encomium for correctness and a eulogy for deference.

[202] The modern Canadian state “could not function without the many and varied administrative tribunals that people the legal landscape” (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, “government would be paralyzed, and so would the courts” (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

[203] In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal

backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally “[d]esigned to be less cumbersome, less expensive, less formal and less delayed” than their judicial counterparts — but “no less effectiv[e] or credibl[e]” (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, “Collective Bargaining in Ontario: A New Legislative Approach” (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, “A ‘Unique Experiment’: The Ontario Labour Court, 1943-1944” (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around “reasonableness” and “correctness”, and determining when each standard applies. On the one hand, “reasonableness” review expects courts to defer to decisions by specialized decision-makers that “are defensible in respect of the facts and law”; on the other, “correctness” review allows courts to substitute their own

opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute “law” (Kevin M. Stack, “Overcoming Dicey in Administrative Law” (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey’s approach at work is the House of Lords’ decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of “jurisdictional error”. *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of “jurisdictional errors”

capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to “enter on the inquiry in question” (p. 171). The second was wider:

[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

[208] The broad “jurisdictional error” approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. These cases “took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal”, and in each case, “th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal’s statute for that of the tribunal” (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this

Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code*, 1961-62, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the “jurisdictional error” model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature’s decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could “bristl[e] with ambiguities” and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing “curial deference” to administrative bodies, *C.U.P.E.* embraced “a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state” (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

. . . legislatures and courts in . . . Canada have come to settle on the idea that the functional capacities of administrative agencies – their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change – justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state.* [Emphasis added.]

(Stack, at p. 310)

[212] In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada’s approach to administrative law — one based on the legislature’s express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

[213] A new institutional relationship between the courts and administrative actors was thus being forged, based on “an understanding of the role of expertise in the modern administrative state” which “acknowledge[d] that judges are not always in the best position to interpret the law” (The Hon. Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002), 27 *Queen’s L.J.* 859, at p. 866).

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of “jurisdictional error”. In *U.E.S.*,

Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, the Court introduced the “pragmatic and functional” approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal’s existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator “intend[ed] the question to be within the jurisdiction conferred on the tribunal” (p. 1087; see also p. 1088). If so, the tribunal’s decision could only be set aside if it was “patently unreasonable” (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey’s framework and towards a more sophisticated understanding of the role of administrative tribunals:

. . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that “the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal’s decision . . . [e]ven where the tribunal’s enabling statute provides explicitly for appellate review” (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be “the most important” (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that “the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal’s expertise” (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court’s willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court’s administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its “home” statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that “deference requires respect for the legislative

choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system” (para. 49). They noted that “in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (para. 49, citing David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court’s post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker’s interpretation of its home or closely-related statutes (see *Alberta Teachers’ Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at para. 46:

Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy*

Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (“NGC”), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, the majority recognized:

The presumption of reasonableness is grounded in the legislature’s choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer . . . [E]xpertise is something that inheres in a tribunal itself as an institution: “. . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions”. [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court’s longstanding jurisprudential acceptance of the “specialized expertise” principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v.*

Bell Aliant Regional Communications, [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even referring to the presence of an appeal clause. When appeal clauses were discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected “the idea that in the absence of express statutory language . . . a reviewing court is ‘to apply a correctness standard as it does in the regular appellate context’” (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 (“*Mowat*”), where the Court confirmed that “care should be taken not to conflate” judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that “general administrative law principles still apply” on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

[w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal [para. 38]

[227] In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, “recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court” (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that “a statutory right of appeal is not a new ‘category’ of correctness review” (para. 70).

[228] By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*’s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

This contextual approach should be applied sparingly. As held by the majority of this Court in Alberta Teachers, it is inappropriate to “retreat to the application of a full standard of review analysis where it can be determined summarily” After all, the “contextual approach can generate uncertainty and endless litigation concerning the standard of review” (Capilano [Edmonton East], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (Capilano [Edmonton East], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a

clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

[229] In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of “true questions of jurisdiction” and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority’s Reasons

[230] The majority’s framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a “presumption of reasonableness review”, this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as “expertise . . . institutional experience . . . proximity and responsiveness to stakeholders . . . prompt[ness], flexib[ility], and efficien[cy]; and . . . access to justice”, the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, at para. 53). Specialization and

expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, “Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law” (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving “polycentric” disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

[233] All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court’s acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H.W. Arthurs said:

There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-

trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.

(“Protection against Judicial Review” (1983), 43 *R. du B.* 277, at p. 289)

[234] Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body’s specialized expertise can be essential to achieving the purposes of a statutory scheme:

The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, “Standard of Review: Back to the Future?”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to

legislative intent, and recognizing that they give administrative decision-makers the “interpretative upper hand” on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority’s approach extolls respect for the legislature’s “institutional design choices”, it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority’s claim that “if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not”. Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The

theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on “the reality that . . . those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

[239] The exclusion of expertise, specialization and other institutional advantages from the majority’s standard of review framework is not merely a theoretical concern. The removal of the current “conceptual basis” for deference opens the gates to expanded correctness review. The majority’s “presumption” of deference will yield all too easily to justifications for a correctness-oriented framework.

[240] In the majority’s framework, deference gives way whenever the “rule of law” demands it. The majority’s approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey’s 19th century philosophy.

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the “court-centric conception of the rule of law”

had to be “reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law” (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, “What I Think I’ve Learned About Administrative Law” (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, “Fairness in Context: Achieving Fairness Through Access to Administrative Justice”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

. . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.

(Yves-Marie Morissette, “What is a ‘reasonable decision’?” (2018), 31 *C.J.A.L.P.* 225, at p. 236)

[243] These goals are compromised when a narrow conception of the “rule of law” is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

[244] The majority even calls for a reformulation of the “questions of central importance” category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on “questions of central importance to the legal system as a whole”, even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions “of central importance to the legal system *and* outside the specialized expertise of the adjudicator” (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers’ expertise on these matters, this category will inevitably provide more “room . . . for

both mistakes and manipulation” (Andrew Green, “Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law” (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*’s description of this category undisturbed.¹

[245] We also disagree with the majority’s reformulation of “legislative intent” to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a “different institutional structure” that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court’s powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

¹ Other than one of the two *amici*, no one asked us to modify this category.

[246] In reality, the majority’s position on statutory appeal rights, although couched in language about “giv[ing] effect to the legislature’s institutional design choices”, hinges almost entirely on a textualist argument: the presence of the word “appeal” indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

[247] The majority’s reliance on the “presumption of consistent expression” in relation to the single word “appeal” is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, must be inflexibly applied to every right of “appeal” within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority’s claim that legislatures “d[o] not speak in vain” is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament’s decision to provide appeal routes must influence the standard of review analysis, there is no

principled reason why Parliament’s decision via privative clauses to *prohibit* appeals should not be given comparable effect.²

[249] In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term “appeal” cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.³ We agree with the Attorney General of Canada’s position in the companion appeals of *Bell Canada v. Canada* (*Attorney General*), 2019 SCC 66, that, absent exceptional circumstances, the existence of a

² The “constitutional concerns” cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification” (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!” (2013), 42 *Adv. Q.* 1, at p. 21).

³ See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec’s recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

statutory right of appeal does not displace the presumption that the standard of reasonableness applies.⁴ The majority, however, has inexplicably chosen the template proposed by the *amici*,⁵ recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

[251] The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the

⁴ The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

⁵ Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

[252] Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

[253] The majority’s reasons “roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess” (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature’s intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada’s carefully developed, deferential approach to administrative law returns us to the “black letter law” approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority’s reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority’s approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the “shared enterprises in the administrative state” of “[l]aw-making and legal interpretation” between courts and administrative decision-makers (Stack, at p. 310).

[254] But the aspect of the majority’s decision with the greatest potential to undermine both the integrity of this Court’s decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).

Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled*

Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a “special justification”, which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords “require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it” (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand’s Supreme Court views “caution, often considerable caution” as the “touchstone” of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent “merely because, if the matter were being decided afresh, the Court might take a different view” (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process” (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for “[c]ertainty in the law” (*Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a “foundation stone of the rule of law” (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, “Stare Decisis and the Rule of Law: A Layered Approach” (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., “Stare Decisis and Judicial Restraint” (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

[261] Respect for precedent also safeguards this Court’s institutional legitimacy. The precedential value of a judgment of this Court does not “expire with the tenure of the particular panel of judges that decided it” (*Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

There is . . . a point beyond which frequent overruling would overtax the country’s belief in the Court’s good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

(*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

[262] Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

overruling precedent damages the public’s conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.

(“Overruling Precedent” (1986), 21 *Is.L.R.* 269, at p. 275)

[263] The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court

in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which “simply represen[t] a preferred choice with which the current Bench does not agree” (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). “[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance” (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

. . . an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a “special justification”—over and above the belief “that the precedent was wrongly decided.” [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents*

immobiliers du Québec v. Proprio Direct inc., [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas; Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to “home statute” deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers’ Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court’s strong reluctance to overturn precedents that “represen[t] the considered views of firm majorities” (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a “recent vintage” (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority’s decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority’s approach, every existing interpretation of such statutes by an

administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia’s *Securities Act*⁶ had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court’s decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

[270] The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority’s approach will undermine legal certainty — “the foundational principle upon which the common law relies” (*Bedford*, at para. 38; see also *Cromwell*, at p. 315).

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally

⁶ R.S.B.C. 1996, c. 418, s. 159

directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a “long line of precedents” going back 75 years or more and cited by lower courts thousands of times (p. 2422).

She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

. . . even if we are wrong about *Auer*, “Congress remains free to alter what we have done.” In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are “balls tossed into Congress’s court, for acceptance or not as that branch elects.” And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress’s continuing ability to take up Kisor’s arguments — we would need a particularly “special justification” to now reverse *Auer*. [Citations omitted; pp. 2422-23]

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court’s jurisprudence, the majority’s reliance on “judicial and academic criticism” falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification”, at p. 109; Green, at pp. 489-90; Matthew

Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, “The Time Has Come: Standard of Review in Canadian Administrative Law” (2017), 68 *U.N.B.L.J.* 87; The Hon. John M. Evans, “Standards of Review in Administrative Law” (2013), 26 *C.J.A.L.P.* 67, at p. 79; The Hon. John M. Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, “Seeking Simplicity in Canada’s Complex World of Judicial Review” (2019), 32 *C.J.A.L.P.* 67).

[274] A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct.* It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

Accordingly, as one commentator has put the point: “the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises”. [Emphasis in original; footnote omitted.]

(paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52, at pp. 102-3)

[275] This Court, in fact, has been clear that “criticism of a judgment is not sufficient to justify overruling it” (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with “varying degrees of enthusiasm” (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, “The Standard of Appellate Review and The Ironies of *Housen v. Nikolaisen*” (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, “Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review” (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, “Unreasonable review: The losing party and the palpable and overriding error standard” (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, “Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada” (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court’s jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect,

is wrong. Ever since *Bell Canada* (1989) and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

[278] This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court’s existing jurisprudence.

Going Forward

[279] In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. “[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine” (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

Judicial modesty is a disposition to respect precedents (as embodying the opinions of others), to learn from their and others’ experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

[280] Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

... it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]

(See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, “The Role of the Supreme Court of Canada in Shaping the Common Law”, in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

[281] Lord Bingham’s comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and

explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of “true questions of jurisdiction” and foreclosing the use of the contextual factors identified in *Dunsmuir*. These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures’ court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review.⁷ We fear, however, that the majority’s multi-factored, open-ended list of “constraints” on administrative decision making will encourage reviewing courts to dissect administrative reasons in a “line-by-line treasure hunt for error” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54). These “constraints” may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of “jurisdictional errors” spelled out in *Anisminic* itself.

[285] Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority’s warning that administrative decision-makers cannot “arrogate powers to themselves that they were never intended to have”, an unhelpful truism that risks reintroducing the tortured concept of “jurisdictional error” by another name.

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart

⁷ Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as “correctness”, “reasonableness” or in other terms — is fundamentally about “whether or not a reviewing court should defer”⁸ to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct “reasonableness” review, they must properly understand what deference means.

[287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

[288] First and foremost, deference is an “attitude of the court” conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay

⁸ Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

“respectful attention” to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

. . . When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been The standard of reasonableness does not imply that a decision-maker is merely afforded a “margin of error” around what the court believes is the correct result.

. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]

(See also *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, “The Signal and the Noise in

Administrative Law” (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?”, at p. 107.)

[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18). Administrative

law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

. . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate . . .

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; *Van Harten et al.*, at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive

— but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not “disguised correctness review”, as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

[295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.⁹

[296] The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

⁹ Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43.

[297] Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

[298] Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

[299] Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result “that promotes effective public policy and administration . . . than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law” (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker’s reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it

affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan,

at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the “day-to-day realities of administrative agencies” (*Baker*, at para. 44), which may not be conducive to the production of “archival” reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court’s understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, “Renovating Judicial Review” (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, “by inference”, why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.))*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker’s understanding of the purpose of its statutory mandate finds support in the provision’s legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are

“consistent with the process of reasoning” applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without “supplant[ing] the analysis of the administrative body” (*Lukács*, at para. 24).

[304] The “adequacy” of reasons, in other words, is not “a stand-alone basis for quashing a decision” (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead “be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative

decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach “imperils deference” (Paul Daly, “Unreasonable Interpretations of Law” (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that “once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal’s decision, there seems often to be little room for deference” (Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?”, at p. 109; see also *Mason*, at para. 34; Dyzenhaus, “Dignity in Administrative Law: Judicial Deference in a Culture of Justification”, at p. 108; Daly, “Unreasonable Interpretations of Law”, at

pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to “deferential” review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, at p. 304; Paul Daly, “Deference on Questions of Law” (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the “ordinary meaning” of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are

statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with “purposeful ambiguity” in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, “Some Reflections on the Reading of Statutes” (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, “Unreasonable Interpretations of Law”, at pp. 233-34, 250 and 254-55).

[310] Justice Brown’s reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as “[g]loves, mittens [or] mitts”. *Igloo Vikski* argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal (“CITT”) confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the “specific expertise” of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with *Igloo Vikski*’s arguments before turning to the errors alleged by

Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked “perfect clarity”, Justice Brown nevertheless concluded that the Tribunal’s interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT’s reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers’ Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's

passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other

representative[s] or employee[s] in Canada of a foreign government” within the meaning of s. 3(2)(a).

[322] The Federal Court ([2016] 2 F.C.R. 39) dismissed Mr. Vavilov’s application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar’s interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov’s parents were working in Canada as undercover agents of the Russian government at the time of his birth.

[323] The Federal Court of Appeal ([2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar’s decision to cancel Mr. Vavilov’s citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar’s interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar’s

interpretation of the Act in this case. As such, the standard of review is reasonableness.

[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

Persons who are citizens

3 (1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977;

...

Not applicable to children of foreign diplomats, etc.

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

Not applicable to children of foreign diplomats, etc.

(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent

(a) is an alien who has not been lawfully admitted to Canada for permanent residence; and

(b) is

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of “diplomatic or consular officer” in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link “other representative or employee in Canada of a foreign government” to a diplomatic mission, the analyst determined “it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of ‘diplomatic and consular staff.’” Finally, the analyst stated that the phrase “other representative or employee in Canada of a foreign government” has not been previously interpreted by a court.

[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("FMIOA"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the FMIOA, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the FMIOA, which deal with diplomatic privileges and immunities. He submitted

that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote

that s. 3(2)(a) only applies to the “children of individuals with diplomatic status” (paras. 5 and 65). Justice Shore also stated that “[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship” (para. 63).

[338] The Registrar’s reasons failed to respond to Mr. Vavilov’s extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov’s arguments on this point. In discussing the scope of s. 3(2), she wrote, “[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov’s parents] held diplomatic or consular status with the Russian Federation while they resided in Canada.” It thus appears that the analyst did not recognize that Mr. Vavilov’s argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms “other representative” and “employee” to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase “other representative or employee” was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that “[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth.”

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2)

that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

*Solicitors for the respondent: Jackman Nazami & Associates, Toronto;
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Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest

Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Confédération des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

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Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

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Hadekel Shams, Montréal.*

*Solicitors for the intervener the First Nations Child & Family Caring
Society of Canada: Stikeman Elliott, Ottawa.*

Tab 5

**IN THE MATTER OF the *Broadcasting Act*,
S.C. 1991, c. 11;**

**AND IN THE MATTER OF the Canadian
Radio-television and Telecommunications
Commission's Broadcasting Regulatory
Policy CRTC 2010-167 and Broadcasting
Order CRTC 2010-168;**

**AND IN THE MATTER OF an application
by way of a reference to the Federal Court of
Appeal pursuant to ss. 18.3(1) and 28(2) of the
Federal Courts Act, R.S.C. 1985, c. F-7.**

**Cogeco Cable Inc., Rogers Communications
Inc., TELUS Communications Company and
Shaw Communications Inc. *Appellants***

v.

**Bell Media Inc. (formerly CTV Globemedia
Inc.), V Interactions Inc., Newfoundland
Broadcasting Co. Ltd. and Canwest Television
Limited Partnership *Respondents***

and

**Canadian Radio-television
and Telecommunications
Commission *Intervener***

**INDEXED AS: REFERENCE RE BROADCASTING
REGULATORY POLICY CRTC 2010-167 AND
BROADCASTING ORDER CRTC 2010-168**

2012 SCC 68

File No.: 34231.

2012: April 17; 2012: December 13.

Present: McLachlin C.J. and LeBel, Deschamps,
Fish, Abella, Rothstein, Cromwell, Moldaver and
Karakatsanis JJ.

**DANS L'AFFAIRE intéressant la *Loi sur la
radiodiffusion*, L.C. 1991, ch. 11;**

**ET DANS L'AFFAIRE DE la Politique
réglementaire de radiodiffusion CRTC
2010-167 du Conseil de la radiodiffusion
et des télécommunications canadiennes
et l'ordonnance de radiodiffusion CRTC
2010-168;**

**ET DANS L'AFFAIRE D'UNE demande
introduite sous forme de renvoi à la Cour
d'appel fédérale en vertu des par. 18.3(1) et
28(2) de la *Loi sur les Cours fédérales*, L.R.C.
1985, ch. F-7.**

**Cogeco Câble Inc., Rogers Communications
Inc., TELUS Communications Company et
Shaw Communications Inc. *Appelantes***

c.

**Bell Media Inc. (auparavant CTV Globemedia
Inc.), V Interactions Inc., Newfoundland
Broadcasting Co. Ltd. et Canwest Television
Limited Partnership *Intimées***

et

**Conseil de la radiodiffusion et
des télécommunications
canadiennes *Intervenant***

**RÉPERTORIÉ : RENOI RELATIF À LA POLITIQUE
RÉGLEMENTAIRE DE RADIODIFFUSION CRTC
2010-167 ET L'ORDONNANCE DE RADIODIFFUSION
CRTC 2010-168**

2012 CSC 68

Nº du greffe : 34231.

2012 : 17 avril; 2012 : 13 décembre.

Présents : Le juge en chef McLachlin et les juges
LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver et Karakatsanis.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Broadcasting — Canadian Radio-television and Telecommunications Commission (“CRTC”) adopting policy establishing market-based value for signal regulatory regime — Policy empowering private local television stations (“broadcasters”) to negotiate direct compensation for retransmission of signals by cable and satellite companies (“broadcasting distribution undertakings” or “BDUs”), as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether CRTC having jurisdiction under Broadcasting Act to implement proposed regime — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10.

Legislation — Conflicting legislation — CRTC adopting policy establishing market-based value for signal regulatory regime — Policy empowering broadcasters to negotiate direct compensation for retransmission of signals by BDUs, as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether proposed regime conflicting with Copyright Act — Whether Copyright Act limiting discretion of CRTC in exercising regulatory and licensing powers under Broadcasting Act — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10 — Copyright Act, R.S.C. 1985, c. C-42, ss. 2, 21, 31, 89.

Responding to recent changes to the broadcasting business environment, in 2010 the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations could choose to negotiate direct compensation for the retransmission of their signals by BDUs, such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the question of its jurisdiction to the Federal Court of Appeal, which held the proposed regime was within the statutory authority of the CRTC pursuant to its broad mandate under the *Broadcasting Act* to regulate and supervise all aspects

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit des communications — Radiodiffusion — Adoption par le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les stations privées de télévision locale (« radiodiffuseurs ») à négocier une compensation directe pour la retransmission de leurs signaux par les entreprises de câblodistribution et de communications par satellite (« entreprises de distribution de radiodiffusion » ou « EDR »), et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le CRTC a-t-il compétence en vertu de la Loi sur la radiodiffusion pour mettre en œuvre le régime proposé? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10.

Législation — Conflit de lois — Adoption par le CRTC d'une politique établissant un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché — Politique habilitant les radiodiffuseurs à négocier une compensation directe pour la retransmission de leurs signaux par les EDR, et leur conférant le droit d'interdire aux EDR de retransmettre ces signaux en cas d'échec des négociations — Le régime proposé entre-t-il en conflit avec la Loi sur le droit d'auteur? — Cette loi limite-t-elle la discrétion du CRTC lorsqu'il exerce les pouvoirs de prise de règlements et d'attribution de licences que lui confère la Loi sur la radiodiffusion? — Loi sur la radiodiffusion, L.C. 1991, ch. 11, art. 2, 3, 5, 9, 10 — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 2, 21, 31, 89.

Réagissant à des changements récents survenus dans l'industrie de la radiodiffusion, le CRTC a proposé en 2010 d'établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des EDR telles les entreprises de câblodistribution et les sociétés de communications par satellite. En vertu de ce nouveau régime, les radiodiffuseurs auraient la possibilité de permettre ou d'interdire aux EDR de retransmettre leurs services de programmation. Les EDR ont contesté la compétence du CRTC pour mettre en œuvre un tel régime, au motif qu'il entre en conflit avec certaines dispositions de la *Loi sur le droit d'auteur*. En conséquence, le CRTC a renvoyé une question touchant sa propre compétence devant la Cour

of the Canadian broadcasting system, and that no conflict existed between the regime and the *Copyright Act*.

Held (Deschamps, Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be allowed. The proposed regulatory regime is *ultra vires* the CRTC.

Per McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime.

No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(k)), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” when issuing licences (s. 9(1)(h)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found. Here, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs or the direct economic relationship between BDUs and broadcasters. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act.

d’appel fédérale. Cette dernière a conclu que le régime proposé relevait de la compétence reconnue par la loi au CRTC, conformément au vaste mandat que lui confère la *Loi sur la radiodiffusion* en matière de réglementation et de surveillance de tous les aspects du système de radiodiffusion canadien, et qu’il n’existait aucun conflit entre le régime proposé et la *Loi sur le droit d’auteur*.

Arrêt (les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents) : Le pourvoi est accueilli. Le régime de réglementation proposé excède les pouvoirs du CRTC.

La juge en chef McLachlin et les juges LeBel, Fish, Rothstein et Moldaver : Lorsqu’on les interprète à la lumière de leur contexte global, on ne peut considérer que les dispositions de la *Loi sur la radiodiffusion* ont pour effet d’autoriser le CRTC à mettre en œuvre le régime proposé de compensation pour la valeur des signaux.

Aucune disposition de la *Loi sur la radiodiffusion* ne confère expressément au CRTC le pouvoir de mettre en œuvre le régime proposé, et il ne suffisait pas à ce dernier de se référer isolément à certains des objectifs de politique énoncés à l’art. 3 et de postuler que le régime proposé de compensation pour la valeur des signaux contribuerait à la réalisation de ces objectifs. La possibilité d’établir l’existence d’un lien — aussi ténu soit-il — entre un règlement projeté et un objectif de politique énuméré à l’art. 3 de la Loi ne saurait constituer un critère suffisant pour donner compétence au CRTC. Des énoncés de politique ne sont pas des dispositions attributives de compétence et ne peuvent pas servir à élargir les pouvoirs de cet organisme à des domaines non précisés par le législateur. De même, une clause générale rédigée en termes larges accordant un pouvoir général de prendre des règlements (al. 10(1)(k)) ou une disposition conférant à l’organisme de réglementation un pouvoir non défini l’autorisant à délivrer des licences « selon les modalités qu’il précise » (al. 9(1)(h)) ne peut être interprétée isolément, mais doit être considérée dans le contexte du reste de l’article dans lequel elle se trouve. En l’espèce, aucun des sujets précis et susceptibles d’être réglementés qui sont énumérés au par. 10(1) ne se rapporte à la création de droits exclusifs qui permettraient aux radiodiffuseurs d’autoriser ou d’interdire la distribution de signaux ou d’émissions, ou de contrôler les rapports économiques directs entre les EDR et les radiodiffuseurs. Il ressort d’une interprétation de la *Loi sur la radiodiffusion* qui tient compte du contexte global de celle-ci que la création de tels droits constitue une mesure beaucoup trop éloignée des objectifs fondamentaux visés par le législateur ainsi que des pouvoirs conférés au CRTC par cette loi.

Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*. First, the value for signal regime conflicts with s. 21(1) because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*. A broadcaster's s. 21(1)(c) exclusive right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not include a right to authorize or prohibit a BDU from retransmitting those communication signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in s. 21(1), specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between authors' and users' rights as expressed by Parliament in s. 21(1).

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing

Même si l'on pouvait trouver dans le texte de la *Loi sur la radiodiffusion* la compétence nécessaire pour mettre en œuvre le régime proposé de compensation pour la valeur des signaux, le régime proposé entrerait en conflit avec certaines dispositions précises édictées par le Parlement dans la *Loi sur le droit d'auteur*. Premièrement, le régime de compensation pour la valeur des signaux entre en conflit avec le par. 21(1) de cette dernière loi, en ce qu'il accorderait aux radiodiffuseurs le droit d'autoriser ou non la retransmission de signaux par les EDR, droit qui a été refusé aux radiodiffuseurs par le régime établi par la *Loi sur le droit d'auteur*. Le droit exclusif conféré aux radiodiffuseurs par l'al. 21(1)c) — à savoir autoriser, ou refuser d'autoriser, un autre radiodiffuseur à retransmettre simultanément ses signaux — n'emporte pas celui de permettre ou d'interdire à une EDR de retransmettre ces signaux de communication. Il ne serait pas logique de la part du législateur fédéral d'instaurer au par. 21(1) un droit de retransmission soigneusement élaboré, qui soustrait explicitement les EDR du champ d'application du droit exclusif des radiodiffuseurs sur la retransmission simultanée de leurs signaux, mais d'habiliter par ailleurs un organisme de réglementation subalterne à créer un droit fonctionnellement équivalent par l'entremise d'un régime connexe. Le régime de compensation pour la valeur des signaux nuirait à la réalisation de l'objectif de la *Loi sur le droit d'auteur* qui consiste à établir un équilibre adéquat entre les droits des créateurs et ceux des utilisateurs, tel qu'il a été exprimé par le législateur au par. 21(1).

Deuxièmement, le régime de compensation pour la valeur des signaux entre également en conflit avec le droit de retransmission énoncé à l'art. 31, lequel crée une exception écartant la violation du droit d'auteur dans le cas de la retransmission simultanée par une EDR d'une « œuvre » portée par des signaux locaux. Toutefois, suivant le régime de compensation pour la valeur des signaux, les radiodiffuseurs jouiraient du droit d'exiger le retrait de certaines émissions. Ainsi, un radiodiffuseur qui n'arriverait pas à s'entendre avec une EDR sur la compensation payable pour la distribution de ses services de programmation aurait le droit d'exiger de cette EDR qu'elle retire de tous les signaux qu'elle distribue toute émission à l'égard de laquelle le radiodiffuseur aurait acquis les droits exclusifs de diffusion. Le régime de compensation pour la valeur des signaux aurait concrètement pour effet de réduire à néant l'exception prévue par l'art. 31, en accordant aux radiodiffuseurs le droit de contrôler la retransmission simultanée des œuvres, alors que la *Loi sur le droit d'auteur* exclut expressément cette activité du droit de contrôle des titulaires du droit d'auteur, y compris

and regulatory jurisdiction under the *Broadcasting Act*.

Section 31(2)(b), which provides that in order for the exception to copyright to apply the retransmission must be “lawful under the *Broadcasting Act*”, is also not sufficient to ground the CRTC’s jurisdiction to implement the value for signal regulatory regime. A general reference to “lawful under the *Broadcasting Act*” cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*. Finally, the value for signal regime would create a new right to authorize and prevent retransmission, in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

Per Deschamps, Abella, Cromwell and Karakatsanis JJ. (dissenting): The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. Courts have consistently determined the validity of the CRTC’s exercises of power under the *Broadcasting Act* by asking whether the power was exercised in connection with a policy objective in s. 3(1). This broad jurisdiction flows from the fact that the Act contains generally-worded powers for the CRTC to regulate and supervise all aspects of the Canadian broadcasting system, to impose licensing conditions, and to make regulations as the CRTC deems appropriate to implement the objects set out in s. 3(1).

The proposed regime is within the CRTC’s regulatory jurisdiction since it is demonstrably linked to several of the basic operative broadcasting policies in s. 3. The regime is merely an extension of the current regime, which places conditions, including financial ones, on BDUs for the licence to retransmit local stations’ signals. This broad mandate to set licensing conditions in furtherance of Canada’s broadcasting

les radiodiffuseurs. Ce faisant, le régime redéfinirait l’équilibre qu’a établi le législateur, dans la *Loi sur le droit d’auteur*, entre les intérêts respectifs des titulaires du droit d’auteur et des utilisateurs. Comme ce régime est incompatible avec l’objet visé par la *Loi sur le droit d’auteur*, il échappe à la compétence conférée au CRTC par la *Loi sur la radiodiffusion* en matière de délivrance de licences et de réglementation.

L’alinéa 31(2)(b) — qui précise que, pour que s’applique l’exception écartant la violation du droit d’auteur, la retransmission doit être « licite en vertu de la *Loi sur la radiodiffusion* » — n’est pas non plus une assise suffisante afin de donner au CRTC compétence pour mettre en œuvre le régime réglementaire de compensation pour la valeur des signaux. L’expression générale « licite en vertu de la *Loi sur la radiodiffusion* » ne saurait autoriser le CRTC, lorsqu’il agit en vertu de dispositions attributives de compétence générales, à écarter une prescription précise du législateur dans la *Loi sur le droit d’auteur*. Enfin, le régime de compensation pour la valeur des signaux créerait un nouveau droit permettant à son titulaire d’autoriser et d’interdire la retransmission de signaux, modifiant ainsi concrètement le droit d’auteur conféré par l’art. 21. Ce régime créerait donc un nouveau type de droit d’auteur, sans la loi fédérale requise par l’art. 89.

Les juges Deschamps, Abella, Cromwell et Karakatsanis (dissidents) : Le CRTC a jugé que le nouveau régime était nécessaire pour assurer la survie des stations locales et la réalisation des objectifs de la politique de radiodiffusion énoncée au par. 3(1) de la *Loi sur la radiodiffusion*. Les tribunaux ont systématiquement statué sur la validité de l’exercice par le CRTC des pouvoirs que lui accorde la *Loi sur la radiodiffusion* en se demandant s’il était possible de rattacher l’exercice du pouvoir en cause à l’un des objectifs de politique énumérés au par. 3(1). La vaste compétence reconnue au CRTC découle des pouvoirs que la Loi lui confère en termes généraux pour réglementer et surveiller tous les aspects du système de radiodiffusion canadien, assortir de certaines conditions les licences qu’il délivre et prendre des règlements, de la manière qu’il estime indiquée pour la mise en œuvre des objectifs énoncés au par. 3(1).

Le régime proposé respecte la compétence du CRTC en matière de réglementation, étant donné qu’il se rattache manifestement à plusieurs des principes directeurs fondamentaux en matière de radiodiffusion énoncés à l’art. 3. Le nouveau régime n’est simplement que le prolongement du régime actuel, lequel impose plusieurs conditions — y compris de nature financière — aux EDR en vue de l’obtention d’une licence

policy is analogous to the CRTC's broad mandate to set rates, recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime. Nothing in either the definition of “broadcaster” or in s. 21(1)(c) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

The BDUs' argument that the proposed regime creates royalties for local signals contrary to s. 31(2)(d) of the *Copyright Act*, turns s. 31(2)(d) on its head. Section 31(2)(d) simply requires that BDUs pay a royalty to copyright owners for retransmitting “distant signals”. This provision has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission license under the *Broadcasting Act*.

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By Rothstein J.

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de retransmission des signaux des stations locales. Ce large mandat d'assortir les licences de certaines conditions pour favoriser la mise en œuvre de la politique canadienne de radiodiffusion est analogue au large mandat du CRTC en matière d'établissement de tarifs, lequel a été confirmé récemment par notre Cour dans l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764.

Le régime proposé ne crée pas de conflit avec la *Loi sur le droit d'auteur*. Il ne confère pas aux stations locales un droit d'auteur à l'égard de la retransmission de leurs signaux de télévision. Les EDR tiennent leur droit de retransmettre des signaux uniquement des licences qui leur sont attribuées en vertu de l'art. 9 de la *Loi sur la radiodiffusion*, et elles doivent satisfaire aux conditions dont le CRTC a assorti leur licence, y compris celles prévues dans le régime proposé. Rien dans l'al. 21(1)c) de la *Loi sur le droit d'auteur* ou dans la définition de « radiodiffuseur » n'a pour effet de soustraire les EDR aux exigences établies par le CRTC en matière d'attribution de licences dans le cadre de son mandat relatif à la radiodiffusion.

L'argument des EDR selon lequel le régime proposé exige le paiement de redevances pour la retransmission de signaux locaux fait dire à l'al. 31(2)d) de la *Loi sur le droit d'auteur* quelque chose qu'il ne dit pas. Cet alinéa requiert simplement que les EDR qui retransmettent des « signaux éloignés » versent des redevances aux titulaires des droits d'auteur sur ces signaux. Cette disposition n'a aucun lien avec la question de savoir si les EDR peuvent être requises de verser une compensation aux stations locales pour une autre fin, à savoir pour satisfaire aux conditions assortissant leurs licences de retransmission en vertu de la *Loi sur la radiodiffusion*.

Jurisprudence

Citée par le juge Rothstein

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CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

Neil Finkelstein, Steven G. Mason and Daniel G. C. Glover, for the appellant Cogeco Cable Inc.

Gerald L. Kerr-Wilson and Ariel Thomas, for the appellants Rogers Communications Inc. and TELUS Communications Company.

Kent E. Thomson, James Doris and Sarah Weingarten, for the appellant Shaw Communications Inc.

Benjamin Zarnett, Robert Malcomson, Peter Ruby and Julie Rosenthal, for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervenor.

The judgment of McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] The Canadian Radio-television and Telecommunications Commission (“CRTC”) has authority under the *Broadcasting Act*, S.C. 1991, c. 11, to regulate and supervise the Canadian broadcasting system. In 2010, the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations (referred to as such or as “broadcasters”) could choose to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings (“BDUs”), such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The reference question in this appeal is

CarswellNat 6332. Pourvoi accueilli, les juges Deschamps, Abella, Cromwell et Karakatsanis sont dissidents.

Neil Finkelstein, Steven G. Mason et Daniel G. C. Glover, pour l’appelante Cogeco Câble Inc.

Gerald L. Kerr-Wilson et Ariel Thomas, pour les appelantes Rogers Communications Inc. et TELUS Communications Company.

Kent E. Thomson, James Doris et Sarah Weingarten, pour l’appelante Shaw Communications Inc.

Benjamin Zarnett, Robert Malcomson, Peter Ruby et Julie Rosenthal, pour les intimées Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc. et Newfoundland Broadcasting Co. Ltd.

Personne n’a comparu pour l’intimée Canwest Television Limited Partnership.

Personne n’a comparu pour l’intervenant.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Rothstein et Moldaver rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le Conseil de la radiodiffusion et des télécommunications canadiennes (« CRTC ») possède, en vertu de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11, le pouvoir de réglementer et de surveiller le système canadien de radiodiffusion. En 2010, le CRTC a proposé d’établir un régime réglementaire de compensation pour la valeur des signaux basé sur les forces du marché. Suivant ce régime, les stations privées de télévision locale (également appelées « radiodiffuseurs » dans les présents motifs) auraient la faculté de négocier une compensation directe pour la retransmission de leurs signaux par des entreprises de distribution de radio-diffusion (« EDR ») telles les entreprises de câblo-distribution et les sociétés de communications par

whether the CRTC has jurisdiction to implement the proposed regime.

[2] The *Broadcasting Act* grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broadcasting policy as set out in the *Broadcasting Act*. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the *Copyright Act*, R.S.C. 1985, c. C-42: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 44-52. As such, the CRTC, as a subordinate legislative body, cannot enact a regulation or attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute.

[3] In my opinion, the value for signal regime does just that and is therefore *ultra vires*.

II. Facts and Procedural History

[4] Broadcasters acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their respective signal transmitters. BDUs, such as cable or satellite television service providers, pick up the over-the-air signals of broadcasters and distribute them to the BDUs' subscribers for a fee. Even though broadcasters' signals are free to anyone equipped with a television and an antenna, more than 90 percent of Canadians receive these signals as part of their cable service (transcript, at p. 2).

satellite. En vertu de ce nouveau régime, les radiodiffuseurs auraient la possibilité de permettre ou d'interdire aux EDR de retransmettre leurs services de programmation. La question soumise par renvoi dans le présent pourvoi est celle de savoir si le CRTC a compétence pour mettre en œuvre le régime proposé.

[2] La *Loi sur la radiodiffusion* confère au CRTC de vastes pouvoirs discrétionnaires l'autorisant à prendre des règlements et à attribuer des licences en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée dans la *Loi sur la radiodiffusion*. Lorsqu'il exerce ces pouvoirs, le CRTC doit toutefois respecter le cadre législatif établi par la *Loi sur la radiodiffusion*, ainsi qu'un cadre plus vaste comprenant diverses lois interreliées. La *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, est un élément de ce régime : *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 44-52. En tant qu'organisme de réglementation subalterne, le CRTC ne peut prendre de règlements ou assortir de conditions les licences qu'il délivre en vertu de la *Loi sur la radiodiffusion*, si ces règlements ou conditions entrent en conflit avec les dispositions d'une autre loi connexe.

[3] À mon avis, c'est exactement ce que fait le régime de compensation pour la valeur des signaux et, par conséquent, il est *ultra vires*.

II. Faits et historique procédural

[4] Les radiodiffuseurs acquièrent, créent et produisent des émissions de télévision. Le CRTC leur délivre des licences les autorisant à desservir une région donnée à l'intérieur de la portée de leur émetteur respectif. Des EDR, par exemple des entreprises de câblodistribution et des sociétés de communications par satellite, captent les signaux diffusés en direct par les radiodiffuseurs et les retransmettent à leurs abonnés moyennant certains frais. Même si les signaux des radiodiffuseurs peuvent être captés gratuitement par toute personne disposant d'un téléviseur et d'une antenne, plus de 90 p. 100 des Canadiens et des Canadiennes reçoivent ces signaux dans le cadre de leurs services de câblodistribution (transcription, p. 2).

[5] BDUs must be licensed by the CRTC pursuant to s. 9 of the *Broadcasting Act*. Under the current regulatory model, the CRTC requires BDUs to provide certain benefits to broadcasters, in the nature of mandatory carriage and contributions to a local programming improvement fund accessible by certain local television stations. However, the broadcasters do not receive fees directly from the BDUs for the carriage of their signals.

[6] As noted by the Federal Court of Appeal (“FCA”), 2011 FCA 64, 413 N.R. 312, at para. 6, the CRTC has concluded that the existing model does not adequately deal with recent changes to the broadcasting business environment, which have caused advertising revenues for broadcasters to fall, while the revenues of BDUs have increased. As the FCA observed, the CRTC has concluded that this has resulted in a significant shift in their relative market positions and a financial crisis for broadcasters.

[7] As a solution, the CRTC seeks to implement what it terms a “value for signal regime”. This regime would permit broadcasters to negotiate with BDUs the terms upon which the BDUs may redistribute their signals. These are its main features:

- Broadcasters would have the right, every three years, to choose either to negotiate with BDUs for compensation for the right to retransmit the broadcaster’s programming services, or to continue to operate under the existing regulatory regime;
- A broadcaster who participates in the value for signal regime would forego all existing regulatory protections, including, for example, mandatory distribution of its signals as part of the basic package of BDU television services, and the right to require a BDU to delete a

[5] Les EDR doivent obtenir du CRTC une licence délivrée conformément à l’art. 9 de la *Loi sur la radiodiffusion*. Suivant le modèle de réglementation actuel, le CRTC oblige les EDR à offrir aux radiodiffuseurs certains avantages, notamment la distribution obligatoire de certains signaux et une contribution à un fonds pour l’amélioration de la programmation locale auquel ont accès certaines stations de télévision locale. Toutefois, les radiodiffuseurs ne reçoivent pas directement des EDR des droits pour la distribution de leurs signaux.

[6] Comme l’a souligné la Cour d’appel fédérale (« CAF »), 2011 CAF 64 (CanLII), par. 6, le CRTC a estimé que le modèle de réglementation existant ne permet pas de répondre adéquatement aux récents changements survenus dans l’industrie de la radiodiffusion, changements par suite desquels les revenus publicitaires des radiodiffuseurs ont baissé, alors que les revenus des EDR augmentaient. Ainsi que l’a fait observer la CAF, le CRTC a conclu que cette situation s’est traduite par un changement important de la position respective des parties sur le marché et par une crise financière pour les radiodiffuseurs.

[7] À titre de solution, le CRTC a proposé l’adoption de ce qu’il appelle un « régime de compensation pour la valeur des signaux ». Ce régime permettrait aux radiodiffuseurs de négocier avec les EDR les conditions auxquelles ces dernières peuvent redistribuer leurs signaux. Voici les principales caractéristiques du régime proposé :

- Les radiodiffuseurs auraient le droit, tous les trois ans, de choisir soit de négocier avec les EDR une entente fixant la contrepartie payable par celles-ci pour le droit de retransmettre les services de programmation des radiodiffuseurs, soit de continuer à appliquer le régime de réglementation existant.
- Le radiodiffuseur qui adhérerait au régime de compensation pour la valeur des signaux renoncerait à toutes les protections réglementaires existantes, par exemple la distribution obligatoire de ses signaux dans le cadre du service télévisuel de base offert par les EDR,

non-Canadian program and substitute it with the comparable program of the broadcaster, where the two programs are simultaneously broadcast and retransmitted by the BDU;

- The CRTC would only involve itself in the negotiations for the value for signal regime if the parties do not negotiate in good faith or if they request the CRTC to arbitrate;
- If no agreement is reached between the broadcaster and the BDU on the value of the distribution of the local television's programming services, the broadcaster could require the BDU to delete any program owned by the broadcaster or for which it has acquired exclusive contractual exhibition rights from all signals distributed by the BDU in the broadcaster's market.

The proposed regime is fully described in *Broadcasting Regulatory Policy CRTC 2010-167* (2010) ("2010 Policy") (A.R., vol. II, at p. 1).

[8] The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the following question to the FCA:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

A. *Federal Court of Appeal — Sharlow J.A. (Layden-Stevenson J.A. Concurring)*

[9] Sharlow J.A., writing for the majority, found the proposed regime to be within the statutory authority of the CRTC. She found that the *Broadcasting Act*

ainsi que le droit d'obliger les EDR à retirer une émission non canadienne et à la remplacer par une émission canadienne comparable du radiodiffuseur lorsque les deux émissions sont diffusées simultanément et retransmises par l'EDR.

- Le CRTC n'interviendrait dans la négociation des ententes fondées sur le régime de compensation pour la valeur des signaux que dans les cas où les parties ne négocieraient pas de bonne foi ou lui demanderaient d'agir comme arbitre.
- Si aucune entente n'intervenait entre le radiodiffuseur et l'EDR au sujet de la valeur de la distribution des services de programmation de télévision locale, le radiodiffuseur pourrait obliger l'EDR à retirer de tous les signaux distribués par celle-ci dans le marché du radiodiffuseur toute émission appartenant au radiodiffuseur ou pour laquelle ce dernier a acquis les droits contractuels exclusifs de diffusion.

Le régime proposé est décrit en détail dans la *Politique réglementaire de radiodiffusion CRTC 2010-167* (2010) (« Politique de 2010 ») (d.a., vol. II, p. 1).

[8] Les EDR ont contesté la compétence du CRTC pour mettre en œuvre un tel régime, au motif qu'il entre en conflit avec certaines dispositions de la *Loi sur le droit d'auteur*. En conséquence, le CRTC a renvoyé la question suivante devant la CAF :

Le Conseil a-t-il la compétence, en vertu du mandat que lui confère la *Loi sur la radiodiffusion*, pour établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales?

A. *Cour d'appel fédérale — la juge Sharlow (avec l'appui de la juge Layden-Stevenson)*

[9] S'exprimant au nom de la majorité, la juge Sharlow a conclu que le régime proposé relevait de la compétence reconnue par la loi au CRTC. Elle

confers a broad mandate on the CRTC to regulate and supervise all aspects of the Canadian broadcasting system. Sharlow J.A. rejected the BDUs' argument that the proposed regime conflicts with the *Copyright Act*. She found that s. 21(1) of the *Copyright Act* gives a broadcaster a copyright in the signals it broadcasts, including the sole right to authorize a BDU to retransmit those signals (para. 33). In her opinion, while s. 31(2) provides that the s. 21 copyright is not infringed by a BDU when it retransmits a station's local signal, s. 31(2)(b) provides that the retransmission must be "lawful under the *Broadcasting Act*" (para. 38). She concluded that "the BDUs' statutory retransmission rights in subsection 31(2) of the *Copyright Act* [are] subject to paragraph 31(2)(b), [and that] Parliament has ranked the objectives of Canada's broadcasting policy ahead of those statutory retransmission rights" (para. 40).

B. *Federal Court of Appeal — Nadon J.A. (Dissenting)*

[10] In Nadon J.A.'s view, the proposed value for signal regime is *ultra vires* the powers of the CRTC because it conflicts with Parliament's "clear statement in paragraph 31(2)(d) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals" (para. 49). In his view, Parliament's expressed intention to treat local and distant signals differently is a limit on the CRTC's jurisdiction to impose conditions under the *Broadcasting Act* (para. 73). Given the exhaustiveness of the statutory copyright law, in Nadon J.A.'s opinion, the CRTC's regime must be *ultra vires* (para. 85).

III. Analysis

[11] The scope of the CRTC's jurisdiction under the *Broadcasting Act* must be interpreted according

a estimé que la *Loi sur la radiodiffusion* confère au CRTC un vaste mandat en matière de réglementation et de surveillance de tous les aspects du système de radiodiffusion canadien. La juge Sharlow a rejeté l'argument des EDR suivant lequel le régime proposé entraînerait en conflit avec la *Loi sur le droit d'auteur*. Elle a estimé que le par. 21(1) de la *Loi sur le droit d'auteur* reconnaît aux radiodiffuseurs un droit d'auteur à l'égard des signaux qu'ils émettent et que ce droit d'auteur comporte le droit exclusif d'autoriser une EDR à retransmettre ces signaux (par. 33). À son avis, bien que le par. 31(2) précise que l'EDR ne viole pas le droit d'auteur reconnu à la station privée de télévision locale par l'art. 21 lorsque l'EDR retransmet les signaux locaux de cette station, l'al. 31(2)b exige que la retransmission soit « licite en vertu de la *Loi sur la radiodiffusion* » (par. 38). Elle a conclu qu'« en assujettissant les droits de retransmission accordés aux EDR par le paragraphe 31(2) de la *Loi sur le droit d'auteur* à l'alinéa 31(2)b, le législateur donne préséance aux objectifs de la politique canadienne de radiodiffusion » (par. 40).

B. *Cour d'appel fédérale — le juge Nadon (dissent)*

[10] Le juge Nadon a exprimé l'avis que le régime de compensation pour la valeur des signaux proposé excède la compétence du CRTC, parce qu'il est incompatible avec « l'énoncé clair du législateur à l'alinéa 31(2)d) de la *Loi sur le droit d'auteur* selon lequel des redevances ne doivent être payées que pour la retransmission des signaux éloignés, et non pour la retransmission des signaux locaux » (par. 49). Selon le juge, l'intention déclarée du législateur de traiter différemment les signaux locaux et les signaux éloignés vient limiter le pouvoir du CRTC d'imposer des conditions en vertu de la *Loi sur la radiodiffusion* (par. 73). De l'avis du juge Nadon, vu l'exhaustivité du cadre législatif concernant le droit d'auteur, le régime proposé excède la compétence du CRTC (par. 85).

III. Analyse

[11] La portée de la compétence conférée au CRTC par la *Loi sur la radiodiffusion* doit être

to the modern approach to statutory interpretation. *Per* Elmer A. Driedger's formulation, adopted multiple times by this Court,

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Bell ExpressVu*, at para. 26, *per* Iacobucci J., citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

[12] In addition,

... where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.

(*Bell ExpressVu*, at para. 27)

The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 411).

[13] In my respectful opinion, for two reasons, the provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the *Broadcasting Act* themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.

A. The CRTC's Jurisdiction Under the Broadcasting Act

[14] The reference question asks whether the CRTC has the jurisdiction to implement the

analysée suivant la méthode moderne d'interprétation législative qu'a formulée le professeur Elmer A. Driedger et que notre Cour a adoptée à maintes reprises :

[TRADUCTION] ... il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Bell ExpressVu*, par. 26, le juge Iacobucci, citant l'ouvrage d'E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87.)

[12] De plus :

... lorsque la disposition litigieuse fait partie d'une loi qui est elle-même un élément d'un cadre législatif plus large, l'environnement qui colore les mots employés dans la loi et le cadre dans lequel celle-ci s'inscrit sont plus vastes.

(*Bell ExpressVu*, par. 27)

Le contexte global d'une disposition s'entend donc non seulement de son contexte immédiat, mais aussi de tout autre texte législatif susceptible d'en éclairer le sens (R. Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 411).

[13] À mon humble avis, lorsqu'on les interprète à la lumière de leur contexte global, on ne peut, et ce pour deux raisons, considérer que les dispositions de la *Loi sur la radiodiffusion* ont pour effet d'autoriser le CRTC à mettre en œuvre le régime proposé de compensation pour la valeur des signaux. Premièrement, l'interprétation contextuelle des dispositions de la *Loi sur la radiodiffusion* révèle qu'elles ne visent pas à autoriser le CRTC à créer, en faveur des radiodiffuseurs, des droits exclusifs habilitant ces derniers à contrôler l'exploitation de leurs signaux ou de leurs œuvres par retransmission. Deuxièmement, le régime proposé entrerait en conflit avec certaines dispositions précises édictées par le Parlement dans la *Loi sur le droit d'auteur*.

A. Compétence conférée au CRTC par la Loi sur la radiodiffusion

[14] Dans la question faisant l'objet du renvoi, on demande si le CRTC a compétence pour mettre en

proposed value for signal regime. Answering the question requires interpreting the powers granted to the CRTC under the *Broadcasting Act* and establishing whether the *Copyright Act* limits the discretion of the CRTC in the exercise of its regulatory and licensing powers. The relevant sections of the *Broadcasting Act* and of the *Copyright Act* are annexed to these reasons (see Appendix).

[15] There is no doubt that the licensing and the regulation-making powers granted to the CRTC are broad. The *Broadcasting Act* describes the mission of the CRTC as regulating and supervising “all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)” (s. 5(1)).

[16] The powers granted to the CRTC are found in ss. 9 and 10 of the *Broadcasting Act*. Section 9 grounds the CRTC’s licensing power. Among other things, it gives the CRTC the authority to establish classes of licences, issue licences and require licensees to perform certain acts “in furtherance of its objects”. Under s. 9(1)(b)(i), the issuance of the licences may be subject to such terms and conditions “as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)”.

[17] Section 10 confers on the CRTC the power to make regulations. It allows the CRTC to make regulations “in furtherance of its objects” and enumerates 10 specific areas for regulations. On their face, these pertain mainly to such matters as setting the standards for programs, the allocation of broadcasting time for different types of content and the carriage of certain programming services by distribution undertakings. However, s. 10(1)(k) is a basket clause granting the CRTC the residual authority to make regulations “respecting such other matters as it deems necessary for the furtherance of its objects”.

[18] Section 3(1) of the *Broadcasting Act* declares at length the broadcasting policy for Canada,

œuvre le régime de compensation pour la valeur des signaux proposé. Pour répondre à cette question, il faut interpréter les pouvoirs qui sont conférés au CRTC par la *Loi sur la radiodiffusion* et décider si la *Loi sur le droit d’auteur* limite la discrétion dont jouit le CRTC lorsqu’il exerce ses pouvoirs de réglementation et d’attribution de licences. Les articles applicables de la *Loi sur la radiodiffusion* et de la *Loi sur le droit d’auteur* sont reproduits à l’annexe jointe aux présents motifs.

[15] Il est incontestable que le CRTC dispose de vastes pouvoirs en matière de réglementation et d’attribution de licences. Aux termes de la *Loi sur la radiodiffusion*, le CRTC a pour mission de réglementer et de surveiller « tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion » (par. 5(1)).

[16] Les pouvoirs reconnus au CRTC sont énoncés aux art. 9 et 10 de la *Loi sur la radiodiffusion*. Le CRTC tient ses pouvoirs en matière d’attribution de licences de l’art. 9, qui lui permet notamment d’établir des catégories de licences, d’attribuer des licences et d’obliger les titulaires de licences à accomplir certains actes « dans l’exécution de sa mission ». Aux termes de l’al. 9(1)b), le CRTC peut assortir les licences des conditions « qu’il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion ».

[17] L’article 10 confère au CRTC le pouvoir d’établir des règlements. Cet article l’autorise en effet à prendre des règlements « dans l’exécution de sa mission », en plus d’énumérer 10 aspects précis pouvant être réglementés. À première vue, il s’agit principalement de questions comme l’élaboration de normes régissant les émissions, d’attribution de temps d’antenne à différents types de contenus et de distribution de certains services de programmation par des entreprises de diffusion. L’alinéa 10(1)k) constitue toutefois une clause générale accordant au CRTC le pouvoir résiduel de « prendre toute autre mesure qu’il estime nécessaire à l’exécution de sa mission ».

[18] Le paragraphe 3(1) de la *Loi sur la radiodiffusion* expose en détail la politique canadienne

which this Court summarized in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 (“*ISP Reference*”), at para. 4, as:

... the policy objectives listed under s. 3(1) of the Act focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.

[19] In substance, the value for signal regime would regulate the economic relationships between BDUs and broadcasters. The salient feature is that the CRTC would grant individual broadcasters an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU. This program deletion right is intended to give the broadcasters the necessary leverage to require compensation from the BDUs.

[20] No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime. However, the broadcasters submit that ss. 9(1)(b)(i) and 9(1)(h) empower the CRTC to dictate the terms of the carriage relationship between broadcasters and BDUs, in furtherance of Canadian broadcasting policy (R.F., at para. 65). The broadcasters submit that the power to do this also exists under s. 10(1)(g), which empowers the CRTC to make regulations “respecting the carriage of any foreign or other programming services by distribution undertakings” and s. 10(1)(k) which allows regulations to be made “respecting such other matters as [the CRTC] deems necessary for the furtherance of its objects”.

[21] In its 2010 Policy, the CRTC determined:

... in order to fulfil the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. [para. 163]

de radiodiffusion, que notre Cour a résumée ainsi dans le *Renvoi relatif à la Loi sur la radiodiffusion*, 2012 CSC 4, [2012] 1 R.C.S. 142 (« *Renvoi sur les FSI* »), au par. 4 :

... les objectifs énoncés au par. 3(1) de la Loi s’attachent au contenu (enrichissement culturel du Canada, promotion du contenu canadien, offre d’une programmation originale de haute qualité, variété de la programmation, etc.).

[19] En substance, le régime de compensation pour la valeur des signaux réglerait les relations économiques entre les EDR et les radiodiffuseurs. Sa principale caractéristique est le fait que le CRTC accorderait à chaque radiodiffuseur le droit exclusif d’exiger le retrait des émissions dont il a acquis les droits de diffusion de tous les signaux émis par une EDR. Ce droit d’exiger le retrait d’émissions se veut un moyen d’accorder aux radiodiffuseurs l’influence nécessaire pour exiger une compensation des EDR.

[20] Aucune disposition de la *Loi sur la radiodiffusion* ne confère expressément au CRTC le pouvoir de mettre en œuvre le régime proposé. Cependant, les radiodiffuseurs soutiennent que les al. 9(1)b) et 9(1)h) habilite le CRTC à dicter aux radiodiffuseurs et aux EDR les modalités de distribution des signaux pour favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion (m.i., par. 65). Les radiodiffuseurs prétendent que le pouvoir d’instaurer un tel régime découle aussi de l’al. 10(1)g), lequel autorise le CRTC à prendre des règlements pour « régir la fourniture de services de programmation — mêmes étrangers — par les entreprises de distribution », et de l’al. 10(1)k), qui lui permet de « prendre toute autre mesure qu’il estime nécessaire à l’exécution de sa mission ».

[21] Dans sa Politique de 2010, le CRTC tire la conclusion suivante :

... afin d’atteindre les objectifs de politique énoncés à l’article 3(1) de la Loi, il faut corriger ce système pour permettre aux télédiffuseurs privés de négocier avec les EDR une juste valeur pour le produit qu’ils offrent aux EDR. [par. 163]

The CRTC referred specifically only to s. 3(1)(e) and (f) of the *Broadcasting Act* (see para. 152 of the 2010 Policy). In their factum, the broadcasters add ss. 3(1)(g), (s) and (t), 9 and 10 (R.F., at paras. 63-65, 69, 74-79 and 87). The CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10.

[22] Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.

[23] In my opinion, to find jurisdiction, it was not sufficient for the CRTC to refer in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. As stated by Gonthier J., writing for the majority of this Court in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476:

... courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. [para. 42]

It is therefore necessary to consider the jurisdiction granted to the CRTC under ss. 9 and 10 of the Act to attach conditions to licences and to make regulations.

Le CRTC a mentionné de façon expresse uniquement les al. 3(1)e) et f) de la *Loi sur la radiodiffusion* (voir le par. 152 de la Politique de 2010). Dans leur mémoire, les radiodiffuseurs ajoutent les al. 3(1)g), s) et t), ainsi que les art. 9 et 10 (m.i., par. 63-65, 69, 74-79 et 87). Le CRTC n'a pas fait état des dispositions attributives de compétence figurant aux art. 9 et 10.

[22] Les énoncés de politique telle la déclaration relative aux objectifs de la politique canadienne de radiodiffusion que l'on trouve au par. 3(1) de la *Loi sur la radiodiffusion* ne sont pas des dispositions attributives de compétence. Ces énoncés expliquent les objectifs que poursuit le Parlement en édictant la loi en question et, ce faisant, ils circonscrivent le pouvoir discrétionnaire qui est accordé à un organisme de réglementation subalterne (Sullivan, p. 387-388 et 390-391). Les déclarations de principes ne peuvent donc pas servir à élargir les pouvoirs de cet organisme à des domaines non précisés par le législateur dans les dispositions attributives de compétence.

[23] Pour que le CRTC soit justifié de conclure qu'il avait compétence, il ne lui suffisait pas à mon avis de se référer isolément à certains des objectifs de politique énoncés à l'art. 3 et de postuler que le régime proposé de compensation pour la valeur des signaux contribuerait à la réalisation de ces objectifs. Comme l'a déclaré le juge Gonthier, au nom de la majorité, dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476 :

... les cours de justice et les tribunaux administratifs doivent avoir recours aux énoncés d'intention pour établir, et non pas pour contrecarrer l'intention du législateur. À mon avis, le CRTC s'est fondé sur les objectifs de politique pour écarter l'intention du législateur qui ressort clairement du sens ordinaire du par. 43(5), de l'art. 43 dans son ensemble et de la Loi considérée comme un tout. [par. 42]

Il est par conséquent nécessaire d'examiner la compétence qui est conférée au CRTC par les art. 9 et 10 de la Loi et qui l'autorise à assortir les licences de certaines conditions et à prendre des règlements.

[24] The broadcasters argue that the test for the CRTC's jurisdiction in enacting regulations under s. 10 of the *Broadcasting Act* is whether the regulation objectively refers to one of the objectives in s. 3. They rely on this Court's decision in *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, where the majority of the Court, *per* Spence J., stated, at p. 11:

... the validity of any regulation enacted in reliance upon s. 16 [now s. 10] must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively.

[25] In my opinion, *CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a *sufficient* test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that policy statements circumscribe the discretion granted to a subordinate legislative body.

[26] The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to determine whether rates set by telecommunication companies are just and reasonable. The CRTC's jurisdiction over the setting of rates under s. 27 of the *Telecommunications Act*, S.C. 1993, c. 38, provides that rates must be just and reasonable. Under that section, the CRTC is specifically empowered to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).

[24] Les radiodiffuseurs soutiennent que le critère applicable pour décider si le CRTC a compétence pour prendre un règlement donné en vertu de l'art. 10 de la *Loi sur la radiodiffusion* consiste à se demander si, objectivement, le règlement en question se rattache à l'un des objectifs énumérés à l'art. 3. Ils s'appuient à cet égard sur l'arrêt *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2, dans lequel notre Cour à la majorité a déclaré ce qui suit, sous la plume du juge Spence, à la p. 11 :

... pour déterminer la validité de règlements établis en vertu de l'art. 16 [maintenant l'art. 10], il faut décider s'ils portent sur une catégorie de sujets mentionnée à l'art. 3 de la Loi, et que, ce faisant, le tribunal examine les règlements d'un point de vue objectif.

[25] À mon avis, l'arrêt *CKOY* ne permet pas d'affirmer que la possibilité d'établir l'existence d'un lien — aussi ténu soit-il — entre un règlement projeté et un objectif de politique énuméré à l'art. 3 de la Loi constitue un critère *suffisant* pour donner compétence au CRTC. Un tel raisonnement irait à l'encontre du principe suivant lequel des énoncés de politique ont pour effet de circonscrire le pouvoir discrétionnaire conféré à un organisme de réglementation subalterne.

[26] La différence entre, d'une part, des dispositions générales permettant de prendre des règlements et d'attribuer des licences et, d'autre part, de véritables dispositions attributives de compétence est évidente lorsqu'on compare la présente espèce avec l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764. Dans cette affaire, notre Cour était appelée à décider si la création et l'utilisation de certains comptes de report relevaient du pouvoir explicite du CRTC de déterminer si les tarifs fixés par les entreprises de télécommunications sont justes et raisonnables. La compétence en matière de fixation de tarifs dont dispose le CRTC en vertu de l'art. 27 de la *Loi sur les télécommunications*, L.C. 1993, ch. 38, précise que les tarifs doivent être justes et raisonnables. Cet article habilite de façon précise le CRTC à déterminer si cette condition est respectée et, à cette fin, lui accorde le pouvoir exprès d'« utiliser la méthode ou la technique qu'il estime appropriée » (par. 27(5)).

[27] This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in that case. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(k) and a broad licensing power under s. 9(1)(b)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.

[28] That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. Rather,

discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation.

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 50, *per* Bastarache J.)

[29] A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” (s. 9(1)(h)) cannot be read in isolation: *ATCO*, at para. 46. Rather, “[t]he content of a provision ‘is enriched by the rest of the section in which it is found . . .’” (*Ontario v. Canadian Pacific Ltd.*,

[27] Dans *Bell Aliant*, la vaste compétence expresse ainsi attribuée au CRTC lui permettait de créer et d'utiliser les comptes de report en litige. Cette situation se distingue nettement du présent cas et des dispositions invoquées par les radio-diffuseurs en l'espèce, à savoir le pouvoir général de prendre des règlements prévu à l'al. 10(1)(k) et le large pouvoir d'attribution de licences prévu à l'al. 9(1)(b)(i). Une disposition attributive de compétence n'est pas analogue à une disposition accordant un pouvoir général de prendre des règlements ou d'attribuer des licences. En effet, alors que par le premier type de dispositions le législateur accorde expressément une compétence précise, par le second il confère un pouvoir général qui doit être interprété de manière à éviter de reconnaître un pouvoir discrétionnaire illimité que n'envisagent pas les dispositions attributives de compétence de la loi en cause.

[28] Il s'agit là de l'aspect fondamental. Si la seule limite restreignant les pouvoirs conférés au CRTC par le par. 10(1) était l'obligation que le règlement concerné favorise la réalisation d'un des objectifs de politique énoncés au par. 3(1), la seule limite à laquelle serait assujéti le pouvoir de réglementation du CRTC serait sa propre appréciation de l'opportunité du règlement proposé à la lumière de l'un ou l'autre des objectifs en question, ce qui reviendrait à lui reconnaître un pouvoir discrétionnaire illimité. Au contraire, l'organisme

doit [. . .] exercer [son pouvoir discrétionnaire] en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois.

(*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 50, le juge Bastarache)

[29] Une clause générale rédigée en termes larges, par exemple l'al. 10(1)(k), ou encore un pouvoir non défini autorisant l'organisme de réglementation à délivrer des licences « selon les modalités qu'il précise » (al. 9(1)(h)) ne peuvent être interprétés isolément : *ATCO*, par. 46. Au contraire, « [l]e contenu d'une disposition “est enrichi par le reste

[1995] 2 S.C.R. 1031, at para. 64, *per* Gonthier J., citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 647-48; see also Sullivan, at pp. 228-29). In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.

[30] However, the broadcasters submit that s. 10(1)(g), which enables the CRTC to make regulations “respecting the carriage of any foreign or other programming services”, and s. 9(1)(h), which empowers the CRTC to require a licensed BDU “to carry . . . programming services specified by the Commission”, together with the broad wording of ss. 10(1)(k) and 9(1)(b)(i), empower the CRTC to “dictate the terms of the carriage relationship between broadcasters and BDUs” (R.F., at para. 65). Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.

[31] I cannot agree. On their face, ss. 9(1)(h) and 10(1)(g) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country’s cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(k) and 9(1)(b)(i), they entitle the CRTC to create exclusive control rights for broadcasters.

[32] This interpretation is consistent with a reading of the Act in its entire context. The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition,

de l’article dans lequel il est situé” » (*Ontario c. Canadien Pacifique Ltée*, [1995] 2 R.C.S. 1031, par. 64, le juge Gonthier, citant l’arrêt *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647-648; voir également Sullivan, p. 228-229). À mon avis, aucun des sujets précis et susceptibles d’être réglementés qui sont énumérés au par. 10(1) ne se rapporte à la création de droits exclusifs qui permettraient aux radiodiffuseurs d’autoriser ou d’interdire la distribution de signaux ou d’émissions, ou de contrôler les rapports économiques directs entre les EDR et les radiodiffuseurs.

[30] Cependant, les radiodiffuseurs affirment que l’al. 10(1)g), aux termes duquel le CRTC peut, par règlement, « régir la fourniture de services de programmation — même étrangers — par les entreprises de distribution », ainsi que l’al. 9(1)h), qui permet au CRTC d’obliger les titulaires de licences d’exploitation d’entreprises de distribution « à offrir certains services de programmation selon les modalités qu’il précise », conjugués aux dispositions générales que sont les al. 10(1)k) et 9(1)b), habilitent le CRTC à [TRADUCTION] « dicter les modalités des rapports entre les radiodiffuseurs et les EDR en ce qui concerne la fourniture des services de programmation » (m.i., par. 65). Par conséquent, le CRTC aurait, de l’avis des radiodiffuseurs, compétence pour mettre en œuvre le régime proposé.

[31] Je ne partage pas cet avis. À première vue, les al. 9(1)h) et 10(1)g) pourraient, par exemple, permettre au CRTC d’obliger les EDR à distribuer aux Canadiens certains types d’émissions, au motif que celles-ci seraient considérées importantes pour la structure culturelle du Canada. Toutefois, cela n’équivaut pas vraiment à conclure que, conjugués aux al. 10(1)k) et 9(1)b), les alinéas susmentionnés autorisent le CRTC à conférer aux radiodiffuseurs des droits de contrôle exclusifs.

[32] Cette interprétation s’accorde avec une lecture de la Loi qui prend en compte le contexte global de celle-ci. La *Loi sur la radiodiffusion* vise des objectifs principalement culturels. Les autres pouvoirs énumérés au par. 10(1) portent sur des questions telles la répartition du temps d’antenne et

the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target “the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse” (*ISP Reference*, at para. 4). While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act: Sullivan, at pp. 388 and 390-91. Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.

[33] In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.

B. *The Larger Statutory Scheme — Conflict with the Copyright Act*

(1) Connection Between the *Broadcasting Act* and the *Copyright Act*

[34] Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, that would not resolve the question in this reference as the *Broadcasting Act* is part of a larger statutory scheme that includes the *Copyright Act* and the *Telecommunications Act*. As Sunny Handa et al. explain, the *Telecommunications Act* and the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are the main statutes governing carriage, and the *Broadcasting Act* deals with content, which is “the object of ‘carriage’” (S. Handa et al., *Communications Law in Canada* (loose-leaf ed.),

l’élaboration de normes régissant les émissions. De plus, si on les considère globalement, les objectifs énoncés au par. 3(1) de la *Loi sur la radiodiffusion* « s’attachent au contenu (enrichissement culturel du Canada, promotion du contenu canadien, offre d’une programmation originale de haute qualité, variété de la programmation » (*Renvoi sur les FSI*, par. 4). Bien que de telles déclarations de principes ne puissent être considérées comme des attributions distinctes de pouvoirs, il faut leur accorder la valeur qui leur revient lors de l’interprétation de dispositions précises d’une loi : Sullivan, p. 388 et 390-391. Il faut présumer que le Parlement a donné au CRTC le pouvoir d’agir en vue de réaliser les objectifs culturels en question; toutefois, les moyens de réglementation mis à la disposition du CRTC pour réaliser ces objectifs ne vont pas jusqu’à lui permettre de créer des droits de contrôle exclusifs.

[33] En somme, il n’est fait mention nulle part dans la Loi de la création de droits de contrôle exclusifs sur les signaux ou les émissions. Il ressort d’une interprétation de la *Loi sur la radiodiffusion* qui tient compte du contexte global de celle-ci que la création de tels droits constitue une mesure beaucoup trop éloignée des objectifs fondamentaux visés par le législateur et des pouvoirs conférés au CRTC par la *Loi sur la radiodiffusion*.

B. *Cadre législatif plus large — Conflit avec la Loi sur le droit d’auteur*

(1) Liens entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d’auteur*

[34] Même si l’on pouvait trouver dans le texte de la *Loi sur la radiodiffusion* la compétence nécessaire pour mettre en œuvre le régime proposé de compensation pour la valeur des signaux, cela ne réglerait pas la question posée dans le présent renvoi, car la *Loi sur la radiodiffusion* s’inscrit dans un cadre législatif plus large qui englobe la *Loi sur le droit d’auteur* et la *Loi sur les télécommunications*. Comme l’expliquent Sunny Handa et autres, la *Loi sur les télécommunications* et la *Loi sur la radiocommunication*, L.R.C. 1985, ch. R-2, sont les principales lois en matière de distribution

at §3.21). In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying that “there is a connection between these two statutes”. Considering that the *Broadcasting Act* and the *Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

[35] Indeed, the *Broadcasting Act* regulates “program[s]” that are “broadcast” for reception by the Canadian public (see s. 2(1), definitions of “broadcasting” and of “program”), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, “[t]he *Broadcasting Act* is primarily concerned with the programmed content delivered by means of radio waves or other means of telecommunication to the public” (Handa et al., at §5.5).

[36] The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner’s consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772,

de signaux, et la *Loi sur la radiodiffusion* porte pour sa part sur le contenu des signaux, lequel constitue [TRADUCTION] « l’objet de la “distribution” » (S. Handa et autres, *Communications Law in Canada* (éd. feuilles mobiles), §3.21). Dans l’arrêt *Bell ExpressVu*, par. 52, alors qu’il interprétait une disposition de la *Loi sur les radiocommunications*, le juge Iacobucci a également examiné la *Loi sur le droit d’auteur*, soulignant qu’il existait « un lien entre cette loi et celle sur le droit d’auteur ». Étant donné que la *Loi sur la radiodiffusion* et la *Loi sur la radiocommunication* font clairement partie du même régime législatif, il s’ensuit selon moi qu’il existe aussi un lien entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d’auteur*. Ces trois lois (ainsi que la *Loi sur les télécommunications*) sont des éléments d’un régime de mesures interreliées.

[35] D’ailleurs, la *Loi sur la radiodiffusion* régit les « émissions » qui sont « diffusées » et destinées à être reçues par le public canadien (voir, au par. 2(1), la définition des termes « radiodiffusion » et « émission »), en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée au par. 3(1) de la Loi. De façon générale, [TRADUCTION] « [l]a *Loi sur la radiodiffusion* s’intéresse principalement au contenu de la programmation diffusée au public au moyen d’ondes radio ou d’autres moyens de télécommunication » (Handa et autres, §5.5).

[36] La *Loi sur le droit d’auteur* vise à la fois à encourager la créativité et à permettre aux créateurs de jouir raisonnablement du fruit de leur travail de création. La concrétisation de ces objectifs est favorisée par l’existence d’un régime soigneusement équilibré qui confère des droits économiques exclusifs à différentes catégories de titulaires du droit d’auteur sur leurs œuvres ou sur un autre objet protégé, généralement au moyen d’un monopole légal qui interdit à quiconque d’exploiter l’œuvre de certaines façons précises sans le consentement du titulaire du droit d’auteur. Ce régime établit également des droits d’utilisation telles l’utilisation équitable et certaines exemptions précises autorisant le public en général ou des catégories particulières d’utilisateurs à accéder au contenu protégé moyennant le respect de certaines conditions. (Voir, p. ex.,

at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56.) Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals (see ss. 2 “copyright” and 21 of the *Copyright Act*). In addition, “program[s]” within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely “dramatic work[s]” or “compilation[s]” thereof, under the *Copyright Act*: see, e.g., discussion in J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at para. 15:3(a).

[37] Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend “harmony, coherence, and consistency between statutes dealing with the same subject matter” (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

[38] Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to *avoid* conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones

[39] In addition, “[o]rdinarily, . . . an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation” (*Friends of the Oldman River Society v. Canada (Minister of*

Théberge c. Galerie d'Art du Petit Champlain inc., 2002 CSC 34, [2002] 2 R.C.S. 336, par. 11-12 et 30; *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772, par. 21; D. Vaver, *Intellectual Property Law : Copyright, Patents, Trade-marks* (2^e éd. 2011), p. 34 et 56.) Parmi les catégories d'objets protégés par le droit d'auteur, mentionnons les droits des radiodiffuseurs sur les signaux de communication (voir la définition de « droit d'auteur » à l'art. 2, ainsi que l'art. 21 de la *Loi sur le droit d'auteur*). Qui plus est, les « émission[s] » au sens de la *Loi sur la radiodiffusion* se présentent souvent sous forme de contenu original préenregistré susceptible de constituer une œuvre protégée, à savoir des « œuvre[s] dramatique[s] » ou des « compilation[s] » de telles œuvres au sens de la *Loi sur le droit d'auteur* : voir, p. ex., l'analyse dans J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4^e éd. (feuilles mobiles)), par. 15:3(a).

[37] Bien que les deux lois visent des objectifs différents, les sujets dont elles traitent se recoupent inévitablement. Comme le législateur est présumé avoir voulu « l'harmonie, la cohérence et l'uniformité entre les lois traitant du même sujet » (*R. c. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 R.C.S. 867, par. 52; Sullivan, p. 325-326), on donnera effet suivant leur libellé à deux dispositions s'appliquant aux mêmes faits, dès lors qu'elles n'entrent pas en conflit l'une avec l'autre.

[38] Par conséquent, lorsqu'une disposition se prête à plusieurs interprétations, la présomption de cohérence exige que, afin d'éviter les conflits, les lois en cause soient interprétées ensemble. Dans l'arrêt *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, par. 61, le juge en chef Lamer a écrit ce qui suit :

Certes, selon le principe de la présomption de cohérence des lois qui portent sur des sujets analogues, l'interprète doit chercher l'harmonisation entre ces lois plutôt que leur contradiction

[39] De plus, « [n]ormalement, la loi fédérale doit l'emporter sur le texte réglementaire incompatible » (*Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1

Transport), [1992] 1 S.C.R. 3, at p. 38). Consequently, as it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.

[40] It is therefore necessary to first determine if a conflict arises.

(2) Types of Conflict

[41] For the purposes of statutory interpretation, conflict is defined narrowly. It has been said that overlapping provisions will be given effect according to their terms, unless they “cannot stand together” (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J.).

[42] In *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for

R.C.S. 3, p. 38). En conséquence, comme il ne serait pas permis au CRTC, en tant qu'organisme de réglementation subalterne, de mettre en œuvre un texte réglementaire qui entre en conflit avec une autre loi fédérale, les dispositions attributives de compétence de nature générale de la *Loi sur la radiodiffusion* ne peuvent être interprétées de manière à permettre au CRTC de créer des conflits avec la *Loi sur le droit d'auteur*.

[40] Il est donc nécessaire de décider tout d'abord s'il y a un conflit.

(2) Types de conflits

[41] En matière d'interprétation des lois, la notion de conflit est définie étroitement. Il a été jugé que des dispositions qui se chevauchent seront appliquées suivant leur libellé, à moins qu'elles [TRADUCTION] « ne puissent coexister » (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488, p. 499, le juge Anglin).

[42] Dans l'affaire *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, la Cour s'est penchée sur l'incompatibilité de dispositions de deux lois émanant du même législateur. S'exprimant au nom de la majorité, le juge Bastarache a défini comme suit la notion de « conflit », au par. 47 :

Le critère à appliquer pour déterminer si un conflit est inévitable est clairement énoncé par le professeur Côté dans son traité d'interprétation des lois :

Selon la jurisprudence, deux lois ne sont pas en conflit du simple fait qu'elles s'appliquent à la même matière : il faut que l'application de l'une exclue, explicitement ou implicitement, celle de l'autre.

(P.-A. Côté, *Interprétation des lois* (3^e éd. 1999), p. 443)

Ainsi, une loi prévoyant que le passager d'un train qui ne paye pas son passage doit être expulsé n'est pas en conflit avec une autre loi prévoyant uniquement l'imposition d'une amende, parce que l'application d'une loi n'exclut pas l'application de l'autre loi (*Toronto Railway Co. c. Paget* (1909), 42 R.C.S. 488). Par contre, il y a un conflit inévitable lorsque deux lois sont directement contradictoires ou que leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde. Par exemple, la

example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [Emphasis added.]

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; Sullivan, at p. 330).

[44] This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.

[45] Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.

loi qui autorise la prorogation du délai de dépôt d'un appel uniquement avant l'expiration du délai est en conflit direct avec une autre loi qui autorise l'acceptation d'une demande de prorogation après l'expiration du délai (*Massicotte c. Boutin*, [1969] R.C.S. 818). [Je souligne.]

[43] On entend également par résultat absurde les situations où une loi aurait concrètement pour effet d'aller à l'encontre de l'*objet* de l'autre loi (*Lévis*, par. 54; Sullivan, p. 330).

[44] Cette conception n'est pas incompatible avec la notion de conflit retenue par la jurisprudence sur le fédéralisme. Pour l'application de la doctrine de la prépondérance des lois fédérales, notre Cour a reconnu l'existence de deux types de conflits. Il y a conflit d'application lorsqu'il est *impossible de se conformer* aux deux dispositions en même temps. L'autre type de conflits concerne les cas d'incompatibilité d'objets. Dans les conflits de ce deuxième type, il n'y a pas impossibilité de se conformer à la lettre des deux lois; le conflit découle plutôt du fait que l'application d'une disposition s'opposerait à l'*objet* qu'entend réaliser le Parlement dans une autre. Voir, p. ex., *Colombie-Britannique (Procureur général) c. Lafarge Canada Inc.*, 2007 CSC 23, [2007] 2 R.C.S. 86, par. 77 et 84).

[45] Les décisions dans lesquelles les tribunaux ont appliqué la doctrine de la prépondérance fédérale présentent certaines similitudes dans la mesure où l'on y définit les conflits comme des conflits d'application ou d'objets (*Friends of the Oldman River Society*, p. 38). Ces définitions de la notion de conflits de lois sont donc utiles pour interpréter deux lois émanant du même législateur. Le pouvoir du CRTC de prendre des règlements et d'assortir de certaines conditions les licences qu'il délivre doit être considéré comme assujéti aux limites découlant de chaque type de conflits. Autrement dit, en vue de réaliser sa mission, le CRTC ne peut choisir des moyens qui entraînent un conflit d'application avec des dispositions précises de la *Loi sur la radio-diffusion*, de la *Loi sur la radiocommunication*, de la *Loi sur les télécommunications* ou de la *Loi sur le droit d'auteur*, ou encore qui seraient incompatibles avec l'objet de ces diverses lois.

(3) The Allocation of Rights Under the Copyright Act(a) *Section 21*

[46] The BDUs contend that the CRTC's proposed value for signal regime conflicts with the retransmission regimes specifically established in ss. 21(1)(c) and 31(2) of the *Copyright Act*.

[47] It is necessary to describe the *Copyright Act*'s regimes at some length. It will become apparent from this description that, in my respectful view, the analysis of the *Copyright Act* conducted by the majority of the FCA is problematic.

[48] The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

- (a) to fix it;
- (b) to reproduce any fixation of it that was made without the broadcaster's consent;
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

[49] The aspect relevant for this appeal is in para. (c). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal.

(3) Droits attribués par la Loi sur le droit d'auteura) *Article 21*

[46] Les EDR affirment que le régime de compensation pour la valeur des signaux proposé par le CRTC entre en conflit avec les régimes de retransmission expressément établis à l'al. 21(1)c) et au par. 31(2) de la *Loi sur le droit d'auteur*.

[47] Il est nécessaire de décrire de manière assez détaillée les régimes prévus par la *Loi sur le droit d'auteur*. À mon humble avis, cette description fera ressortir le caractère problématique de l'analyse de la *Loi sur le droit d'auteur* effectuée par les juges majoritaires de la CAF.

[48] Les EDR soutiennent tout d'abord que le par. 21(1) de la *Loi sur le droit d'auteur* entre en conflit avec le régime de compensation pour la valeur des signaux. Cette disposition accorde aux radiodiffuseurs un droit d'auteur limité sur les signaux qu'ils diffusent en direct. Ce droit d'auteur confère au radiodiffuseur le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci, d'accomplir ou d'autoriser l'un des quatre actes suivants :

- a) de le fixer;
- b) d'en reproduire toute fixation faite sans son autorisation;
- c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
- d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas a), b) et d).

[49] L'aspect pertinent pour les besoins du présent pourvoi est celui prévu à l'al. c). Aux termes de cet alinéa, le radiodiffuseur a le droit exclusif d'autoriser un autre *radiodiffuseur* à retransmettre

Section 2 of the *Copyright Act* defines “broadcaster” as

a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

[50] The underlined portion of the definition refers to BDUs. BDUs are not a “broadcaster” within the meaning of the *Copyright Act* because their primary activity in relation to communication signals is their retransmission. Thus, the broadcaster’s s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster’s exclusive right does not include a right to authorize or prohibit a BDU from retransmitting its communication signals.

(b) *Section 31*

[51] In addition to their s. 21 rights in communication signals, broadcasters may hold other retransmission rights under the *Copyright Act*. As mentioned, a pre-recorded television program is often copyright subject matter that can be protected as an original “dramatic work” or a “compilation” thereof (s. 2 of the *Copyright Act*). The broadcaster, as a corporation, may hold copyright in the pre-recorded program or compilation of programs carried in its signals, either as the employer of the author of such a work or as an assignee of copyright from the original author.

[52] The *Copyright Act* seeks to regulate the economic rights in communication signals, as well as the retransmission of works by BDUs. The BDUs contend that the value for signal regime would conflict with the retransmission regime for works

simultanément un signal de communication. Le mot « radiodiffuseur » est défini comme suit à l’art. 2 de la *Loi sur le droit d’auteur* :

Organisme qui, dans le cadre de l’exploitation d’une entreprise de radiodiffusion, émet un signal de communication en conformité avec les lois du pays où il exploite cette entreprise; est exclu de la présente définition l’organisme dont l’activité principale, liée au signal de communication, est la retransmission de celui-ci.

[50] Le passage souligné de la définition réfère aux EDR. Ces dernières ne sont pas des « radiodiffuseurs » au sens de la *Loi sur le droit d’auteur*, parce que leur principale activité en ce qui concerne les signaux de communication consiste à les retransmettre. Par conséquent, le droit conféré aux radiodiffuseurs par l’al. 21(1)(c) — à savoir autoriser, ou refuser d’autoriser, un autre radiodiffuseur à retransmettre simultanément ses signaux — ne peut être opposé aux EDR. En d’autres termes, suivant l’art. 21 de la *Loi sur le droit d’auteur*, le droit exclusif des radiodiffuseurs n’emporte pas celui de permettre ou d’interdire à une EDR de retransmettre leurs signaux de communication.

b) *Article 31*

[51] Outre les droits que leur reconnaît l’art. 21 en matière de signaux de communication, les radiodiffuseurs peuvent détenir d’autres droits de retransmission en vertu de la *Loi sur le droit d’auteur*. Comme il a été expliqué précédemment, une émission de télévision préenregistrée fait souvent l’objet d’un droit d’auteur qui peut être protégé en tant qu’« œuvre dramatique » originale ou « compilation » de telles œuvres (art. 2 de la *Loi sur le droit d’auteur*). À titre de personne morale, le radiodiffuseur peut être titulaire du droit d’auteur sur l’émission préenregistrée ou la compilation d’émissions qu’il diffuse en qualité d’employeur de l’auteur de l’œuvre en question ou de cessionnaire du droit d’auteur de l’auteur original.

[52] La *Loi sur le droit d’auteur* vise à régir les droits économiques sur les signaux de communication, ainsi que la retransmission des œuvres par les EDR. Celles-ci affirment que le régime de compensation pour la valeur des signaux entrerait en

set out in s. 31 of the *Copyright Act*. The proposed regime would enable broadcasters to control the simultaneous retransmission of *programs*, by granting them the right to require deletion of any *program* in which they own or control the copyright from all signals distributed by the BDU, if no agreement is reached on compensation for the simultaneous retransmission of the broadcaster's programming services.

[53] The *Copyright Act* in s. 3(1)(f) confers on the owner of copyright in a work the exclusive right to communicate it to the public by telecommunication. Section 3(1)(f) provides:

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right . . .

. . .

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

[T]elecommunication”, in s. 2 of the Act, is broadly defined to include

any transmission of . . . intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.

[54] These general words would at first blush confer on the copyright owner, including a broadcaster in that capacity, the right to control the retransmission of the works in which it holds copyright. However, s. 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the *retransmission* of literary, dramatic, musical or artistic works carried in signals. “[S]ignal” is defined for the purposes of s. 31(2) to mean “a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station” (see s. 31(1)). Section 31(1) defines “retransmitter” as “a

conflit avec le régime de retransmission des œuvres prévu à l’art. 31 de la *Loi sur le droit d’auteur*. Le régime proposé permettrait aux radiodiffuseurs de contrôler la retransmission simultanée d’émissions en leur reconnaissant le droit d’exiger le retrait de toute *émission* à l’égard de laquelle ils détiennent ou contrôlent le droit d’auteur de tous les signaux distribués par l’EDR, si aucune entente n’est conclue sur la compensation à verser pour la retransmission simultanée des services de programmation du radiodiffuseur.

[53] L’alinéa 3(1)f) de la *Loi sur le droit d’auteur* accorde au titulaire du droit d’auteur sur une œuvre le droit exclusif de communiquer celle-ci au public par télécommunication. Cet alinéa est rédigé ainsi :

3. (1) Le droit d’auteur sur l’œuvre comporte le droit exclusif . . .

. . .

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

. . .

Le mot « télécommunication » est défini largement à l’art. 2 de la *Loi* et il s’entend notamment de

toute transmission de [. . .] renseignements de toute nature par fil, radio, procédé visuel ou optique, ou autre système électromagnétique.

[54] Ces termes généraux semblent à première vue conférer au titulaire du droit d’auteur, y compris à un radiodiffuseur agissant en cette qualité, le droit de contrôler la retransmission des œuvres sur lesquelles il détient un droit d’auteur. Toutefois, le par. 31(2) de la *Loi sur le droit d’auteur* circonscrit de façon détaillée le droit des titulaires du droit d’auteur de contrôler la *retransmission* des œuvres littéraires, dramatiques, musicales ou artistiques portées par les signaux. Pour l’application du par. 31(2), le mot « signal » s’entend de : « [t]out signal porteur d’une œuvre transmis à titre gratuit au public par une station terrestre de radio ou de télévision » (voir le par. 31(1)). Au paragraphe 31(1), le

person who performs a function comparable to that of a cable retransmission system”.

[55] Section 31(2) provides:

31. . . .

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;
- (c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
- (d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and
- (e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

[56] Read together, ss. 31(1) and 31(2) create an *exception* to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication. The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (a) through (e) are met. Paragraph (b) provides that the retransmission must be lawful under the *Broadcasting Act*. I will come back to the meaning of this particular condition.

[57] In the case of works carried in distant signals only, the section provides copyright owners with a right to receive royalties as payment for the simultaneous retransmission of those works by a BDU. The royalties are determined by the

terme « retransmetteur » est défini comme suit : « [p]ersonne, autre qu'un retransmetteur de nouveaux médias, dont l'activité est comparable à celle d'un système de retransmission par fil ».

[55] Voici le texte du par. 31(2) :

31. . . .

(2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :

- a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;
- b) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;
- c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;
- d) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;
- e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)b).

[56] Considérés ensemble, les par. 31(1) et 31(2) créent une *exception* au droit exclusif des titulaires du droit d'auteur sur des œuvres littéraires, dramatiques, musicales ou artistiques de contrôler la communication de leurs œuvres au public par télécommunication. L'exception, ou droit de l'utilisateur, permet en fait aux EDR de retransmettre les œuvres en question sans le consentement du titulaire du droit d'auteur, lorsque les conditions énumérées aux al. a) à e) sont réunies. L'alinéa b) précise que la retransmission doit être licite en vertu de la *Loi sur la radiodiffusion*. Je reviendrai plus loin sur le sens de cette condition particulière.

[57] Dans le cas des œuvres portées uniquement par des signaux éloignés, la disposition en question confère aux titulaires du droit d'auteur le droit de percevoir des redevances pour la retransmission simultanée de ces œuvres par une EDR.

Copyright Board, on the basis of tariffs filed by collective societies, pursuant to the regime detailed in ss. 71 to 74 of the *Copyright Act*. Under s. 31(2), works carried in local signals attract no royalty when retransmitted in accordance with all conditions of that section. The Governor in Council has defined “local signal” as the signal of a terrestrial station reaching all or a portion of the service area of a retransmitter. A “distant signal” is a signal that is not a local signal. See ss. 1 and 2 of *Local Signal and Distant Signal Regulations*, SOR/89-254.

[58] It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(f), to communicate the work by telecommunication to the public. On the other hand, the owner’s general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). Both user rights are, subject to s. 31(2), beyond the owner’s control.

Ces redevances sont fixées par la Commission du droit d’auteur, en fonction des tarifs proposés par des sociétés de gestion, conformément au régime décrit en détail aux art. 71 à 74 de la *Loi sur le droit d’auteur*. Suivant le par. 31(2), les œuvres portées par des signaux locaux ne donnent droit à aucune redevance lorsqu’elles sont retransmises conformément à toutes les conditions énumérées à cette disposition. Le gouverneur en conseil a défini le terme « signal local » comme étant le signal d’une station terrestre de radio ou de télévision rejoignant tout ou une partie de la zone de desserte d’un retransmetteur. Constitue un « signal éloigné » tout signal qui n’est pas un signal local. Voir les art. 1 et 2 du *Règlement sur la définition de signal local et de signal éloigné*, DORS/89-254.

[58] Il convient de souligner que, dans le cas des œuvres portées à la fois par des signaux locaux et par des signaux éloignés, le titulaire du droit d’auteur *n’a pas le droit d’interdire* la retransmission simultanée de ces œuvres; son recours se limite à recevoir, par l’intermédiaire d’une société de gestion, la redevance prescrite, mais uniquement pour la retransmission simultanée des œuvres portées par des signaux éloignés (par. 76(1) et 76(3) de la *Loi sur le droit d’auteur*). D’une part, le titulaire du droit d’auteur se voit reconnaître un droit général de retransmettre l’œuvre. Ce droit de retransmission fait partie du droit que lui reconnaît l’al. (3)(1)f) de communiquer l’œuvre au public par télécommunication. D’autre part, le droit général de retransmission du titulaire du droit d’auteur est limité par l’exception prévue au par. 31(2) de la *Loi sur le droit d’auteur*, qui confère effectivement deux droits de retransmission à une catégorie particulière de retransmetteurs. Le premier de ces droits autorise ces utilisateurs à retransmettre simultanément, sans avoir à verser de redevances, des œuvres portées par des signaux locaux. Le second droit permet aux utilisateurs de retransmettre simultanément des œuvres portées par des signaux éloignés, sous réserve uniquement du paiement de redevances en vertu d’une sorte de régime de licences obligatoires (*Loi sur le droit d’auteur*, al. 31(2)a) et d)). Sous réserve du par. 31(2), ces deux droits reconnus aux utilisateurs échappent au contrôle du titulaire du droit d’auteur.

[59] In sum, under the *Copyright Act*'s retransmission regimes for communication signals and for works:

- Broadcasters have a limited exclusive right in their *signals* (s. 21);
- Broadcasters do not have an exclusive right in *signals* against BDUs;
- BDUs have the right to simultaneously retransmit *works* carried in local signals without authorization and without payment to the copyright owner;
- Owners of copyright in those works, including broadcasters in that capacity, do not have the right to block retransmission of local or distant signals carrying their works;
- The Copyright Board has jurisdiction to value the compulsory licence royalty for the simultaneous retransmission of works carried in distant signals;

(4) Finding Conflict

[60] The CRTC's proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of whether or not they carry copyright protected "work[s]", and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation. Importantly, contrary to the retransmission regimes of the *Copyright Act*, the value for signal regime proposed by the CRTC would grant individual broadcasters, should they elect to be governed by this regime, the *right to prohibit* the simultaneous retransmission of their programs.

[59] En résumé, suivant les régimes de retransmission prévus par la *Loi sur le droit d'auteur* à l'égard des signaux de communication et des œuvres :

- les radiodiffuseurs possèdent un droit exclusif limité sur leurs *signaux* (art. 21);
- les radiodiffuseurs ne possèdent pas, à l'égard des *signaux*, un droit exclusif opposable aux EDR;
- les EDR ont le droit de retransmettre simultanément des *œuvres* portées par des signaux locaux sans avoir été autorisées à le faire par le titulaire du droit d'auteur et sans verser à celui-ci de contrepartie à cet égard;
- les titulaires du droit d'auteur sur les œuvres en question, y compris les radiodiffuseurs agissant en cette qualité, n'ont pas le droit de bloquer la retransmission de signaux locaux ou éloignés portant leurs œuvres;
- la Commission du droit d'auteur a compétence pour évaluer les redevances relatives aux licences obligatoires pour la retransmission simultanée d'œuvres portées par des signaux éloignés.

(4) Constatation d'un conflit

[60] Le régime de compensation pour la valeur des signaux proposé par le CRTC permettrait aux radiodiffuseurs de négocier la compensation qui leur serait payée pour la retransmission par les EDR de leurs signaux et de leurs services de programmation, et ce, peu importe que ces signaux ou services portent des « œuvres » protégées par le droit d'auteur et indépendamment du fait que les œuvres en question soient portées par des signaux locaux, signaux à l'égard desquels la *Loi sur le droit d'auteur* ne prévoit aucune compensation. Fait important à signaler, contrairement aux régimes de retransmission établis par la *Loi sur le droit d'auteur*, le régime de compensation pour la valeur de signaux que propose le CRTC conférerait à certains radiodiffuseurs, advenant qu'ils choisissent d'être régis par ce régime, le *droit d'interdire* la retransmission simultanée de leurs émissions.

[61] As mentioned, the presumption of coherence between related Acts of Parliament requires avoiding an interpretation of a provision that would introduce conflict into the statutory scheme. In this case, the presumption of coherence requires that if the CRTC's proposed regulatory regime would create such conflict with the specific expressions of Parliament's intent under the *Copyright Act*, it must be *ultra vires*. Sections 21 and 31(2) of the *Copyright Act* are relevant.

[62] First, the value for signal regime conflicts with s. 21(1) of the *Copyright Act* because it would grant broadcasters a retransmission authorization right against BDUs that was *withheld* by the scheme of the *Copyright Act*.

[63] Looking only at the letter of the provision, s. 21 expressly speaks only to the relationship between a broadcaster and another broadcaster and not the relationship between a broadcaster and a retransmitter. As such, it is arguable that nothing in s. 21 purports to prevent another regulator from regulating the terms for carriage of a broadcaster's television signal by the BDUs, leaving it open to the CRTC, provided it is authorized to do so under the *Broadcasting Act*, to establish a value for signal regime without conflicting with s. 21.

[64] However, s. 21 cannot be considered devoid of its purpose. This Court has characterized the purpose of the *Copyright Act* as a balance between authors' and users' rights. The same balance applies to broadcasters and users. In *Théberge*, Binnie J. recognized that the *Copyright Act*

is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately,

[61] Comme il a été mentionné précédemment, la présomption de cohérence des lois fédérales connexes exige d'éviter d'interpréter une disposition d'une manière qui créerait un conflit à l'intérieur du régime établi par ces lois. En l'espèce, si le régime de réglementation proposé par le CRTC a pour effet d'entrer en conflit avec les manifestations expresses de la volonté du législateur dans la *Loi sur le droit d'auteur*, la présomption de cohérence commande que ce régime soit déclaré *ultra vires*. L'article 21 et le par. 31(2) de la *Loi sur le droit d'auteur* sont pertinents.

[62] Premièrement, le régime de compensation pour la valeur des signaux entre en conflit avec le par. 21(1) de la *Loi sur le droit d'auteur*, en ce qu'il accorderait aux radiodiffuseurs le droit d'autoriser ou non la retransmission de signaux par les EDR, droit qui a été refusé aux radiodiffuseurs par le régime établi par la *Loi sur le droit d'auteur*.

[63] Si l'on s'en tient à la lettre de cette disposition, l'art. 21 ne traite de manière expresse que des rapports entre radiodiffuseurs et non des rapports entre radiodiffuseurs et retransmetteurs. Par conséquent, il est possible de soutenir que rien dans cette disposition n'empêche un autre organe de réglementation de définir les modalités de la distribution, par une EDR, des signaux de télévision d'un radiodiffuseur, situation qui permettrait au CRTC — à condition qu'il y soit autorisé par la *Loi sur la radiodiffusion* — d'établir un régime de compensation pour la valeur des signaux sans créer de conflit avec l'art. 21.

[64] Toutefois, l'art. 21 ne peut être analysé sans tenir compte de son objet. Notre Cour a qualifié l'objet de la *Loi sur le droit d'auteur* en disant que celle-ci visait à établir un équilibre entre les droits des créateurs et ceux des utilisateurs. Le même équilibre s'applique dans le cas des radiodiffuseurs et des utilisateurs. Dans l'arrêt *Théberge*, le juge Binnie a reconnu que la *Loi sur le droit d'auteur*

est généralement présentée comme établissant un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et, d'autre part, l'obtention

to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

(See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at paras. 10 and 23.)

[65] This point was reiterated in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427. In that case, the Court considered whether, for the purposes of the *Copyright Act*, Internet Service Providers “communicate [works] to the public” when such works are requested by their subscribers — thereby infringing copyright in such works. The Court was required to interpret s. 2.4(1)(b) of the *Copyright Act*, which provides that

a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

[66] In rejecting the argument that s. 2.4(1)(b), as an exemption, should be read narrowly, the majority, *per* Binnie J., held that

[u]nder the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give “the fair and balanced reading that befits remedial legislation”. [para. 88]

The Court recognized that “[s]ection 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright scheme” (para. 89). The Court therefore confirmed its earlier teaching in *Théberge* that the policy balance established by the *Copyright Act* is maintained *also* by “giving due weight to [the] limited nature” of the rights of creators (*Théberge*, at para. 31).

d’une juste récompense pour le créateur (ou, plus précisément, l’assurance que personne d’autre que le créateur ne pourra s’approprier les bénéfices qui pourraient être générés). [par. 30]

(Voir également *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, par. 10 et 23.)

[65] Ce point a été réitéré dans l’arrêt *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Assoc. canadienne des fournisseurs Internet*, 2004 CSC 45, [2004] 2 R.C.S. 427. Dans cette affaire, la Cour s’est demandé si, pour l’application de la *Loi sur le droit d’auteur*, les fournisseurs Internet « communiquent [des œuvres] au public » lorsque leurs abonnés leur demandent les œuvres en question — et, de ce fait, violent le droit d’auteur sur ces œuvres. La Cour était appelée à interpréter l’al. 2.4(1)b) de la *Loi sur le droit d’auteur*, qui est rédigé ainsi :

... n’effectue pas une communication au public la personne qui ne fait que fournir à un tiers les moyens de télécommunication nécessaires pour que celui-ci l’effectue.

[66] Rejetant l’argument suivant lequel, du fait que l’al. 2.4(1)b) constitue une exception, il devrait être interprété restrictivement, les juges majoritaires ont tiré la conclusion suivante, sous la plume du juge Binnie :

Dans la *Loi sur le droit d’auteur*, les droits du titulaire du droit d’auteur et les restrictions y afférentes doivent être considérés de pair et recevoir « l’interprétation juste et équilibrée que commande une mesure législative visant à remédier à un état de fait ». [par. 88]

La Cour a reconnu que « [l]’alinéa 2.4(1)b) n’est pas une échappatoire, mais un élément important de l’équilibre établi par le régime législatif en cause » (par. 89). Elle a par conséquent confirmé le principe qu’elle avait formulé précédemment dans *Théberge*, à savoir que l’équilibre établi par la *Loi sur le droit d’auteur* est également assuré « en accordant l’importance qu’il convient à la nature limitée » des droits des créateurs (*Théberge*, par. 31).

[67] In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Théberge*, at para. 30).

[68] Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime *ultra vires*, further conflict arises in my opinion between the value for signal regime and the retransmission rights in *works* set out in s. 31 of the *Copyright Act*.

[69] As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a *work* carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the *Copyright Act*. The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the *Copyright Act* specifically excludes it from the

[67] À mon avis, le par. 21(1) représente le juste équilibre qui, de l'avis du législateur, doit exister entre les droits des radiodiffuseurs sur leurs signaux de communication et le droit des utilisateurs, y compris les EDR, sur ces mêmes signaux. Il ne serait pas logique de la part du législateur fédéral d'instaurer dans la *Loi sur le droit d'auteur* un droit de retransmission soigneusement élaboré, qui soustrait explicitement les EDR du champ d'application du droit exclusif des radiodiffuseurs sur la retransmission simultanée de leurs signaux, mais d'habiliter par ailleurs un organisme de réglementation subalterne à créer un droit fonctionnellement équivalent par l'entremise d'un régime connexe. Le régime de compensation pour la valeur des signaux nuirait à la réalisation de l'objectif de la *Loi sur le droit d'auteur* qui consiste à établir « un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et, d'autre part, l'obtention d'une juste récompense pour le créateur » (*Théberge*, par. 30).

[68] Deuxièmement, bien que le conflit entre le régime de compensation pour la valeur des signaux proposé et l'art. 21 soit suffisant pour rendre ce régime *ultra vires*, je suis d'avis que celui-ci entre également en conflit avec le droit de retransmission des *œuvres* énoncé à l'art. 31 de la *Loi sur le droit d'auteur*.

[69] Comme il a été expliqué plus tôt, l'art. 31 crée une exception écartant la violation du droit d'auteur dans le cas de la retransmission simultanée par une EDR d'une *œuvre* portée par des signaux locaux. Toutefois, suivant le régime de compensation pour la valeur des signaux, les radiodiffuseurs jouiraient du droit d'exiger le retrait de certaines émissions. Ainsi, un radiodiffuseur qui n'arriverait pas à s'entendre avec une EDR sur la compensation payable pour la distribution de ses services de programmation aurait le droit d'exiger de cette EDR qu'elle retire de tous les signaux qu'elle distribue toute émission à l'égard de laquelle le radiodiffuseur aurait acquis les droits exclusifs de diffusion. Comme il a été signalé précédemment, les « émission[s] » sont souvent des « œuvre[s] » au

control of copyright owners, including broadcasters.

[70] Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(f) communication right. It would disrupt the balance established by Parliament.

[71] The recent legislative history of the *Copyright Act* supports the view that Parliament made deliberate choices in respect of copyright and broadcasting policy. The history evidences Parliament's intent to facilitate simultaneous retransmission of television programs by cable and limit the obstacles faced by the retransmitters.

[72] Leading up to the 1997 amendment to the *Copyright Act* (Bill C-32), under which s. 21 was introduced, broadcasters made submissions to the Standing Committee on Canadian Heritage seeking *signal* rights. They contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs. The broadcasters, in fact, argued expressly against the narrow right that Parliament eventually adopted as s. 21(1)(c). See, e.g., submissions of CTV to Standing Committee on Canadian Heritage, "Re: Bill C-32" (August 30, 1996) (A.R., vol. VII, at p. 68); submissions of WIC Western International Communications Ltd. (1996) (A.R.,

sens de la *Loi sur le droit d'auteur*. Le régime de compensation pour la valeur des signaux aurait pour effet d'accorder aux radiodiffuseurs le droit de contrôler la retransmission simultanée des œuvres, alors que la *Loi sur le droit d'auteur* exclut expressément ce droit de contrôle dans le cas des titulaires du droit d'auteur, y compris les radiodiffuseurs.

[70] Je le répète, bien que l'exception écartant la violation du droit d'auteur prévue à l'art. 31 ne soit pas, à première vue, censée interdire à un autre organisme de réglementation d'imposer, directement ou indirectement, des conditions applicables à la retransmission d'œuvres, il est nécessaire d'aller au-delà de la lettre de cette disposition et de tenir compte de son objet, lequel consiste à établir un équilibre entre les droits des titulaires du droit d'auteur et l'intérêt du public à la diffusion des œuvres. Le régime de compensation pour la valeur des signaux aurait concrètement pour effet de réduire à néant l'exception prévue par l'art. 31 à l'égard du droit de communication reconnu aux titulaires du droit d'auteur par l'al. 3(1)(f) et de rompre ainsi l'équilibre créé par le législateur.

[71] L'historique législatif récent de la *Loi sur le droit d'auteur* permet d'affirmer que le législateur a fait des choix délibérés en ce qui concerne le droit d'auteur et la politique de radiodiffusion. Cet historique témoigne en effet de la volonté du législateur de faciliter la retransmission simultanée des émissions de télévision par câble et de limiter les obstacles que les retransmetteurs doivent surmonter.

[72] Au cours de la période qui a précédé la modification, en 1997, de la *Loi sur le droit d'auteur* (projet de loi C-32), par l'insertion notamment de l'art. 21, des radiodiffuseurs ont présenté au Comité permanent sur le patrimoine canadien des mémoires dans lesquels ils réclamaient des droits sur les *signaux*. Les radiodiffuseurs soutenaient qu'on devait leur reconnaître le droit d'autoriser ou de refuser d'autoriser la retransmission de leurs signaux par d'autres personnes, y compris les EDR. En fait, les radiodiffuseurs s'opposaient expressément au droit limité que le législateur a finalement reconnu à l'al. 21(1)(c). Voir, p. ex., mémoire de CTV au Comité permanent du patrimoine

vol. VII, at p. 15); submissions of the British Columbia Association of Broadcasters, “Bill C-32, the Copyright Reform Legislation” (August 28, 1996) (A.R., vol. VII, at p. 20); submissions of the Canadian Association of Broadcasters, “Clause by Clause Recommendations for Amendments to Bill C-32” (November 27, 1996) (A.R., vol. VII, at p. 77). In addition, although this section has not been amended since 1997, ongoing consultations between Parliament and the broadcasters show continued requests from the latter to include the right to authorize BDU retransmissions. See, e.g., submissions of CTVglobemedia, “Re: Government’s 2009 Copyright Consultations” (September 11, 2009) (A.R., vol. IX, at pp. 35-37); Canadian Association of Broadcasters, “A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act*” (September 15, 2003) (A.R., vol. IX, at p. 28).

[73] Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament’s silence is not necessarily determinative of legislative intention. However, in the context of repeated urging from the broadcasters, Parliament’s silence strongly suggests that it is Parliament’s intention to maintain the balance struck by s. 21 (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, per Abella J.).

[74] The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(f) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. Section 3(1)(f) was amended in 1988 to confer the exclusive right to “communicate the work to the public by telecommunication” to reflect the obligations entered

canadien, « Re : Bill C-32 » (30 août 1996) (d.a., vol. VII, p. 68); mémoire du WIC Western International Communications Ltd. (1996) (d.a., vol. VII, p. 15); mémoire de la British Columbia Association of Broadcasters, « Bill C-32, the Copyright Reform Legislation » (28 août 1996) (d.a., vol. VII, p. 20); mémoire de l’Association canadienne des radiodiffuseurs, « Clause by Clause Recommendations for Amendments to Bill C-32 » (27 novembre 1996) (d.a., vol. VII, p. 77). De plus, bien que cet article n’ait pas été modifié depuis 1997, il ressort des consultations en cours entre le Parlement et les radiodiffuseurs que ces derniers continuent de réclamer que la loi leur reconnaisse le droit d’autoriser les retransmissions par les EDR. Voir, p. ex., mémoire de CTVglobemedia, « Re : Government’s 2009 Copyright Consultations » (11 septembre 2009) (d.a., vol. IX, p. 35-37); Association canadienne des radiodiffuseurs, « A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act* » (15 septembre 2003) (d.a., vol. IX, p. 28).

[73] Malgré les modifications successives apportées à la *Loi sur le droit d’auteur*, le Parlement n’a pas modifié l’art. 21 de la manière réclamée par les radiodiffuseurs. Le silence du législateur n’est pas nécessairement déterminant quant à son intention. Toutefois, compte tenu des demandes pressantes et répétées des radiodiffuseurs, ce silence tend fortement à indiquer qu’il voulait préserver l’équilibre établi par l’art. 21 (voir *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, par. 42, la juge Abella).

[74] Cette volonté de mise en équilibre ressort également de l’historique législatif du régime prévu à l’art. 31 en matière de retransmission des *œuvres*. La disposition qu’a remplacée l’actuel al. 3(1)(f) garantissait aux titulaires du droit d’auteur le droit exclusif de transmettre leurs œuvres au moyen de la *radiophonie*. La jurisprudence a considéré que ce droit à la transmission par la radiophonie excluait les transmissions par *câble* : (*Canadian Admiral Corp. c. Rediffusion, Inc.*, [1954] R.C. de l’É. 382. L’alinéa 3(1)(f) a été modifié en 1988 afin de conférer le droit exclusif de « communiquer au

into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61-62; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 36-37, and McKeown, at para. 3:2(b)). The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.

[75] However, at the same time, Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71-76 of the *Copyright Act (Canada-United States Free Trade Agreement Implementation Act*, s. 62). Studies on the same question had preceded this enactment; there, too, a major concern was that copyright owners “should not be permitted to stop retransmission because this activity is too important to Canada’s communications system” (Standing Committee on Communications and Culture. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright* (1985), at p. 80 (A.R., vol. III, at p. 118); Government Response to A Charter of Rights for Creators (February 1986) (A.R., vol. III, at p. 127)).

[76] The value for signal regime would rewrite the balance between the owners’ and users’ interests as set out by Parliament in the *Copyright Act*. Because the CRTC’s value for signal regime is inconsistent with the purpose of the *Copyright Act*,

public, par télécommunication, une œuvre », et ce, pour tenir compte des obligations contractées par le Canada aux termes de l’*Accord de libre-échange entre le gouvernement du Canada et le gouvernement des États-Unis d’Amérique*, R.T. Can. 1989 n° 3 (voir *Loi de mise en œuvre de l’Accord de libre-échange Canada — États-Unis*, L.C. 1988, ch. 65, art. 61-62; voir également *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] R.C.S. 283, par. 36-37, et McKeown, par. 3:2(b)). Par suite du remplacement du terme « radiophonie » par « télécommunication », les entreprises canadiennes de câblodistribution devaient désormais répondre de toute violation du droit d’auteur lorsqu’elles communiquaient au public des œuvres protégées par le droit d’auteur.

[75] Toutefois, à la même époque, le législateur s’est expressément penché sur la question de savoir si la retransmission simultanée d’œuvres portées par des signaux de télévision locaux ou éloignés devait être subordonnée à l’obtention du consentement du titulaire du droit d’auteur : il a adopté le régime de licences obligatoires et d’exception prévu à l’art. 31 et aux art. 71-76 de la *Loi sur le droit d’auteur (Loi de mise en œuvre de l’Accord de libre-échange Canada — États-Unis*, art. 62). Des études sur la même question avaient été publiées avant l’adoption de ce texte de loi; dans ces études aussi, on considérait qu’il s’agissait d’un enjeu important et on soulignait que les titulaires du droit d’auteur « ne doivent pas avoir le droit d’interdire la retransmission [d’œuvres], parce que cette activité revêt une trop grande importance dans le réseau de communications du Canada » (Comité permanent des communications et de la culture. *Une charte des droits des créateurs et créatrices : Rapport du Sous-comité sur la révision du droit d’auteur* (1985), p. 89 (d.a., vol. III, p. 118); Réponse du gouvernement au Rapport du Sous-comité sur la révision du droit d’auteur (février 1986) (d.a., vol. III, p. 127)).

[76] Le régime de compensation pour la valeur des signaux proposé par le CRTC aurait pour effet de redéfinir l’équilibre qu’a établi le législateur, dans la *Loi sur le droit d’auteur*, entre les intérêts respectifs des titulaires du droit d’auteur et des

it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*.

[77] I said earlier that I would come back to s. 31(2)(b) of the *Copyright Act*. The majority of the FCA concluded that there is no incoherence between the value for signal regime and the *Copyright Act* because of s. 31(2)(b) of the *Copyright Act*. This section provides that in order for the exception to copyright to apply, the retransmission must be “lawful under the *Broadcasting Act*”. The majority appears to have thought this was sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime.

[78] In my respectful opinion, this provision cannot serve to authorize the CRTC acting under the *Broadcasting Act* to effectively amend the very heart of the balance of the retransmission regime set out in s. 31(2). Section 31(2)(b) is not a so-called Henry VIII clause that confers jurisdiction on the CRTC to promulgate, through regulation or licensing conditions, subordinate legislative provisions that are to prevail over primary legislation (see Sullivan, at pp. 342-43). Absent specific indication, Parliament cannot have intended by s. 31(2)(b) to empower a subordinate regulatory body to disturb the balance struck following years of studies. The legislative history does not lend support to this argument; indeed, the history confirms Parliament's deliberate policy choice in enacting the compulsory licence and exception, or user's rights, regime under s. 31(2). A general reference to “lawful under the *Broadcasting Act*” cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*.

[79] In any case, the conflict found between the value for signal regime and s. 21 is sufficient. It

utilisateurs. Comme ce régime est incompatible avec l'objet visé par la *Loi sur le droit d'auteur*, il échappe à la compétence conférée au CRTC par la *Loi sur la radiodiffusion* en matière de délivrance de licences et de réglementation.

[77] J'ai dit plus haut que je reviendrais sur l'al. 31(2)(b) de la *Loi sur le droit d'auteur*. La CAF a conclu à la majorité que, en raison de l'al. 31(2)(b) de la *Loi sur le droit d'auteur*, il n'y avait pas d'incohérence entre cette loi et le régime de compensation pour la valeur des signaux. Aux termes de l'alinéa en question, pour que s'applique l'exception écartant la violation du droit d'auteur, la retransmission doit être « licite en vertu de la *Loi sur la radiodiffusion* ». Les juges majoritaires semblent avoir pensé que cela suffisait afin de donner au CRTC compétence pour mettre en œuvre le régime réglementaire de compensation pour la valeur des signaux.

[78] À mon humble avis, la disposition en question ne permet pas au CRTC, lorsqu'il agit en vertu de la *Loi sur la radiodiffusion*, de modifier dans les faits le fondement même de l'équilibre établi par le régime de retransmission prévu au par. 31(2). L'alinéa 31(2)(b) n'est pas ce qu'on appelle une « clause Henry VIII », qui conférerait au CRTC le pouvoir de promulguer — par voie de règlements ou de conditions assortissant des licences — des dispositions réglementaires qui auraient préséance sur des dispositions législatives (voir Sullivan, p. 342-343). À défaut d'indication précise, on ne peut présumer que le législateur entendait, par l'al. 31(2)(b), habiliter un organisme de réglementation subalterne à perturber l'équilibre atteint après bien des années et bien des études. L'historique législatif n'appuie pas cet argument; il confirme plutôt la décision de principe délibérée qu'a prise le législateur lorsqu'il a édicté, au par. 31(2), le régime de licences obligatoires et d'exception écartant la violation du droit d'auteur, ou régime relatif aux droits d'utilisation. L'expression générale « licite en vertu de la *Loi sur la radiodiffusion* » ne saurait autoriser le CRTC, lorsqu'il agit en vertu de dispositions attributives de compétence générales, à écarter une prescription précise du législateur dans la *Loi sur le droit d'auteur*.

[79] En tout état de cause, le conflit constaté entre le régime de compensation pour la valeur des

could not be overcome even on a different reading of s. 31(2)(b) of the *Copyright Act*.

[80] There is one final point to be made. Section 89 of the *Copyright Act* provides:

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

The deliberate use of the words “this Act or any other Act of Parliament” rather than “this Act or any other enactment” means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. “Act” and “enactment” are defined in s. 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where

“Act” means an Act of Parliament;

and

“enactment” means an Act or regulation or any portion of an Act or regulation;

The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.

[81] Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition. Sections 2 and 21 of the *Copyright Act* define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the *Copyright Act* is limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance

signaux et l’art. 21 est suffisant. Ce conflit ne pourrait être surmonté, même si l’al. 31(2)b) de la *Loi sur le droit d’auteur* était interprété différemment.

[80] Il reste une dernière observation à formuler. Cette observation repose sur l’art. 89 de la *Loi sur le droit d’auteur*, qui est rédigé ainsi :

89. Nul ne peut revendiquer un droit d’auteur autrement qu’en application de la présente loi ou de toute autre loi fédérale; le présent article n’a toutefois pas pour effet d’empêcher, en cas d’abus de confiance, un individu de faire valoir son droit ou un tribunal de réprimer l’abus.

L’emploi délibéré des mots « la présente loi ou de toute autre loi fédérale » au lieu de « la présente loi ou de tout autre texte » indique que le droit d’auteur revendiqué doit figurer dans une loi fédérale et non dans un règlement émanant d’un organisme de réglementation. Les mots « loi » et « texte » sont définis ainsi à l’art. 2 de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21 :

« loi » Loi fédérale.

et

« texte » Tout ou partie d’une loi ou d’un règlement.

Ces définitions confirment que le législateur ne voulait pas qu’un organisme de réglementation subalterne puisse créer un droit d’auteur au moyen de règlements ou de conditions d’attribution de licences

[81] Le régime de compensation pour la valeur des signaux aurait pour effet de créer, en contravention de l’art. 89, un nouveau type de droit d’auteur par voie de règlement ou de conditions d’attribution de licences. Les articles 2 et 21 de la *Loi sur le droit d’auteur* précisent que le droit d’auteur comporte le droit exclusif, à l’égard du signal de communication émis par le radiodiffuseur, d’autoriser un autre radiodiffuseur à retransmettre simultanément ce signal au public. Le fait d’autoriser la retransmission simultanée constitue donc un aspect du droit d’auteur, mais la *Loi sur le droit d’auteur* limite cette autorisation à des entités expressément définies, en l’occurrence d’autres radiodiffuseurs. Compte tenu de l’historique

struck in the *Copyright Act* between broadcasters and BDUs. The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

[82] My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, the differences that they point to do not alter the fundamental functional equivalence between the proposed regime and a copyright. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of their signals if certain conditions are met; the value for signal regime does exactly the same thing. My colleagues are correct that the CRTC cannot, through the value for signal regime, amend s. 21 of the *Copyright Act*. However that is precisely what the proposed regime does. Parliament could have imposed conditions that are the same, or similar to the value for signal regime in s. 21 in the same way it imposed limits in s. 31 on the copyright it granted in respect of retransmission of works, had it intended broadcasters to have such a right. Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. Not calling it copyright does not remove it from the scope of s. 89. If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.

législatif examiné précédemment, cette restriction du droit d'auteur semble découler du choix précis du législateur de ne pas modifier l'équilibre établi dans la *Loi sur le droit d'auteur* entre les radiodiffuseurs et les EDR. Le régime de compensation pour la valeur des signaux créerait un nouveau droit permettant à son titulaire d'autoriser la retransmission de signaux (et, corollairement, d'interdire une telle retransmission si aucune entente n'est conclue au sujet de la compensation à verser), modifiant ainsi concrètement le droit d'auteur conféré par l'art. 21. Ce régime créerait donc un nouveau type de droit d'auteur, sans la loi fédérale requise par l'art. 89.

[82] Mes collègues affirment qu'il existe des différences fonctionnelles entre le droit d'auteur et le régime réglementaire proposé. Avec égards, les différences qu'ils relèvent ne modifient pas l'équivalence fonctionnelle fondamentale entre le régime proposé et un droit d'auteur. L'article 21 de la *Loi sur le droit d'auteur* habilite les radiodiffuseurs à interdire la retransmission de leurs signaux lorsque certaines conditions sont réunies; le régime de compensation pour la valeur des signaux fait exactement la même chose. Mes collègues ont raison de dire que le CRTC ne peut pas, par l'entremise du régime de compensation pour la valeur des signaux, modifier l'art. 21 de la *Loi sur le droit d'auteur*. Toutefois, c'est précisément ce que fait le régime proposé. Le législateur aurait pu, à l'art. 21, imposer des conditions identiques ou analogues à celles prévues par le régime de compensation pour la valeur des signaux, de la même façon qu'il a, à l'art. 31, imposé des limites au droit d'auteur qu'il a accordé relativement à la retransmission des œuvres, s'il avait voulu que les radiodiffuseurs disposent d'un tel droit. Le fait de qualifier le nouveau droit conféré aux radiodiffuseurs en vertu du régime de compensation pour la valeur des signaux d'ensemble de modifications d'ordre réglementaire n'a pas pour effet de changer le caractère véritable de ce droit. Le fait de ne pas l'appeler « droit d'auteur » ne le soustrait pas au champ d'application de l'art. 89. Si un simple changement d'appellation suffisait, l'art. 89 n'atteindrait pas son objectif, qui consiste à restreindre les droits d'auteur susceptibles d'être revendiqués à ceux accordés en application d'une loi fédérale.

IV. Conclusion

[83] The reference question should be answered in the negative. The appeal should be allowed with costs throughout.

The reasons of Deschamps, Abella, Cromwell and Karakatsanis were delivered by

[84] ABELLA AND CROMWELL JJ. (dissenting) — We have had the benefit of reading the reasons of Rothstein J. but, with respect, do not agree.

[85] Private local stations are licensed by the CRTC to acquire, create and produce television programming. They serve small geographic areas defined by the reach of their signals. According to the CRTC, local stations are key contributors to attaining the objectives for the Canadian broadcasting system.

[86] Local stations have recently experienced a financial crisis. The stations rely on advertising revenue to fund the cost of creating, acquiring and broadcasting high quality Canadian programming. Changes in the broadcasting business environment, however, have caused advertising revenues to rapidly decline. These changes include the development of direct-to-home satellite TV services and speciality television channels, and the widespread adoption of alternative media platforms.

[87] Currently, the local stations' over-the-air signals are picked up and retransmitted to a wider audience by cable service providers (known as broadcasting distribution undertakings, or "BDUs"). The BDUs retransmit these signals to their own subscribers for a fee. Under the current broadcasting regime, BDUs are not required to negotiate compensation with the local stations for retransmitting their signals to a local market. Instead, the CRTC requires the BDUs to provide local stations with

IV. Dispositif

[83] Il convient de répondre par la négative à la question faisant l'objet du renvoi. Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Version française des motifs des juges Deschamps, Abella, Cromwell et Karakatsanis rendus par

[84] LES JUGES ABELLA ET CROMWELL (dissidents) — Nous avons pris connaissance des motifs du juge Rothstein, mais, avec égards, nous ne pouvons y souscrire.

[85] La licence que le CRTC attribue aux stations locales privées leur permet d'acheter, de créer et de produire des émissions de télévision. Elles desservent des régions géographiques limitées, circonscrites par la portée des signaux qu'elles émettent. Selon le CRTC, les stations locales apportent une contribution essentielle à la réalisation des objectifs du système canadien de radiodiffusion.

[86] Les stations locales ont récemment été touchées par une crise financière. Elles dépendent des revenus publicitaires pour financer la création, l'acquisition et la radiodiffusion d'une programmation canadienne de haute qualité. Toutefois, des changements survenus dans le paysage commercial de la radiodiffusion se sont traduits par une chute des revenus publicitaires. Parmi ces changements, mentionnons la création des services de radiodiffusion directe par satellite des ondes télévisuelles, l'arrivée des chaînes spécialisées et l'adoption répandue d'autres supports médias.

[87] À l'heure actuelle, les signaux de télévision en direct émis par les stations locales sont retransmis à un large auditoire par les câblodistributeurs (les entreprises de distribution de radiodiffusion ou « EDR »). Les EDR retransmettent ces signaux à leurs propres abonnés moyennant le paiement de droits. Suivant le régime de radiodiffusion actuel, les EDR ne sont pas tenues de négocier avec les stations locales le versement d'une compensation pour la retransmission des signaux de

various benefits, including mandatory carriage to the station's local market, preferential channel placement, and substitution of the local stations' advertisements in place of those appearing on American stations transmitting the same program. The current regime also requires the BDUs to make financial contributions to the local stations; specifically, 1.5 percent of the BDUs' gross revenues must go to a local programming improvement fund.

[88] In 2010, the CRTC issued the *Broadcasting Regulatory Policy CRTC 2010-167* ("2010 Policy"), concluding that local stations' potential revenue streams under the existing regime needed to be expanded in order to ensure the viability of local programming. The new regime would supply local stations with funds beyond advertising revenues, by giving them the option to negotiate with the BDUs for compensation for all retransmissions of their signals. Where no agreement is reached, the local station would be entitled to prevent retransmission of its signal by the BDU. The BDUs already negotiate compensation with local stations for retransmitting their signals *outside* the station's local market, known as a "distant signal".

[89] The proposed regime is consistent with the market-based negotiations that increasingly prevail on other platforms, including discretionary pay and specialty services, video-on-demand and online and mobile streaming platforms. According to the CRTC, it is also consistent with its own approach of using market-based solutions when appropriate. Significantly, the CRTC has determined that the new regime is necessary to preserve local stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*, S.C. 1991, c. 11.

ces dernières à un marché local. Le CRTC oblige plutôt l'EDR à offrir à la station locale certains avantages, dont la distribution obligatoire de ses signaux dans le marché local de la station, l'alignement des canaux prioritaires et la substitution des publicités diffusées par les chaînes américaines qui transmettent l'émission par celles de la station locale. Sous le régime actuel, les EDR sont également tenues de verser une contribution financière aux stations locales — à savoir 1,5 p. 100 de leurs revenus bruts — à un fonds d'amélioration de la programmation locale.

[88] En 2010, le CRTC a publié la *Politique réglementaire de radiodiffusion CRTC 2010-167* (« Politique de 2010 ») dans laquelle il conclut à la nécessité d'assurer aux stations locales d'autres sources potentielles de revenus que celles prévues par le régime actuel afin de garantir la viabilité de la programmation locale. Dans le cadre du nouveau régime, les stations locales bénéficieraient, en plus des revenus tirés de la publicité, de la faculté de négocier avec les EDR des ententes leur assurant une compensation pour toute retransmission de leurs signaux. Faute d'entente, une station locale pourrait interdire la retransmission de ses signaux par une EDR. Les EDR négocient déjà avec les stations locales les droits payables à celles-ci pour la retransmission des signaux de ces dernières *hors* de leur marché local respectif, ce qu'on appelle le « signal éloigné ».

[89] Le régime proposé s'inspire du type de négociations basées sur le recours aux forces du marché qui caractérisent de plus en plus les autres supports, notamment les services facultatifs tels que les chaînes payantes et les chaînes spécialisées, la vidéo sur demande et les supports en ligne et mobiles permettant la lecture en continu. Selon le CRTC, le régime concorde également avec sa propre approche, qui consiste à adopter des solutions faisant appel aux règles du marché lorsque la situation s'y prête. Fait important, le CRTC a jugé que le nouveau régime est nécessaire pour assurer la survie des stations locales et la réalisation des objectifs de la politique de radiodiffusion énoncée au par. 3(1) de la *Loi sur la radiodiffusion*, L.C. 1991, ch. 11.

[90] While the CRTC concluded that the new regime was necessary to ensure the viability of local stations, it acknowledged concern in the 2010 Policy itself that the *Copyright Act*, R.S.C. 1985, c. C-42, might create a “potential impediment” to its jurisdiction to implement the regime (para. 165). Under ss. 18.3 and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, it therefore brought the following reference question to the Federal Court of Appeal:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

[91] We agree with the majority of the Federal Court of Appeal that this question should be answered in the affirmative, and would therefore dismiss the appeal (2011 FCA 64, 413 N.R. 312). In our view, the new regime is merely an extension of the current regime, which places several conditions — including financial ones — on BDUs for the licence to retransmit local stations’ signals. We also conclude that nothing in the *Copyright Act* creates a barrier to the CRTC’s authority to implement the new regime.

Analysis

[92] The narrow reference question requires us to determine whether the CRTC has jurisdiction under the *Broadcasting Act* to implement the new regime. Read on its own, the *Broadcasting Act* appears to grant this jurisdiction, which raises the question of whether something in the *Copyright Act* demonstrates Parliament’s intent to derogate from or attenuate this jurisdiction in order to satisfy another public interest. In other words, we must determine whether there would be an unavoidable conflict if the *Broadcasting Act* were read to confer on the CRTC the jurisdiction to implement the

[90] Bien qu’il ait conclu à la nécessité du nouveau régime pour assurer la viabilité des stations locales, le CRTC a néanmoins reconnu, dans sa Politique de 2010 même, que la *Loi sur le droit d’auteur*, L.R.C. 1985, ch. C-42, risquait de créer un « obstacle » susceptible d’influer sur sa compétence relativement à la mise en œuvre du régime (par. 165). Par conséquent, il a renvoyé la question suivante devant la Cour d’appel fédérale, en vertu de l’art. 18.3 et du par. 28(2) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7 :

Le Conseil a-t-il la compétence, en vertu du mandat que lui confère la *Loi sur la radiodiffusion*, pour établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales?

[91] À l’instar des juges majoritaires de la Cour d’appel fédérale, nous estimons que cette question appelle une réponse affirmative et, en conséquence, nous sommes d’avis de rejeter l’appel (2011 CAF 64, 413 N.R. 312). Selon nous, le nouveau régime n’est simplement que le prolongement du régime actuel, lequel impose plusieurs conditions — y compris de nature financière — aux EDR en vue de l’obtention d’une licence de retransmission des signaux des stations locales. Nous concluons également que rien dans la *Loi sur le droit d’auteur* ne fait obstacle au pouvoir du CRTC de mettre en œuvre le nouveau régime.

Analyse

[92] La question précise qui nous est soumise dans le renvoi nous invite à décider si le CRTC a compétence, en vertu de la *Loi sur la radiodiffusion*, pour mettre en œuvre le nouveau régime. Considérée isolément, la loi en question semble conférer cette compétence, ce qui amène à se demander s’il n’y a pas, dans la *Loi sur le droit d’auteur*, quelque disposition révélant l’intention du législateur d’écarter ce pouvoir ou d’en atténuer la portée pour répondre à d’autres considérations d’intérêt public. Autrement dit, il nous faut décider si le fait de considérer que la *Loi sur la radiodiffusion* confère au CRTC la

regime. If so, this would suggest a less expansive reading of the CRTC's jurisdiction. An unavoidable conflict only occurs when two statutes directly contradict one another, in a way that applying one excludes the application of the other, or where their concurrent application could lead to unreasonable or absurd results: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Generally, the Court will favour an interpretation that avoids such a conflict: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. However, in our view, there is no conflict between the *Broadcasting Act* and the *Copyright Act* that would prevent reading the former as conferring on the CRTC the jurisdiction to implement the new regime.

[93] Analytically, the first question is whether the CRTC has jurisdiction to implement the proposed regime under the *Broadcasting Act*. The CRTC is granted a broad, flexible mandate to implement measures that further the broadcasting policy of Canada. Section 3(1) of the *Broadcasting Act* sets out the basic operative broadcasting policies. They primarily address the need to support local content in television and other programs in order to enrich Canada's cultural, political, social and economic environments. The provisions that confer powers on the CRTC — what Rothstein J. refers to as “jurisdiction-conferring” provisions — explicitly incorporate these policy objectives. Under s. 5(1) of the Act, the CRTC “shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)”. The CRTC possesses the jurisdiction to issue licences to participants in the Canadian broadcasting system. It can impose any conditions on these licences that it “deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)”: s. 9(1)(b)(i); *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; see also *Canadian Radio-Television and Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530, at p. 545. The CRTC may also make regulations

compétence pour mettre en œuvre le régime entraînerait un conflit de lois inévitable. Si c'est le cas, cela tendrait à suggérer une interprétation moins large des pouvoirs de cet organisme. Il y a conflit inévitable uniquement lorsque deux lois sont directement contradictoires et que l'application de l'une exclut l'application de l'autre, ou encore lorsque leur application concurrente donnerait lieu à un résultat déraisonnable ou absurde : *Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 47. En règle générale, la Cour préconise une interprétation qui permet d'éviter ce genre de conflit : *R. c. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 R.C.S. 867, par. 30. À notre avis toutefois, il n'existe entre la *Loi sur la radiodiffusion* et la *Loi sur le droit d'auteur* aucun conflit qui empêche de considérer que la première confère au CRTC la compétence pour mettre le nouveau régime en œuvre.

[93] Sur le plan de l'analyse, la première question consiste à se demander si le CRTC a compétence, en vertu de la *Loi sur la radiodiffusion*, pour mettre en œuvre le régime proposé. Cet organisme jouit d'un mandat large et souple, qui lui permet de prendre des mesures pour mettre en œuvre la politique canadienne de radiodiffusion. Le paragraphe 3(1) de cette loi énonce les principes directeurs fondamentaux en matière de radiodiffusion, lesquels s'attachent d'abord et avant tout au besoin de soutenir une programmation locale, télévisuelle ou autre, en vue d'enrichir la structure culturelle, politique, sociale et économique du Canada. Les dispositions qui confèrent des pouvoirs au CRTC — que le juge Rothstein appelle dispositions « attributives de compétence » — incorporent explicitement ces objectifs de politique. En effet, aux termes du par. 5(1) de la Loi, le CRTC « réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion ». Le CRTC a compétence pour attribuer des licences aux participants du système canadien de radiodiffusion. Il peut assortir ces licences des conditions « qu'il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion » : al. 9(1)b); *CKOY Ltd. c. La Reine*, [1979] 1 R.C.S. 2; voir également *Conseil de la radiodiffusion et des télécommunications*

under s. 10(1)(k) of the Act “respecting such other matters as it deems necessary for the furtherance of its objects”. Section 3(2) of the Act states that the Canadian broadcasting system is a single system, and that the objectives in s. 3(1) can best be achieved by regulation and supervision through “a single independent public authority”: the CRTC.

[94] As “broadcasting undertaking[s]” under s. 2(1) of the Act, BDUs are part of the single broadcasting system that the CRTC must regulate and supervise pursuant to s. 5(1). BDUs do not have a freestanding right to retransmit local stations’ programs: BDUs derive that right *only* from licences granted pursuant to s. 9 of the *Broadcasting Act*, subject to any conditions imposed under s. 9(1)(b)(i). The current conditions of the BDUs’ licences to retransmit local stations’ signals require them to provide the benefits noted earlier, which include payments to a fund for the local stations. The proposed regime would involve an extension or alteration of the conditions on BDUs’ licences, requiring them to negotiate compensation directly with the local stations.

[95] The breadth of the CRTC’s discretion to determine what measures are necessary to further Canada’s broadcasting policy was acknowledged by this Court in *CKOY*. The issue was whether the CRTC had jurisdiction under the *Broadcasting Act* to enact a regulation which prohibited stations or networks from broadcasting telephone interviews without the participant’s consent. Spence J., writing for the majority, observed that “Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created” (at p. 12, quoting with approval the Court of Appeal: (1976), 13 O.R. (2d) 156, at p. 162). He set out the test for

canadiennes c. CTV Television Network Ltd., [1982] 1 R.C.S. 530, p. 545. Le CRTC peut également, en vertu de l’al. 10(1)(k) de la Loi, « prendre toute autre mesure qu’il estime nécessaire à l’exécution de sa mission ». Suivant le par. 3(2) de la même loi, le système canadien de radiodiffusion constitue un système unique, et la meilleure façon d’atteindre les objectifs énoncés au par. 3(1) consiste à en confier la réglementation et la surveillance à « un seul organisme public autonome » : le CRTC.

[94] En tant qu’« entreprise[s] de radiodiffusion » au sens du par. 2(1) de la Loi, les EDR font partie de ce système unique que le CRTC doit surveiller et réglementer en vertu du par. 5(1). Les EDR ne disposent pas d’un droit autonome de retransmission des émissions des stations locales : elles tiennent ce droit *uniquement* de la licence qui leur est attribuée conformément à l’art. 9 de la *Loi sur la radiodiffusion*, sous réserve des conditions dont cette licence est susceptible d’être assortie suivant l’al. 9(1)(b). À l’heure actuelle, les licences autorisant les EDR à retransmettre les signaux des stations locales les obligent à accorder les avantages énumérés précédemment, notamment à contribuer à un fonds destiné à ces stations. Le régime proposé aurait pour effet d’ajouter aux conditions assortissant les licences des EDR, ou de les modifier, en contraignant ces dernières à négocier directement avec les stations locales le versement d’une compensation.

[95] L’étendue du pouvoir discrétionnaire dont dispose le CRTC pour déterminer les mesures nécessaires à la mise en œuvre de la politique canadienne de radiodiffusion a été reconnue par notre Cour dans l’arrêt *CKOY*. Dans cette affaire, il s’agissait de décider si le CRTC avait, en vertu de la *Loi sur la radiodiffusion*, compétence pour prendre un règlement interdisant à une station ou à un réseau de diffuser une conversation téléphonique sans le consentement du participant. S’exprimant au nom des juges majoritaires, le juge Spence a déclaré que « le Parlement a certainement voulu donner au Conseil une grande latitude dans l’exercice de son pouvoir réglementaire pour la mise en œuvre de la politique et des objets pour lesquels

determining the validity of the CRTC's regulations as follows:

... the validity of any regulation enacted in reliance upon [the predecessor section to s. 10] must be tested by determining whether the regulation *deals with a class of subject referred to in s. 3* of the statute and ... in doing so the Court looks at the regulation objectively. [Emphasis added; p. 11.]

[96] Spence J. concluded that because the particular regulation had a basis in several of the policies enumerated in s. 3 of the Act, including the need to provide a reasonably balanced opportunity for the expression of differing views, and to provide programming of a high standard, the regulation was authorized by the *Broadcasting Act*: pp. 12-14.

[97] In accordance with this approach, the proposed regime is within the CRTC's regulatory jurisdiction under the *Broadcasting Act*, since it is demonstrably linked to several of the policies in s. 3. In its 2010 Policy, the CRTC determined that the new regime was necessary to ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. In particular, the CRTC concluded that the regime was necessary to fulfill the policies stated in ss. 3(1)(e) and 3(1)(f):

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming

[98] Because the proposed regime was intended to save the financially troubled local stations, it is also linked to the policy set out in s. 3(1)(s):

il a été créé » (p. 12, citant en les approuvant les propos de la Cour d'appel : (1976), 13 O.R. (2d) 156, p. 162). Le juge Spence a énoncé en ces termes le critère permettant de statuer sur la validité d'un règlement pris par le CRTC :

... pour déterminer la validité de règlements établis en vertu [de la disposition qu'a remplacée l'art. 10], il faut décider s'ils portent sur *une catégorie de sujets mentionnée à l'art. 3* de la Loi, et [. . .], ce faisant, le tribunal examine les règlements d'un point de vue objectif. [Italiques ajoutés; p. 11.]

[96] Le juge Spence a conclu que, comme le règlement en question reposait sur plusieurs des principes énoncés à l'art. 3 de la Loi, notamment la nécessité de fournir la possibilité raisonnable et équilibrée d'exprimer des vues différentes et d'offrir une programmation de haute qualité, la prise de ce règlement était autorisée par la *Loi sur la radiodiffusion* : p. 12-14.

[97] Suivant ce même raisonnement, le régime proposé en l'espèce respecte la compétence que la *Loi sur la radiodiffusion* reconnaît au CRTC en matière de réglementation, étant donné qu'il se rattache manifestement à plusieurs des principes établis à l'art. 3. Dans sa Politique de 2010, le CRTC a jugé que le nouveau régime est nécessaire pour assurer la réalisation des objectifs de la politique de radiodiffusion énoncés au par. 3(1) de la *Loi sur la radiodiffusion*, tout particulièrement ceux énumérés aux al. 3(1)(e) et f), qui sont reproduits ci-dessous :

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation . . . ;

[98] Comme le régime proposé a été conçu pour sauver les stations locales en difficultés financières, il se rattache également au principe énoncé à l'al. 3(1)(s) :

(s) private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public. . . .

[99] Modern statutory interpretation looks to the objectives of the statute to construe the meaning of the words and the mandate. This had led to a long and accepted line of jurisprudence which has consistently interpreted the CRTC's jurisdiction to regulate and supervise Canadian broadcasting broadly. Reference has been made to the "very broad words" of the jurisdiction-conferring provisions in the *Broadcasting Act*, as well as the "embrasive objects committed to the Commission under [the predecessor to s. 5(1)], objects which extend to the supervision of 'all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act': *CKOY* at pp. 13-14, quoting Laskin C.J. in *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

[100] The Federal Court of Appeal has similarly and repeatedly indicated that the CRTC "has a very broad mandate under the *Broadcasting Act*", and "has been endowed with powers couched in the broadest of terms for 'the supervision and regulation of the Canadian broadcasting system'. . . with a view to implementing the broadcasting policy enunciated in section 3 of the Act": *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3 ("T.W.U."), at para. 40; *Assn. for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission*, [1981] 1 F.C. 524 (C.A.), at p. 530, leave to appeal refused, [1981] 1 S.C.R. v. Because of the CRTC's specialization and expertise, "Parliament has granted extensive powers for the supervision and regulation of the

s) les réseaux et les entreprises de programmation privés devraient, *dans la mesure où leurs ressources financières et autres le leur permettent*, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

[99] Suivant les règles modernes d'interprétation législative, il faut tenir compte des objectifs de la loi pour déterminer le sens des mots et le mandat de l'organisme concerné. L'application de cette méthode a donné lieu à une jurisprudence abondante et reconnue, qui a invariablement interprété de façon large la compétence du CRTC en matière de réglementation et de surveillance de la radiodiffusion au Canada. Les tribunaux ont fait état dans ces décisions du libellé « très général » des dispositions attributives de compétence de la *Loi sur la radiodiffusion*, et de la « grande portée des matières confiées au Conseil par [la disposition qu'a remplacée le par. 5(1)], qui comprennent la surveillance de "tous les aspects du système de la radiodiffusion canadienne en vue de mettre en œuvre la politique de radiodiffusion énoncée dans l'art. 3 de la présente loi" » : *CKOY*, p. 13-14, citant les propos du juge en chef Laskin dans *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141.

[100] De même, la Cour d'appel fédérale a indiqué à maintes reprises que le CRTC « est investi d'une très vaste mission en vertu de la *Loi sur la radiodiffusion* » et « de pouvoirs définis en termes très larges pour assurer "la réglementation et la surveillance du système de la radiodiffusion canadienne" [. . .] en vue de mettre en œuvre la politique de radiodiffusion énoncée dans l'article 3 de la Loi » : *Syndicat des travailleurs en télécommunications c. Conseil de la radiodiffusion et des télécommunications canadiennes*, 2003 CAF 381, [2004] 2 R.C.F. 3 (« S.T.T. »), par. 40; *Assn. for Public Broadcasting in British Columbia c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1981] 1 C.F. 524 (C.A.), p. 530, autorisation d'appel refusée, [1981] 1 R.C.S. v. À cause de l'expertise spécialisée du CRTC, « le Parlement [lui] a confié [. . .] de vastes pouvoirs

Canadian broadcasting system to allow [the CRTC] to implement the broadcasting policy set out in s. 3 of the *Broadcasting Act* It is settled that the CRTC has broad discretion in exercising its powers to issue or revoke licences”: *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (F.C.A.), at para. 2.

[101] The CRTC’s broad jurisdiction derives from the fact that each of ss. 5(1), 9(1)(b)(i) and 10(1)(k) confer generally-worded powers, along with a discretion to use them as the CRTC deems appropriate to implement the objects set out in s. 3(1). Courts have consistently determined the validity of the CRTC’s exercises of power under any of these provisions by applying the *CKOY* test: was the power used in connection with a policy objective in s. 3(1)? In *CKOY*, Spence J. dealt with the use of the regulation-making power, and noted that the section’s “very broad words . . . authorize one enactment of regulations to further any policy outlined in the whole of s. 3” (p. 13). In *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff’d [1985] 1 S.C.R. 174, Le Dain J.A., when he was in the Federal Court of Appeal, held that the same principle applies to the power to attach conditions to licences:

What was said concerning the validity of a regulation under [the predecessor to s. 10(1)] applies equally in my opinion to the validity of a condition attached to a licence under [the predecessor to s. 9(1)]. That section begins, like [the predecessor to s. 10(1)], with the words “In furtherance of the objects of the Commission”, and empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it “deems appropriate for the implementation of the broadcasting policy enunciated in section 3”, an authority that is, if anything, even broader than that which is conferred by [the predecessor to s. 10(1)(k)]. [Emphasis added; p. 192.]

pour assurer la réglementation et la surveillance du système de radiodiffusion canadienne de façon à lui permettre de mettre en œuvre la politique de radiodiffusion énoncée dans l’article 3 de la *Loi sur la radiodiffusion* [. . .] Dans l’exercice de ses pouvoirs d’attribuer ou de révoquer une licence, il est établi qu’il jouit d’une grande discrétion » : *Société Radio-Canada c. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (C.A.F.), par. 2.

[101] La vaste compétence dont jouit le CRTC découle des pouvoirs que lui confèrent en termes généraux le par. 5(1) et les al. 9(1)b) et 10(1)k), ainsi que du pouvoir discrétionnaire dont il est investi d’employer ces pouvoirs de la manière qu’il estime indiquée pour la mise en œuvre des objectifs énoncés au par. 3(1). Les tribunaux ont systématiquement statué sur la validité de l’exercice par le CRTC des pouvoirs que lui accordent ces diverses dispositions en appliquant le critère établi dans l’arrêt *CKOY* : Est-il possible de rattacher l’exercice du pouvoir à l’un des objectifs énumérés au par. 3(1)? Dans cette affaire, le juge Spence s’est penché sur l’exercice du pouvoir de prendre des règlements et il a indiqué que le libellé « très général » de la disposition « autorise la promulgation de règlements visant à mettre en œuvre toute politique énoncée à l’art. 3 dans son ensemble » (p. 13). Dans l’arrêt *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174, le juge Le Dain, alors juge de la Cour d’appel fédérale, a conclu que le même principe s’applique au pouvoir d’assortir les licences de conditions :

Ce qu’on a dit au sujet de la validité d’un règlement pris en vertu [de la disposition qu’a remplacée le par. 10(1)] s’applique également, à mon sens, à la validité d’une condition à laquelle est soumise une licence attribuée sous le régime [de la disposition qu’a remplacée le par. 9(1)]. Comme [la disposition qu’a remplacée le par. 10(1)], cet article commence par l’expression « Dans la poursuite des objets du Conseil », et autorise le comité de direction à soumettre une licence de radiodiffusion aux conditions propres à la situation du titulaire que le comité « estime appropriées pour la mise en œuvre de la politique de radiodiffusion énoncée dans l’article 3 », pouvoir qui est même plus large que celui conféré par [la disposition qu’a remplacée l’al. 10(1)k)]. [Italiques ajoutés; p. 192.]

In *T.W.U.*, Sexton J.A. reiterated that the *CKOY* test applies to the exercise of both the regulation-making and licence-condition powers. He held that

the CRTC has broad power to impose conditions of license. *The only limitation on the conditions that the CRTC may impose is that it must deem the conditions “appropriate for the implementation of the broadcasting policy set out in subsection 3(1).”* [Emphasis added; para. 48.]

[102] Moreover, courts have thus far recognized that the mandate granted to the CRTC under the *Broadcasting Act* is both economic and cultural (*T.W.U.*, at para. 28), not “primarily cultural”, as asserted by Justice Rothstein (at para. 32), and have upheld regulations and licensing conditions imposed by the CRTC in furtherance of economic objectives listed in the *Broadcasting Act*, but absent any specific grant of power.

[103] In *Canadian Broadcasting League*, as in the present case, at issue was the CRTC’s power to direct the economic relationship between participants in the broadcasting system and, specifically, whether the CRTC could fix the installation fees and maximum monthly fees that a BDU could charge to its subscribers. Le Dain J.A. held that the CRTC could do so under *either* its licensing power or its regulation-making power, rejecting the argument that the CRTC lacked the power to regulate rates and fees because it was not expressly granted in the *Broadcasting Act*.

[104] The CRTC’s jurisdiction to impose financial conditions on broadcast system participants was also upheld by the Federal Court of Appeal in *Canadian Motion Picture Distributors Assn. v. Partners of Viewer’s Choice Canada* (1996), 137 D.L.R. (4th) 561. The court held that the CRTC did not exceed its statutory mandate by requiring a pay-per-view licensee to share the revenues it earned

Dans *S.T.T.*, le juge Sexton de la Cour d’appel a rappelé que le critère établi dans *CKOY* s’applique à l’exercice tant du pouvoir de prendre des règlements que du pouvoir d’assortir les licences de certaines conditions. Il a tiré la conclusion suivante :

... le CRTC dispose d’un pouvoir étendu d’imposer des conditions de licence. *La seule restriction faite aux conditions que le CRTC peut imposer réside dans le fait que celui-ci doit estimer les conditions « indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion . . . ».* [Italiques ajoutés; para. 48.]

[102] Qui plus est, les tribunaux ont reconnu jusqu’à présent au mandat confié au CRTC par la *Loi sur la radiodiffusion* un caractère à la fois économique et culturel (*S.T.T.*, par. 28), et non « principalement culture[l] », comme le prétend le juge Rothstein (par. 32), et ils ont confirmé la validité de règlements et de conditions établis par le CRTC en vue de favoriser la réalisation des objectifs économiques énumérés dans la *Loi sur la radiodiffusion*, malgré l’absence d’un pouvoir précis à cet égard.

[103] Tout comme dans la présente espèce, dans l’affaire *Ligue de la radiodiffusion canadienne* le litige portait sur le pouvoir du CRTC de régir les rapports économiques liant les participants du système de radiodiffusion et, particulièrement, sur la question de savoir si le CRTC était habilité à fixer les frais d’installation ainsi que les tarifs mensuels maximums qu’une EDR pouvait demander à ses abonnés. Le juge Le Dain de la Cour d’appel a conclu que le CRTC était habilité à le faire en vertu *soit* de son pouvoir d’attribuer des licences *soit* de son pouvoir de prendre des règlements, et il a rejeté l’argument selon lequel cet organisme n’avait pas compétence pour réglementer les tarifs et les frais du fait que ce pouvoir ne lui était pas conféré expressément dans la *Loi sur la radiodiffusion*.

[104] Le pouvoir du CRTC d’imposer des conditions financières aux participants du système de radiodiffusion a également été confirmé par la Cour d’appel fédérale dans l’affaire *Assoc. canadienne des distributeurs de films c. Associés de Viewer’s Choice Canada*, [1996] A.C.F. n° 894 (QL). La Cour d’appel a jugé que le CRTC n’avait pas outre-passé le mandat que lui confie la loi en obligeant

from the distribution of feature films in equal parts with the copyright holder and the licensed programming undertaking that assembled the pay-per-view content. According to the court:

The reference to the film distribution industry as “an important element of the broadcasting system” *provides a clear link* to the Commission’s objects in subsection 5(1) of the *Act* and the broadcasting policy in subsection 3(1). [Emphasis added; p. 565.]

A similar “clear link” exists in this case.

[105] And in *T.W.U.*, Sexton J.A. found that the CRTC could enact a regulation that essentially deregulated basic cable service rates in areas where there was sufficient competition to let market forces take over. He found that the CRTC had an obligation, based on the policy objectives in s. 3(1), to ensure that programming was provided at affordable rates, and could rely on market forces to fulfill that objective. Similarly, in this case, the CRTC seeks to implement a market-based negotiation scheme consistent with the policy objectives in s. 3(1).

[106] In each of these cases, the CRTC regulated an economic aspect of the Canadian broadcasting system by requiring revenue splitting, by setting rates for services, or by deregulating them. None of these forms of regulation was tied to a specific and express grant of power in the *Broadcasting Act*. In each case, the CRTC was found to have jurisdiction under either or both of its general powers to make regulations and impose conditions on licences.

[107] The conclusion that the proposed regime is within CRTC jurisdiction is consistent with this broad mandate, most recently upheld by this

le titulaire d’une licence de télévision à la carte à partager les revenus qu’il tirait de la distribution de longs métrages sur une base égale avec le titulaire du droit d’auteur et avec l’entreprise de programmation autorisée ayant assemblé la programmation offerte à la carte. Pour reprendre les propos du tribunal :

Le renvoi à l’industrie de la distribution des films comme à « un élément important du système de la radiodiffusion » *établit un lien évident* avec la mission confiée au Conseil au paragraphe 5(1) de la *Loi* et la politique de radiodiffusion exposée au paragraphe 3(1). [Italiques ajoutés; par. 6.]

Nous sommes en présence d’un tel « lien évident » en l’espèce.

[105] De plus, dans *S.T.T.* le juge Sexton a conclu que le CRTC était habilité à prendre un règlement qui avait essentiellement pour effet de déréglementer les tarifs du service de câblodistribution de base dans les zones où la concurrence est suffisante pour laisser jouer les forces du marché. Selon le juge Sexton, le CRTC a, suivant les objectifs de politique énoncés au par. 3(1), l’obligation d’assurer la fourniture de la programmation à des tarifs abordables et il peut s’en remettre aux forces du marché pour atteindre cet objectif. De même, en l’espèce, le CRTC propose la mise en place d’un régime de libre négociation conforme aux objectifs prévus au par. 3(1).

[106] Dans chaque affaire mentionnée précédemment, le CRTC a réglementé un aspect économique du système canadien de radiodiffusion, tantôt en obligeant le partage des revenus, tantôt en fixant les tarifs des services ou en les déréglementant. Or, aucune de ces interventions du CRTC ne se rattachait à un pouvoir précis, expressément conféré par la *Loi sur la radiodiffusion*. Dans chaque instance, le CRTC s’est vu reconnaître la compétence nécessaire en vertu de son pouvoir général de prendre des règlements, de son pouvoir général d’assortir les licences de conditions, ou des deux.

[107] La conclusion selon laquelle le régime proposé relève de la compétence du CRTC est conforme à ce vaste mandat, lequel a été confirmé

Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. The issue was whether the CRTC could exercise the rate-setting authority it had under the *Telecommunications Act*, S.C. 1993, c. 38, to require local carriers to spend their deferral accounts by expanding broadband services and giving credits to consumers. This Court confirmed that the decision was entirely within the CRTC's mandate:

... the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, *a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake*. . . .

. . . .

... it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with *considerable scope in establishing and approving the use to be made of deferral accounts*. [Emphasis added; paras. 38 and 55.]

[108] This broad mandate to set rates in furtherance of Canada's telecommunications policy is analogous to the CRTC's broad mandate to set licensing conditions in furtherance of Canada's broadcasting policy as it has purported to do in the 2010 Policy. Both mandates involve "a polycentric exercise", necessitating a "considerable scope" of jurisdiction.

[109] Having determined that the *Broadcasting Act* would grant authority to the CRTC to implement the new regime, the question then is whether the regime creates an "unavoidable conflict" with

récemment par notre Cour dans l'arrêt *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764. Il s'agissait dans cette affaire de savoir si le CRTC pouvait exercer le pouvoir de tarification dont il dispose en vertu de la *Loi sur les télécommunications*, L.C. 1993, ch. 38, pour obliger les fournisseurs locaux à utiliser leur compte de report afin d'étendre le service à large bande et de verser un crédit aux consommateurs. La Cour a confirmé que la décision du CRTC relevait entièrement de son mandat :

... les questions soulevées dans les présents pourvois ressortissent donc à l'essence même de l'expertise spécialisée du CRTC. Le fond du différend concerne en fait la méthode d'établissement des tarifs et l'affectation de certains fonds provenant de ces tarifs, *un exercice polycentrique que le législateur a confié au CRTC et pour lequel ce dernier possède une compétence particulière*. . . .

. . . .

... le vaste pouvoir discrétionnaire conféré au CRTC pour la détermination des tarifs justes et raisonnables exigés par l'art. 27, son pouvoir d'imposer à une entreprise, en vertu de l'art. 37, l'adoption de toute méthode comptable qu'il estime appropriée et l'obligation qui lui est faite par l'art. 47 de veiller à la réalisation des grands objectifs de la politique canadienne de télécommunication énoncés à l'art. 7 indiquent que la *Loi sur les télécommunications* lui donne une *latitude considérable pour établir les comptes de report et approuver l'utilisation qui en sera faite*. [Italiques ajoutées; par. 38 et 55.]

[108] Ce large mandat — à savoir l'établissement de tarifs pour favoriser la mise en œuvre de la politique canadienne de télécommunication — est analogue au large mandat qu'il s'est donné dans la Politique de 2010 — à savoir assortir les licences de certaines conditions pour favoriser la mise en œuvre de la politique canadienne de radiodiffusion. Ces deux mandats supposent un « exercice polycentrique », qui exige une compétence conférant « une latitude considérable ».

[109] Maintenant que nous avons jugé que la *Loi sur la radiodiffusion* accorde au CRTC le pouvoir de mettre sur pied le nouveau régime, il faut se demander si ce régime créerait avec la *Loi sur le*

the *Copyright Act* in a way that would invalidate this preliminary interpretive conclusion.

[110] The BDUs point to two unavoidable conflicts between the proposed regime and the provisions of the *Copyright Act*. First, they argue that the regime conflicts with s. 21(1)(c). This provision states that a “broadcaster” — which includes a local station — has the sole right “to authorize another broadcaster to retransmit [its signals] to the public”. The definition of “broadcaster” in s. 2 of the *Copyright Act*, however, *excludes* BDUs, as entities whose “primary activity in relation to communication signals is their retransmission”. Since BDUs are excluded from the definition, they argue that they need not be “authorize[d]” under s. 21(1)(c) at all. This provision therefore conflicts with the proposed regime, which not only gives local stations the right to authorize BDUs to retransmit their signals, but also gives them the right to block BDUs from retransmitting those signals altogether.

[111] In our view, there is no unavoidable conflict with s. 21(1)(c). There is nothing in either the definition of “broadcaster” or in s. 21(1)(c) of the *Copyright Act* that purports to immunize BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime.

[112] Section 21(1)(c) deals only with the extent to which local stations, as “broadcasters”, have a copyright in their communication signals. It does not affect the licensing requirements under the *Broadcasting Act*. While BDUs do not need permission to retransmit signals under the *Copyright Act*, that does not mean they are free to retransmit

droit d’auteur un « conflit inévitable » ayant pour effet d’invalider notre conclusion interprétative préliminaire.

[110] Les EDR font état de deux conflits inévitables entre le régime proposé et les dispositions de la *Loi sur le droit d’auteur*. Premièrement, elles prétendent que le régime entre en conflit avec l’al. 21(1)(c). Suivant cette disposition, un « radiodiffuseur » — terme qui s’entend notamment d’une station locale — a le droit exclusif « d’autoriser un autre radiodiffuseur à [. . .] retransmettre [ses signaux] au public ». Toutefois, les EDR sont expressément *exclues* de la définition de « radiodiffuseur » à l’art. 2 de la *Loi sur le droit d’auteur* en tant qu’entités « dont l’activité principale, liée au signal de communication, est la retransmission de celui-ci ». Comme elles sont exclues du champ d’application de la définition, elles font valoir qu’elles n’ont pas besoin d’être « autoris[ées] » par quiconque en vertu de l’al. 21(1)(c). Par conséquent, cette disposition entrerait en conflit avec le régime proposé, lequel permet aux stations locales non seulement d’autoriser les EDR à retransmettre leurs signaux, mais également d’empêcher complètement la retransmission de ces signaux.

[111] À notre avis, il n’existe pas de conflit inévitable avec l’al. 21(1)(c). Rien dans cette disposition de la *Loi sur le droit d’auteur* ou dans la définition de « radiodiffuseur » n’a pour effet de soustraire les EDR aux exigences établies par le CRTC en matière d’attribution de licences dans le cadre de son mandat relatif à la radiodiffusion. Les EDR tiennent leur droit de retransmettre des signaux uniquement des licences qui leur sont attribuées en vertu de l’art. 9 de la *Loi sur la radiodiffusion*, et elles doivent satisfaire aux conditions dont le CRTC a assorti leur licence, y compris celles prévues dans le régime proposé.

[112] L’alinéa 21(1)(c) traite uniquement de l’étendue du droit d’auteur dont jouit une station locale, à titre de « radiodiffuseur », à l’égard de ses signaux de communication. Il n’a aucune incidence sur les exigences en matière d’attribution de licence établies en vertu de la *Loi sur la radiodiffusion*. Bien que les EDR soient libres de retransmettre des signaux sans

signals without permission under the *Broadcasting Act*.

[113] The second conflict alleged by the BDUs is with s. 31(2)(d) of the *Copyright Act*. The full provision states:

31. . . .

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;
- (c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
- (d) in the case of the retransmission of a *distant signal*, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and
- (e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

[114] This section means that it is not an infringement of copyright if a retransmitter, like a BDU, is retransmitting local or distant signals, is retransmitting lawfully under the *Broadcasting Act*, and, if it is retransmitting a distant signal, has paid copyright royalties. The BDUs' main argument under this provision is that even though s. 31(2)(a) refers to *both* "local" and "distant" signals, s. 31(2)(d) limits royalty payments to distant signals only. This reference to *distant* signals in s. 31(2)(d), they say, conflicts with the proposed regime, which effectively creates royalties for local signals, which are generally the type of signals emitted by local stations.

permission en vertu de la *Loi sur le droit d'auteur*, cela ne signifie pas qu'elles sont également libres de le faire en vertu de la *Loi sur la radiodiffusion*.

[113] Le deuxième conflit invoqué par les EDR concerne l'al. 31(2)d) de la *Loi sur le droit d'auteur* :

31. . . .

(2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :

- a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;
- b) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;
- c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;
- d) dans le cas de la retransmission d'un *signal éloigné*, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;
- e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)b).

[114] Il ressort de cette disposition qu'il n'y a pas violation du droit d'auteur si un retransmetteur, par exemple une EDR, retransmet des signaux locaux ou éloignés, si la retransmission est licite en vertu de la *Loi sur la radiodiffusion* et, lorsqu'il s'agit d'un signal éloigné, si le retransmetteur a acquitté les redevances payables au titre du droit d'auteur. Le principal argument invoqué par les EDR sur le fondement de cette disposition consiste à dire que, même si l'al. 31(2)a) mentionne à la fois les signaux « locaux » et les signaux « éloignés », l'al. 31(2)d) limite à la retransmission des signaux éloignés uniquement l'obligation de payer des redevances. Selon les EDR, la mention des signaux éloignés dans cette dernière disposition entre en conflit avec le régime proposé, lequel exige le paiement de redevances pour la retransmission de signaux locaux, c'est-à-dire généralement le type de signaux qu'émettent les stations locales.

[115] This argument turns s. 31(2)(d) on its head. Even within the context of the *Copyright Act* alone, s. 31(2)(d) simply requires that BDUs pay a copyright royalty to copyright owners for retransmitting “distant signal[s]”. Nothing in the plain meaning of this provision actually *prevents* a copyright royalty for retransmitting “local signal[s]”. If Parliament had intended to prevent such royalties for local signals under any circumstances, it would have expressly said so.

[116] But, despite the plain wording of s. 31(2)(d), the BDUs argue that it was Parliament’s implicit intention to prevent royalties for the retransmission of local signals. They point to a number of reports, committee transcripts and submissions relating to the legislative history of the *Copyright Act*, which they claim demonstrate Parliament’s consistent refusal to grant such royalties. With respect, these materials are of limited assistance. The fact that Parliament may have decided not to impose royalties on the retransmission of local signals for the benefit of copyright owners has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission licence under the *Broadcasting Act*. We therefore do not accept that s. 31(2)(d) of the *Copyright Act* creates an unavoidable conflict with the proposed regime.

[117] The lack of a conflict between the proposed regime and s. 31(2)(d) is highlighted by s. 31(2)(b), which states that BDUs are only entitled to avoid copyright infringement for retransmitting signals where “the retransmission is lawful under the *Broadcasting Act*”. We agree with the majority of the Federal Court of Appeal that s. 31(2)(b) demonstrates Parliament’s clear intention that the conditions placed on BDUs under the *Broadcasting*

[115] Leur argument fait dire à l’al. 31(2)d) quelque chose qu’il ne dit pas. Même interprété à la seule lumière de la *Loi sur le droit d’auteur*, cet alinéa requiert simplement que les EDR qui retransmettent des « signa[ux] éloigné[s] » versent des redevances aux titulaires des droits d’auteur sur ces signaux. Le sens de cette disposition est clair et rien dans celle-ci n’a pour effet d’*empêcher* concrètement que des redevances puissent être exigées, au titre du droit d’auteur, pour la retransmission de « signa[ux] loca[ux] ». Si le législateur avait voulu interdire de telles redevances en toute circonstance, il l’aurait dit expressément.

[116] Toutefois, malgré le libellé clair de l’al. 31(2)d), les EDR font valoir que le législateur avait implicitement l’intention d’interdire les redevances pour la retransmission de signaux locaux. Elles invoquent à cet égard un certain nombre de rapports, transcriptions de délibérations de comités et mémoires relatifs à l’historique législatif de la *Loi sur le droit d’auteur* qui, selon elles, démontrent que le législateur a constamment refusé d’accorder de telles redevances. En toute déférence, ces documents n’ont qu’une utilité limitée. Le fait que le législateur ait pu décider de ne pas subordonner la retransmission de signaux locaux au versement de redevances aux titulaires du droit d’auteur sur ces signaux n’a aucun lien avec la question de savoir si les EDR peuvent être requises de verser une compensation aux stations locales pour une autre fin, à savoir pour satisfaire aux conditions assortissant leurs licences de retransmission en vertu de la *Loi sur la radiodiffusion*. Par conséquent, nous ne pouvons accepter l’argument selon lequel l’al. 31(2)d) de la *Loi sur le droit d’auteur* crée un conflit inévitable avec le régime proposé.

[117] L’absence de conflit ressort également de l’al. 31(2)b), qui précise que la retransmission de signaux ne viole pas le droit d’auteur tant que « la retransmission est licite en vertu de la *Loi sur la radiodiffusion* ». Nous souscrivons à la conclusion des juges majoritaires de la Cour d’appel fédérale selon laquelle l’al. 31(2)b) démontre l’intention claire du législateur de donner aux conditions imposées aux EDR en vertu de la *Loi sur la*

Act in furtherance of Canada's broadcasting policy are ranked ahead of the BDUs' statutory right to retransmit signals under s. 31(2) of the *Copyright Act*.

[118] The BDUs argue, however, that the language in s. 31(2)(b) is too broad to override the specific language in s. 31(2)(d) limiting royalties to those for "distant signals". They cite two cases to support their argument: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140. Neither of these two cases deals with a conflict between statutes, and neither stands for the proposition that a single word in a provision — such as "distant" signal — can defeat an otherwise express and clear legislative intention. *Barrie Public Utilities* dealt only with whether the CRTC had jurisdiction to grant a right of access to a utility's power poles under s. 43(5) of the *Telecommunications Act*, and *ATCO* dealt with whether the Alberta Energy and Utilities Board had jurisdiction to order that proceeds from an asset sale be allocated to a utility's customers under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17.

[119] At the end of the day, the BDUs' argument is that the proposed regime somehow creates a new copyright. They argue that the exclusive right to authorize or block retransmission by BDUs, and the requirement that BDUs compensate local stations for retransmitting their signals, creates a copyright for local stations in the retransmission of their signals. According to the BDUs, this violates s. 89 of the *Copyright Act*, which states that "[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament". It also violates this Court's statement in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, that "copyright is a creature of statute and the rights

radiodiffusion pour la mise en œuvre de la politique canadienne de radiodiffusion priorité sur le droit légal de ces entreprises de retransmettre des signaux conformément au par. 31(2) de la *Loi sur le droit d'auteur*.

[118] Cependant, les EDR affirment que le libellé de l'al. 31(2)(b) est trop général pour écarter le libellé explicite de l'al. 31(2)(d), lequel limite le paiement de redevances aux seuls « signaux éloignés ». Elles invoquent deux arrêts au soutien de leur argument : *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476, et *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140. Or, aucun de ces arrêts ne porte sur un conflit de lois et ne permet d'affirmer que la seule présence d'un mot donné dans une disposition — par exemple « éloigné » — puisse écarter l'intention par ailleurs claire et expresse du législateur. Dans *Barrie Public Utilities*, il s'agissait uniquement de décider si le par. 43(5) de la *Loi sur les télécommunications* habilitait le CRTC à donner accès aux poteaux électriques d'une entreprise de services publics. L'affaire *ATCO* portait sur la question de savoir si l'office de l'énergie et des services publics de l'Alberta avait compétence pour attribuer le produit de la vente d'un bien aux clients d'un service public en vertu du par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17.

[119] En définitive, l'argument des EDR consiste à dire que le régime proposé crée en quelque sorte un nouveau type de droit d'auteur. Elles prétendent que le droit exclusif des stations locales d'autoriser ou d'interdire la retransmission de leurs signaux par les EDR, conjugué à l'obligation imposée à ces dernières de compenser les premières pour la retransmission de ces signaux, a pour effet de créer en faveur des stations locales un droit d'auteur sur la retransmission de leurs signaux. Selon les EDR, cette situation viole l'art. 89 de la *Loi sur le droit d'auteur*, lequel précise que « [n]ul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale ». Elle serait également incompatible avec la

and remedies provided by the *Copyright Act* are exhaustive” (para. 9).

[120] We do not see the proposed regime as giving local stations a copyright in the retransmission of their television signals. Section 2 of the *Copyright Act* defines “copyright” in the case of a communication signal as “the rights described in . . . section 21”. The exhaustive definition of copyright in s. 21 leaves out the right to authorize retransmission by BDUs. We do not see the proposed regime as *amending* this definition, something it cannot in any event do, given s. 89, but as instituting a different type of regulation with respect to an aspect of broadcasting that is simply not included in the exhaustive statutory scheme of copyright.

[121] There are significant functional differences, as well. The copyright owner does not need to forego any other entitlements to claim a copyright. Instead, copyright automatically attaches to a communication signal, lasting for 50 years after the end of the calendar year in which it was broadcast: *Copyright Act*, s. 23(1)(c). The proposed regime, in contrast, gives local stations a limited power, and only *vis-à-vis* BDUs. The local stations have to forego their existing entitlements under the current regime in order to participate in the new regime. Moreover, the local stations’ power to prevent BDUs from retransmitting their signals is conditional on a complete breakdown of negotiations and a resulting lack of agreement with the BDUs. There are additional conditions under the proposed regime that are not placed on copyright owners: for example, local stations must spend approximately 30 percent of any negotiated compensation they receive on Canadian programming, with 5 percent dedicated to “programs of national interest”. Finally, unlike copyright, the new regime is renewable every three years and subject to ongoing regulatory oversight by the CRTC: 2010 Policy,

conclusion exprimée par la Cour dans l’arrêt *CCH Canadienne Ltée c. Barreau du Haut-Canada*, 2004 CSC 13, [2004] 1 R.C.S. 339, selon laquelle « le droit d’auteur tire son origine de la loi, et les droits et recours que prévoit la *Loi sur le droit d’auteur* sont exhaustifs » (par. 9).

[120] Nous ne considérons pas que le régime proposé confère aux stations locales un droit d’auteur à l’égard de la retransmission de leurs signaux de télévision. Aux termes de l’art. 2 de la *Loi sur le droit d’auteur*, le terme « droit d’auteur » s’entend, dans le cas d’un signal de communication, « du droit visé [. . .] à l’article 21 ». La définition exhaustive de ce terme à l’art. 21 ne prévoit pas le droit d’autoriser la retransmission de signaux par une EDR. Selon nous, le régime proposé n’a pas pour effet de *modifier* cette définition — effet qu’il ne peut avoir de toute façon, compte tenu de l’art. 89 —, mais d’instaurer un autre type de réglementation à l’égard d’un aspect de la radiodiffusion que le régime législatif exhaustif en matière de droit d’auteur n’encadre tout simplement pas.

[121] Il existe en outre des différences fonctionnelles importantes. Le titulaire du droit d’auteur n’est pas tenu de renoncer à un autre droit pour revendiquer le droit d’auteur. En effet, ce droit s’applique automatiquement au signal de communication pendant 50 ans suivant la fin de l’année civile au cours de laquelle il a été émis : *Loi sur le droit d’auteur*, al. 23(1)(c). À l’inverse, le régime proposé confère un pouvoir limité aux stations locales, et ce, uniquement à l’égard des EDR. Les stations locales doivent renoncer aux droits offerts par le régime actuel pour participer au nouveau régime. Qui plus est, l’exercice par une station locale du pouvoir d’interdire la retransmission de ses signaux par une EDR est subordonné à l’échec total des négociations avec cette dernière et à l’absence d’entente. Le régime proposé impose d’autres conditions qui ne sont pas exigées des titulaires du droit d’auteur : par exemple, les stations locales doivent dépenser, au titre des émissions canadiennes, environ 30 p. 100 des revenus tirés des ententes négociées, dont 5 p. 100 au titre des « émissions d’intérêt national ». Enfin, contrairement au droit d’auteur, le régime proposé est renouvelable tous

paras. 51, 74-75 and 155-164. The proposed regime, therefore, is far from “functionally equivalent”, as stated by the dissent in the Federal Court of Appeal (at para. 84), to giving local stations a full copyright in the retransmission of their signals.

[122] The regime aims to further the objectives found in s. 3(1)(e), (f) and (s), which call for each element of the Canadian broadcasting system to contribute to the creation and presentation of Canadian programming; call for broadcasting undertakings to make maximum use of Canadian creative and other resources in the creation and presentation of programming; and call for private networks, to the extent consistent with the resources available to them, to contribute to the creation and presentation of Canadian programming. The CRTC has every right to turn to market-based means of fulfilling these specific objectives of Canadian broadcasting policy. These objectives differ from the more general copyright objectives of “promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30. Indeed, as discussed above, BDUs are already required to make financial contributions under the current regime, and they are already required to negotiate compensation with local stations for the retransmission of distant signals.

[123] In our view, therefore, there is no unavoidable conflict with the *Copyright Act* that would eliminate the CRTC’s jurisdiction to implement the proposed regime.

[124] The BDUs also make policy arguments, submitting that giving local stations the ability to block their signals, as well as the extra compensation to local stations, will increase costs and

les trois ans et fait l’objet de la surveillance continue du CRTC : Politique de 2010, par. 51, 74-75 et 155-164. Par conséquent, les deux régimes sont loin d’être « fonctionnellement équivalents », comme le prétend le juge dissident de la Cour d’appel fédérale (par. 84), et le régime proposé n’a pas pour effet de reconnaître aux stations locales le plein droit d’auteur à l’égard de la retransmission de leurs signaux.

[122] Le régime vise à réaliser les objectifs énoncés aux al. 3(1)e), f) et s), dispositions qui, respectivement, invitent tous les éléments du système de radiodiffusion canadien à contribuer à la création et à la présentation d’une programmation canadienne, invitent les entreprises de radiodiffusion à faire appel au maximum aux ressources canadiennes, créatrices et autres, pour la création et la présentation de leur programmation et, enfin, invitent les réseaux privés à contribuer, dans la mesure où leurs ressources financières le leur permettent, à la création et à la présentation d’une programmation canadienne. Le CRTC a entièrement le droit de recourir à des mesures basées sur les règles du marché pour réaliser les objectifs précisés dans la politique canadienne de radiodiffusion. Ces objectifs diffèrent de ceux, plus généraux, que vise le droit d’auteur, soit « la promotion, dans l’intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et [. . .] l’obtention d’une juste récompense pour le créateur » : *Théberge c. Galerie d’Art du Petit Champlain inc.*, 2002 CSC 34, [2002] 2 R.C.S. 336, par. 30. D’ailleurs, comme nous l’avons expliqué précédemment, les EDR sont déjà tenues de verser une contribution financière en vertu du régime actuel et de négocier avec les stations locales les sommes payables à celles-ci pour la retransmission de leurs signaux éloignés.

[123] Par conséquent, il n’existe à notre avis aucun conflit inévitable avec la *Loi sur le droit d’auteur* qui priverait le CRTC du pouvoir de mettre en œuvre le régime proposé.

[124] Les EDR invoquent également des considérations d’intérêt général. Elles font valoir que la faculté accordée aux stations locales de bloquer leurs signaux ainsi que la compensation supplémentaire

signal interruptions, ultimately hurting end consumers. We do not find this argument persuasive. First, retransmitting local signals is currently the *only* instance where a BDU can distribute signals without the broadcaster's prior consent. The CRTC has implemented mandatory negotiation-based schemes for other services, including specialty channels, pay-per-view and video-on-demand.

[125] More importantly, however, the new regime's potential success in achieving the broadcasting policy objectives is completely irrelevant to determining whether the CRTC has jurisdiction to implement it. Any question as to the wisdom of the regime is a question solely for the CRTC as the single broadcasting authority in s. 3(2) of the *Broadcasting Act*. As an expert body, the CRTC, not the courts, is in the best position to decide what measures are necessary to save local stations from going bankrupt. In any event, if for any reason the proposed regime proves unworkable in the future, the CRTC has both the authority and the necessary expertise to make the appropriate changes.

[126] We would therefore dismiss the appeal with costs.

APPENDIX

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

. . .

“broadcasting undertaking” includes a distribution undertaking, a programming undertaking and a network;

. . .

versée à ces dernières feront augmenter les coûts et le nombre d'interruptions de signaux, et qu'en définitive ce sont les consommateurs qui en souffriront. Cet argument ne nous convainc pas. Tout d'abord, à l'heure actuelle, la retransmission de signaux locaux est le *seul* cas où une EDR peut distribuer des signaux sans le consentement préalable du radiodiffuseur. Le CRTC a mis sur pied des régimes de négociation applicables à d'autres services, y compris les chaînes spécialisées, la télévision à la carte et la vidéo sur demande.

[125] Facteur plus important toutefois, la question de savoir si le nouveau régime permettra ou non la réalisation des objectifs de la politique de radiodiffusion n'a absolument aucune pertinence pour décider si le CRTC a compétence pour mettre ce régime en œuvre. Toute question concernant l'opportunité du régime relève uniquement du CRTC, en sa qualité de seul organisme chargé de régir la radiodiffusion aux termes du par. 3(2) de la *Loi sur la radiodiffusion*. En tant qu'organisme expert, le CRTC est mieux placé que les tribunaux judiciaires pour décider des mesures nécessaires pour sauver les stations locales de la faillite. Quoi qu'il en soit, si le régime proposé se révélait ultérieurement inapplicable pour une raison ou pour une autre, le CRTC possède tant la compétence que l'expertise nécessaire pour y apporter les changements qui s'imposent.

[126] Par conséquent, nous sommes d'avis de rejeter le pourvoi avec dépens.

ANNEXE

Loi sur la radiodiffusion, L.C. 1991, ch. 11

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« émission » Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l'exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres.

. . .

“distribution undertaking” means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

. . .

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

. . .

“programming undertaking” means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

. . .

3. (1) It is hereby declared as the broadcasting policy for Canada that

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming . . .;

(g) the programming originated by broadcasting undertakings should be of high standard;

. . .

(s) private networks and programming undertakings should, to an extent consistent with

« entreprise de distribution » Entreprise de réception de radiodiffusion pour retransmission, à l’aide d’ondes radioélectriques ou d’un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d’habitation, ou en vue de sa réception par une autre entreprise semblable.

. . .

« entreprise de programmation » Entreprise de transmission d’émissions soit directement à l’aide d’ondes radioélectriques ou d’un autre moyen de télécommunication, soit par l’intermédiaire d’une entreprise de distribution, en vue de leur réception par le public à l’aide d’un récepteur.

. . .

« entreprise de radiodiffusion » S’entend notamment d’une entreprise de distribution ou de programmation, ou d’un réseau.

. . .

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

. . .

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d’une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation . . .;

g) la programmation offerte par les entreprises de radiodiffusion devrait être de haute qualité;

. . .

s) les réseaux et les entreprises de programmation privés devraient, dans la mesure où leurs ressources

the financial and other resources available to them,

- (i) contribute significantly to the creation and presentation of Canadian programming, and
- (ii) be responsive to the evolving demands of the public; and
- (t) distribution undertakings
 - (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

. . .

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services

. . .

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

5. (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

- (a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;
- (b) takes into account regional needs and concerns;
- (c) is readily adaptable to scientific and technological change;

financières et autres le leur permettent, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

t) les entreprises de distribution :

- (i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

. . .

(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion . . .

. . .

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

5. (1) Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion.

(2) La réglementation et la surveillance du système devraient être souples et à la fois:

- a) tenir compte des caractéristiques de la radiodiffusion dans les langues française et anglaise et des conditions différentes d'exploitation auxquelles sont soumises les entreprises de radiodiffusion qui diffusent la programmation dans l'une ou l'autre langue;
- b) tenir compte des préoccupations et des besoins régionaux;
- c) pouvoir aisément s'adapter aux progrès scientifiques et techniques;

- (d) facilitates the provision of broadcasting to Canadians;
- (e) facilitates the provision of Canadian programs to Canadians;
- (f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
- (g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

9. (1) Subject to this Part, the Commission may, in furtherance of its objects,

- (a) establish classes of licences;
- (b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee
 - (i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and
 - (ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(l) and (m);
- (c) amend any condition of a licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission's own motion;
- (d) issue renewals of licences for such terms not exceeding seven years and subject to such conditions as comply with paragraph (b);
- (e) suspend or revoke any licence;
- (f) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

(d) favoriser la radiodiffusion à l'intention des Canadiens;

(e) favoriser la présentation d'émissions canadiennes aux Canadiens;

(f) permettre la mise au point de techniques d'information et leur application ainsi que la fourniture aux Canadiens des services qui en découlent;

(g) tenir compte du fardeau administratif qu'elles sont susceptibles d'imposer aux exploitants d'entreprises de radiodiffusion.

(3) Le Conseil privilégie, dans les affaires dont il connaît, les objectifs de la politique canadienne de radiodiffusion en cas de conflit avec ceux prévus au paragraphe (2).

9. (1) Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :

(a) établir des catégories de licences;

(b) attribuer des licences pour les périodes maximales de sept ans et aux conditions liées à la situation du titulaire qu'il estime indiquées pour la mise en œuvre de la politique canadienne de radiodiffusion, et, dans le cas de licences attribuées à la Société, lui permettant, à son avis, d'offrir la programmation visée aux alinéas 3(1)l) et m);

(c) modifier les conditions d'une licence soit sur demande du titulaire, soit, plus de cinq ans après son attribution ou son renouvellement, de sa propre initiative;

(d) renouveler les licences pour les périodes maximales de sept ans et aux conditions visées à l'alinéa b);

(e) suspendre ou révoquer toute licence;

(f) obliger les titulaires de licences à obtenir l'approbation préalable par le Conseil des contrats passés avec les exploitants de télécommunications pour la distribution — directement au public — de programmation au moyen de l'équipement de ceux-ci;

(g) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting; and

(h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

. . .

10. (1) The Commission may, in furtherance of its objects, make regulations

(a) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(b) prescribing what constitutes a Canadian program for the purposes of this Act;

(c) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(f) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

(g) respecting the carriage of any foreign or other programming services by distribution undertakings;

(h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct

g) obliger les titulaires de licences d'exploitation d'entreprises de distribution à privilégier la fourniture de radiodiffusion;

h) obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

. . .

10. (1) Dans l'exécution de sa mission, le Conseil peut, par règlement :

a) fixer la proportion du temps d'antenne à consacrer aux émissions canadiennes;

b) définir « émission canadienne » pour l'application de la présente loi;

c) fixer les normes des émissions et l'attribution du temps d'antenne pour mettre en œuvre la politique canadienne de radiodiffusion;

d) régir la nature de la publicité et le temps qui peut y être consacré;

e) fixer la proportion du temps d'antenne pouvant être consacrée à la radiodiffusion d'émissions — y compris les messages publicitaires et annonces — de nature partisane, ainsi que la répartition équitable de ce temps entre les partis politiques et les candidats;

f) fixer les conditions d'exploitation des entreprises de programmation faisant partie d'un réseau ainsi que les conditions de radiodiffusion des émissions de réseau et déterminer le temps d'antenne à réserver à celles-ci par ces entreprises;

g) régir la fourniture de services de programmation — même étrangers — par les entreprises de distribution;

h) pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

i) préciser les renseignements que les titulaires de licences doivent lui fournir en ce qui concerne leurs émissions et leur situation financière ou, sous

and management of their affairs as the regulations may specify;

(j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

(k) respecting such other matters as it deems necessary for the furtherance of its objects.

Copyright Act, R.S.C. 1985, c. C-42

2. In this Act,

. . .

“broadcaster” means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission;

. . .

“communication signal” means radio waves transmitted through space without any artificial guide, for reception by the public;

. . .

“copyright” means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer’s performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal;

. . .

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

. . .

tout autre rapport, la conduite et la direction de leurs affaires;

j) régir la vérification et l’examen des livres de comptes et registres des titulaires de licences par le Conseil ou ses représentants;

k) prendre toute autre mesure qu’il estime nécessaire à l’exécution de sa mission.

Loi sur le droit d’auteur, L.R.C. 1985, ch. C-42

2. Les définitions qui suivent s’appliquent à la présente loi.

. . .

« droit d’auteur » S’entend du droit visé :

- a) dans le cas d’une œuvre, à l’article 3;
- b) dans le cas d’une prestation, aux articles 15 et 26;
- c) dans le cas d’un enregistrement sonore, à l’article 18;
- d) dans le cas d’un signal de communication, à l’article 21.

. . .

« radiodiffuseur » Organisme qui, dans le cadre de l’exploitation d’une entreprise de radiodiffusion, émet un signal de communication en conformité avec les lois du pays où il exploite cette entreprise; est exclu de la présente définition l’organisme dont l’activité principale, liée au signal de communication, est la retransmission de celui-ci.

. . .

« signal de communication » Ondes radioélectriques diffusées dans l’espace sans guide artificiel, aux fins de réception par le public.

. . .

3. (1) Le droit d’auteur sur l’œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’œuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’œuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

. . .

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.

. . .

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

- (a) to fix it,
- (b) to reproduce any fixation of it that was made without the broadcaster's consent,
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

. . .

31. (1) In this section,

“new media retransmitter” means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

“retransmitter” means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

. . .

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

(1.1) Dans le cadre d'une communication effectuée au titre de l'alinéa (1)f), une œuvre est fixée même si sa fixation se fait au moment de sa communication.

. . .

21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :

- a) de le fixer;
- b) d'en reproduire toute fixation faite sans son autorisation;
- c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
- d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas a), b) et d).

. . .

31. (1) Les définitions qui suivent s'appliquent au présent article.

. . .

« retransmetteur » Personne, autre qu'un retransmetteur de nouveaux médias, dont l'activité est comparable à celle d'un système de retransmission par fil.

« retransmetteur de nouveaux médias » Personne dont la retransmission est légale selon les dispositions de la *Loi sur la radiodiffusion* uniquement en raison de l'*Ordonnance d'exemption relative aux entreprises de radiodiffusion de nouveaux médias* rendue par le Conseil de la radiodiffusion et des télécommunications

“signal” means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

(3) The Governor in Council may make regulations

(a) defining “local signal” and “distant signal” for the purposes of subsection (2); and

(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

Appeal allowed with costs throughout, DESCHAMPS, ABELLA, CROMWELL and KARAKATSANIS JJ. dissenting.

Solicitors for the appellant Cogeco Cable Inc.: McCarthy Tétrault, Toronto.

Solicitors for the appellants Rogers Communications Inc. and TELUS Communications Company: Fasken Martineau DuMoulin, Ottawa.

Solicitors for the appellant Shaw Communications Inc.: Davies Ward Phillips & Vineberg, Toronto.

canadiennes à l'Annexe A de son avis public 1999-197, tel que modifié de temps à autre.

« signal » Tout signal porteur d'une œuvre transmis à titre gratuit au public par une station terrestre de radio ou de télévision.

(2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une œuvre au public par télécommunication si, à la fois :

a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;

b) la retransmission est licite en vertu de la *Loi sur la radiodiffusion*;

c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;

d) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;

e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3)b).

(3) Le gouverneur en conseil peut, par règlement :

a) définir « signal local » et « signal éloigné » pour l'application du paragraphe (2);

b) fixer des conditions pour l'application de l'alinéa (2)e) et, le cas échéant, prévoir si elles s'appliquent à l'ensemble des retransmetteurs ou à une catégorie de ceux-ci.

Pourvoi accueilli avec dépens devant toutes les cours, les juges DESCHAMPS, ABELLA, CROMWELL et KARAKATSANIS sont dissidents.

Procureurs de l'appelante Cogeco Câble Inc. : McCarthy Tétrault, Toronto.

Procureurs des appelantes Rogers Communications Inc. et TELUS Communications Company : Fasken Martineau DuMoulin, Ottawa.

Procureurs de l'appelante Shaw Communications Inc. : Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.: Goodmans, Toronto.

Solicitors for the respondent Canwest Television Limited Partnership: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener: Canadian Radio-television and Telecommunications Commission, Gatineau.

Procureurs des intimées Bell Media Inc. (auparavant CTV Globemedia Inc.), V Interactions Inc. et Newfoundland Broadcasting Co. Ltd.: Goodmans, Toronto.

Procureurs de l'intimée Canwest Television Limited Partnership : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenant : Conseil de la radiodiffusion et des télécommunications canadiennes, Gatineau.

Tab 6

Court of Queen's Bench of Alberta

Citation: Business Watch International Inc. v. Alberta (Information and Privacy Commissioner), 2009 ABQB 10

Date: 20090108

Docket: 0803 04984, 0803 04558, 0803 04581

Registry: Edmonton

In the Matter of a complaint made to the Information and Privacy Commissioner of Alberta under the Personal Information Protection Act, R.S.A. 2003, c. P-6.5 ("PIPA") and the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 ("FOIP Act")

And in the matter of a public oral inquiry into case file numbers P0363, F3561 and F3562 pursuant to a complaint made by Kelly Buryniuk regarding the disclosure of personal information by organization EMU Inc., operating as Cash Converters (Millwoods) and regarding the affected parties The City of Edmonton, The Edmonton Police Service and Business Watch International and regarding the intervenors, the Alberta Urban Municipalities Association and the Alberta Association of Chiefs of Police

And in the matter of orders F2007-001, F2007-002 and P2007-001 by the Information and Privacy Commissioner Frank Work issued on February 15, 2008

Between:

Business Watch International Inc.

Applicant

- and -

**Information and Privacy Commissioner
and Kelly Buryniuk**

Respondents

**Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit**

Summary

[1] In January, 2006, Kelly Buryniuk, an Edmonton pawnshop owner, initiated a test case by complaining to the Information and Privacy Commissioner about the City of Edmonton's Business Licence Bylaw which requires pawnshops to collect from pawnors certain personal information about themselves (name, date of birth, gender, eye colour and hair colour) together with a complete description of the goods pawned and which allows that information to be provided to the Edmonton Police Service. Mr. Buryniuk described this system as an "unwarranted collection and transmission of my personal and confidential information".

[2] Pursuant to the terms of Edmonton's business licensing bylaw, Edmonton's City Manager instructed pawnshops and second hand stores to record the information required by the bylaw on an electronic database. Business Watch International Inc. executed a contract with the City of Edmonton pursuant to which BWI manages the database containing the information collected by the pawnshops and provides that information only, and exclusively, to the EPS: no member of Edmonton City Council or any City of Edmonton employee, other than a member of the EPS, has access to the information. BWI provides a similar service in many other cities in Alberta and in many other provinces across Canada.

[3] In February 2008, the Information and Privacy Commissioner ruled: because of the contract between the City of Edmonton and BWI, the personal information in the hands of BWI was collected for the City of Edmonton; the personal information thus collected was in the custody of the City of Edmonton; and, BWI was an employee of the City of Edmonton. The Commissioner found that the City did not have the authority to require second hand stores and pawnshops to upload a pawnor's personal information to the BWI database, and that the City of Edmonton had not taken reasonable steps to safeguard pawnors' personal information. In the result, the Commissioner held that the City of Edmonton and EPS contravened sections 33 and 34 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner ordered the City of Edmonton to destroy Business Watch International Inc.'s database.

[4] In this judicial review, the City of Edmonton, the Edmonton Police Service and Business Watch International Inc. ask this court to quash the Commissioner's orders, including the order relating to the destruction of the BWI database.

[5] The Commissioner's orders are quashed.

[6] The Commissioner committed no reviewable error in deciding to continue and conclude his inquiry, despite his non-compliance with the statutory time limits. The interpretation of those limits - particularly as to whether the 90 day time limit for conclusion of the inquiry is mandatory or only directory - is one in which legal issues cannot easily be separated from factual ones. Therefore, the appropriate standard of review by this court of the Commissioner's decision is reasonableness rather than correctness. Among the circumstances relevant to the analysis required here are: the issue is jurisdictional; the jurisdictional issue is putative loss of jurisdiction rather than an original failure of jurisdiction; the complainant does not complain about the Commissioner's delay; and, if the process were terminated, it could be easily re-instituted and

therefore, the only result would be longer delay which would be counter-productive to the objective. The Commissioner's conclusion that, in all the circumstances here, the statutory time limits were merely directory rather than mandatory was reasonable.

[7] The error which justifies the quashing of the Commissioner's orders relates to the latter's analysis of the relationship between the City of Edmonton and the Edmonton Police Service. Municipal law lies at the core of the Commissioner's substantive decision. Because municipal law is not within the Commissioner's general or specific expertise and because the Commissioner's decision includes a determination relating to employment law which is of central importance to the legal system, the Commissioner's decision is reviewed on the basis of correctness rather than reasonableness. The Commissioner erred in his interpretation of municipal law as it relates to privacy law: a municipal police force is, for purposes of privacy law, a public body separate from its host municipality. Many conclusions flow from this separation: personal information collected by a private organization - such as a pawnshop or a second hand store - which is collected pursuant to legislative authority - here a municipal bylaw - and is properly transmitted to a police force - here pursuant to a standing request for information - and which is properly received by the public body which is the police service - here because the EPS was expressly authorized to receive it and because it is information collected for the purposes of law enforcement - is personal information which is properly in the hands of the police service. Also, since the operator of the database, BWI, is not an employee of the municipality, the Commissioner cannot order the municipality to destroy the database of pawnshop information.

Cases and authority cited

[8] **By the City of Edmonton:** *City of Edmonton Business License Bylaw* 13138; Decision of the Office of the Information and Privacy Commissioner dated February 15, 2008; Excerpts from the *Freedom of Information and Protection of Privacy Act* R.S.A. 2000 c. F-25; Excerpts from the *Personal Information Protection Act* R.S.A. 2000 c. P-6.5; *City of Edmonton Freedom of Information and Protection of Privacy Bylaw* 12100; Excerpts from the *Municipal Government Act* R.S.A. 2000 c. M-26; ***United Taxi Driver's v. Calgary (City)*** 2004 SCC 19; Letter from the City of Edmonton to Pawnshops and Second Hand Stores dated April 8, 2005; ***Dunsmuir v. New Brunswick*** 2008 SCC 9; ***Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)***, [2006] A.J. No. 865; ***Canada Safeway v. Shinetown***, [2007] A.J. 1477; ***Stubicar v. Alberta (Office of the Information and Privacy Commissioner)***, 2007 ABQB 480; ***IMS Health Canada v. Alberta (Information and Privacy Commissioner)***, [2008] A.J. 358; Excerpts from the *Police Act* R.S.A. 2000 c. P-17; *City of Edmonton Police Commission Bylaw* 14040; City of Edmonton Council Report D2B dated October 13, 1999; Excerpts from the *Personal Information Protection Act Regulation* AR 366/2003; Excerpts from the *Interpretation Act* R.S.A. 2000 c. I-8; ***Cash Converters Canada Inc. v. Oshawa (City)***, [2007] O.J. 2613; ***Royal City Jewellers & Loans v. New Westminster (City)***, 2007 B.C.C.A. 398.

[9] **By the Edmonton Police Service:** ***Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)***, 2007 ABQB 499; ***Dunsmuir v. New Brunswick***, 2008

SCC 9; *Alberta Justice v. Roy* (December 3, 1996), Docket 9603-16335; *University of Alberta v. Pylypiuk*, 2001 ABQB 22; *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252; *Shields v. Information and Privacy Commissioner*, 2004 ABQB 353; *Qualicare Health Services v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *Stubicar v. Alberta (Office of the Information and Privacy Commissioner)*, 2007 ABQB 480; *Canada Safeway v. Shinerton*, 2007 ABQB 773; *IMS Health Canada Ltd. v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213; *Lust v. Foundations for the Future Academy* (2007), 409 A.R. 90; *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*, (1998), 58 B.C.L.R. (3d) 61 (C.A.); *Canada (Attorney General) v. Pentney*, 2008 FC 96; *Vialoux and Registered Psychiatric Nurses Association of Manitoba* (1983), 2 D.L.R. (4th) 187 (Man. C.A.); *Neufeld v. North-East Winnipeg Family and Child Extended Social Services*, [1991] M.J. No. 593 (Q.B.); *Cameron v. Law Society of British Columbia* (1991), 81 D.L.R. (4th) 484 (B.C.C.A.); *Symington v. Halifax (Regional Municipality) Police Service*, [2002] N.S.J. No. 65 (S.C.); *Bernauer v. Royal Bank of Canada*, [1994] S.J. No. 154 (Q.B.); *Rahman v. Alberta College of and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.); *Carlin v. Registered Psychiatric Nurses Assn. of Alberta*, [1996] A.J. No. 606 (Q.B.); *Woolridge v. Halifax*, [1999] N.S.J. No. 268 (S.C.); *Harris v. Law Society of Alberta*, [1936] S.C.R. 88; *LeClair v. Manitoba (Residential Care, Director)*, [1999] M.J. No. 38 (Q.B.); *Alberta Giftwares Ltd. v. Calgary (City)*, [1979] A.J. No. 5551 (C.A.); *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (1997), 154 D.L.R. (4th) 344 (Fed. T.D.); Order F-2006-031: *Edmonton Police Service*, September 22, 2008; Order M2004-001: *Registrar of Motor Vehicle Services*, March 29, 2005; Order 99-011: *Legislative Assembly Office*, August 18, 1999; Order F2007-012: *Edmonton Police Service*, October 12, 2007; Order F2005-020: *Alberta Health and Wellness*, June 19, 2006; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 1995 CanLII 148; *Garland v. Consumers' Gas Co.*, 2004 SCC 25; *Gulf Canada Resources v. Alberta*, 2001 ABQB 286; *Newell (County) v. Standard Gravel and Resurfacing of Canada*, [1954] A.J. No. 58; Order F2002-029: *Alberta Government Services*, May 7, 2003; *Royal City Jewellers & Loans v. New Westminister (City)*, 2007 B.C.C.A. 398, reversing 2006 B.C.S.C. 203; Order 2000-003: *The University of Calgary*, September 20, 2000; Order 98-019: *Alberta Treasury*, January 14, 1999; Order F2002-014: *Municipality of Crowsnest Pass*, July 22, 2002; Order F2002-006: *Alberta Human Resources and Employment*, September 26, 2002; Order 2000-021: *Alberta Justice*, November 24, 2000; Order F2006-024: *Calgary Police Service*, November 20, 2006; *Personal Information Protection Act Regulation*, s. 5, A.R. 366/2003; *Interpretation Act*, R.S.A. 2000, c. I-8; Order F2006-004: *Edmonton Police Service*, February 28, 2008; Order F2006-002: *Edmonton Police Service*, August 2, 2007; Order 2000-027: *Calgary Police Service*, March 21, 2001; Order F2006-014: *Edmonton Police Service*, November 19, 2007; Order F2002-001: *Edmonton Police Service*, March 27, 2002; Investigation Report 2001-IR-007: *Alberta Learning*, September 10, 2001; Order F2005-003: *Parkland Regional Library*, June 24, 2005; Order 98-002: *Workers' Compensation Board*, July 8, 1998; Order F2006-018: *Workers' Compensation Board*, December 17, 2007; Investigation Report 2001-IR-008: *University of Alberta*, August 24, 2001; *R. v. Letourneau* 2008 ABPC 192, [2008] A.J. No. 752; *Canadian Oxford Dictionary*, 2nd ed., Oxford University Press; *Black's Law Dictionary*, 8th ed., Thomson, West; *The Alberta Teachers' Association v Information and Privacy Commissioner*, Action No. 0803-05729, oral decision delivered by Marshall J., Alta. Q.B., October 9, 2008; *Police Service Regulation*, Alberta Regulation 356/1990.

[10] **By Business Watch International:** *Dunsmuir v. New Brunswick*, 2008 SCC 9; *University of Alberta v. Pylupiuk*, 2008 ABQB 22; *IMS Health Canada Ltd. v. Information and Privacy Commissioner*, 2008 ABQB 213; *Canada v. Information Commissioner*, [2004] 4 F.C.R. 181, [2004] F.C.J. No. 524; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643; *Adler Firestopping Ltd. v Rea* 2008 ABQB 95.

[11] **By the Information and Privacy Commissioner:** *Re Northwestern Utilities and City of Edmonton* (1978), 89 D.L.R. (3d) 161 (S.C.C.); *Shechter v. Alberta Planning Board* (1979), 14 A.R. 492 (Alta. S.C.A.D.); *CA.I.M.A.W., Local 14 v. Paccar of Canada Ltd.* (1989), 62 D.L.R. (4th) 437 (S.C.C.); *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 253 D.L.R. (4th) 489; *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160; *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, 2008 ABQB 421; *Nametco Holdings Ltd. v. M.N.R.*, 2002 FCA 149; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160; *Singh v. Canada (Minister of Citizenship & Immigration)*, 1995 CarswellNat 1119 (F.C.T.D.); *Northern Telecom v. Communications Workers of Canada* (1979), 98 D.L.R. (3d) 1 (S.C.C.); *Canada Safeway Limited v. Shineton*, 2007 ABQB 773; *Rahman v. Alberta College and Association of Respiratory Therapy*, 2001 ABQB 222; *The Royal Newfoundland Constabulary Public Complaints Commission v. McGrath*, 2002 N.L.C.A. 74; *Ha v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2006 CarswellNat 2139 (F.C.); Order P2007-010: *United Food and Commercial Workers, Local 401*, March 31, 2008; *Sochowski v British Columbia (Information and Privacy Commissioner)* 2008 BCSC 1390; *Finning Canada* [2007] B.C.I.P.C.D. No. 32; *Cyanamid Canada Inc. v Canada (Minister of National Health & Welfare)* 1992 CarswellNat 216 (Fed. Ct., Appeal Ct.); *Society Promoting Environmental Conservation et al v Attorney General of Canada* (2003) 228 D.L.R. (4th) 693 (Federal Court of Appeal); *Manyfingers v Calgary (City) Police Service* 2006 ABCA 162.

[12] **By the court:** *On conferring of jurisdiction by consent: Budgen v St. John's (City)* 2008 NLTD 180, [2008] N.J. No. 333.

Appendix A: Commissioner's Decision

1. Background

[13] In order to establish a factual basis for a test case, in January 2006, Kelly Buryniuk a pawnshop owner in the City of Edmonton, sold a DVD player to Cash Converters (Millwoods), a pawnshop owner operating in the City of Edmonton.

[14] Sections 33 and 40.2 of the City of Edmonton's Licence Bylaw require pawnshops and second hand stores to obtain and record the following information whenever goods are received and held as security for an advance of money:

- the date and time the goods were received;

- the full name, date of birth, residential address, telephone number, gender, eye and hair colour of the person delivering the goods;
- details from at least 2 pieces of identification provided by the person delivering the goods, at least one of which must have a photograph of the person;
- a complete description of each good including, where available, the make, model and serial number of the good, the manufacturer's name and any distinguishing marks;
- the amount of money advanced in respect of each good; and,
- the name of the person working in the pawnshop who conducted the transaction.

[15] Sections 40 and 40.8 of the Bylaw state:

The information required to be recorded by this Part:

- (a) shall be recorded in a form and manner acceptable to the City Manager; and
- (b) shall be made available to a Peace Officer forthwith upon request.

[16] The evidence before the Commissioner established not only that Edmonton City Council passed the bylaw in question, but also that the principle of electronic rather than manual recording and the fees associated with electronic recording were vetted through Edmonton City Council.

[17] Mr. Buryniuk provided all of the information required by the Bylaw to Cash Converters. In addition, he provided to Cash Converters information not required by the Bylaw, but required by Cash Converters itself. In real time, Cash Converters uploaded all of the information collected from Mr. Buryniuk to BWI's database. However, neither the City Manager's directive, nor the service provided by BWI require real time reporting: the BWI system can be used by a pawnshop after having collected personal information, thereby leaving pawnshops in possession of personal information after it has been uploaded to the BWI database.

[18] Since approximately 1896, Edmonton has had bylaws relating to the collection of information, including personal information, by pawnshops from pawnors and it has always been the practice that such information was made available to the police. Prior to the City Manager's decision, in 2005, that the recording of pawnshop information would be recorded electronically, pawnshops manually recorded information from pawnors and the Edmonton Police Service, or its predecessor, would gather the information by sending an officer around to the various pawnshops to collect the information. The enormity of the administrative constraints caused by this manual system can be better understood by reference to some of the evidence before the Commissioner: under the paper-based system, the Edmonton Police Service collected more than 200,000 transaction sheets per year from Edmonton pawnshops resulting in a lag of up to six weeks

between the date on which an item was pawned and the date on which the information was entered into the Edmonton Police Service records management system. Under the current system, the EPS has made a request for continuing information about pawnors and vendors from pawnshops and second hand stores.

[19] By letter dated January 30, 2006, Mr. Buryniuk made a formal complaint to the Information and Privacy Commissioner regarding the collection of his personal information by Cash Converters, the transmittal of that information to Business Watch International, and the access to that information by the Edmonton Police Service.

[20] By letter dated February 28, 2006, the Commissioner advised that he had decided to conduct an inquiry into Mr. Buryniuk's complaint.

[21] In late June 2006, the Commissioner sent formal Notices of Inquiry to Mr. Buryniuk and the other affected parties, specifying that written submissions would be due on September 29, 2006. By letter dated September 28, 2006, the Commissioner advised the parties that in response to a request from BWI, the deadline for written submissions was extended to October 5, 2006.

[22] On October 30, 2006, Mr. Buryniuk stated that he would like to appear at the hearing and file a legal argument. On November 1, 2006, the Commissioner adjourned the oral hearing which had been scheduled to begin on October 31, 2006, gave Mr. Buryniuk until November 15, 2006 to present written submissions, and gave to the other affected parties the opportunity to amend or add to the briefs already submitted.

[23] On December 21, 2006, the Commissioner advised the parties that he had accepted the City's request to provide affidavits from certain witnesses, and those affidavits were due no later than January 4, 2007.

[24] An oral hearing was held on January 9-11, 2007.

[25] By letter dated July 13, 2007, the Commissioner provided the parties with a Notice of Continuation of Inquiry. The Commissioner also advised the parties that, because of the recent decision from the Ontario Court of Appeal in *Cash Converters Canada Inc. v Oshawa (City)*, the Commissioner had decided to reconvene the inquiry as a written inquiry and gave the parties until September 7, 2007 to present written submissions on that decision.

[26] On July 30, 2007, this Court released its decision in *Kellogg Brown and Root Canada v Alberta (Information and Privacy Commissioner)*.

[27] On August 2, 2007, the Commissioner advised the parties that he was extending the deadline for completing the review of Mr. Buryniuk's complaint and that the anticipated completion date for the review was September 30, 2008.

[28] On September 6, 2007, the Commissioner notified the parties that the original deadline for submissions was extended to September 28, 2007.

[29] On February 15, 2008, or approximately two years after the complaint was made, the Commissioner issued the orders which are under review in this application.

[30] Mr. Buryniuk had notice of the application for judicial review, but chose not to formally appear, although he was present in person for most of the hearing.

[31] For ease of reference, the Commissioner's decision, which is available at www.oipc.ab.ca, is attached.

2. Standard of review

[32] Different standards of review apply to different aspects of this application. The appropriate standard of review will be discussed in its specific context.

3. Did the Commissioner lose jurisdiction by failing to comply with the provisions of s. 50(5) of PIPA or s. 69(6) of FOIP?

[33] *The Commissioner did not lose jurisdiction by failing to comply with the 90 day limit under either PIPA or FOIP.*

a) Because the applicants did not raise this issue at the hearing before the Commissioner, are they precluded from raising it now?

[34] *Jurisdiction is a core pre-requisite to the validity of any decision of any tribunal. Because of the critical importance of jurisdiction, the failure of a litigant to raise a jurisdictional issue in a timely way does not necessarily prevent that litigant from raising the issue at a review hearing; although jurisdiction is essentially a legal issue, if a specific fact basis were necessary to fully address jurisdiction, a reviewing court could - and perhaps should - return the matter to the tribunal to allow it to make any required fact findings.*

[35] Relying on the following three specific arguments, the Commissioner asserts that the Court should not entertain arguments from the applicants concerning the timeliness issue because that issue was not raised at the hearing:

- by deciding the timeliness issue, the court would deprive the Commissioner of an opportunity to consider the issue itself;
- there is no evidentiary foundation on the issue of prejudice or on any other issues that may be identified by the Commissioner if he were allowed to deal with this issue;
- parties should not be encouraged to bring jurisdictional challenges only when a tribunal's decision goes against them.

[36] These arguments are not persuasive. In general terms, jurisdiction is of such fundamental importance to the validity of a tribunal's decision that it would be illogical and unfair to prevent a litigant from raising a jurisdictional argument on the review of a tribunal's decision. In the absence of jurisdiction, there is no valid decision to review. Decisions which speak of the general reluctance of a reviewing court to address an issue that was not raised before the tribunal must be carefully scrutinized with respect to the nature of the issue that was not raised; decisions which are not dealing specifically with jurisdiction or *vires* are not relevant to a jurisdictional debate.

[37] For the same reason, namely the critical importance of its determination, the issue of jurisdiction cannot be side-stepped. With respect, I disagree with the conclusion reached in *Singh* to the effect that the issue of *vires* is waivable, and prefer the line of authority holding that, generally, parties cannot confer jurisdiction on a statutory tribunal which does not, as a matter of law, have capacity: *Budgen*, paras 27 ff.

[38] Dealing more specifically with the arguments raised by the Commissioner, I conclude, first, that, in the circumstances here, the Commissioner did, in fact, have the opportunity to consider the issue of jurisdiction. Because the Commissioner was a party to the *Kellogg Brown and Root* litigation, he was privy and party to the court's conclusion relating to jurisdiction. By choosing to continue the hearing in this case, the Commissioner made a decision on jurisdiction, i.e. that he had jurisdiction, without giving the parties an opportunity to argue the point. Indeed, it is somewhat ironic that the Commissioner now raises concerns about not having had the opportunity of considering jurisdiction at the hearing when, during the hearing, the Commissioner did bring to the litigants' attention the decision in the Ontario Court of Appeal in *Cash Converters* but failed to bring to their attention the decision of this court in *Kellogg Brown and Root*. Neither decision was exactly on point in the instant proceedings, but was, recognizably, of some interest in these proceedings. The Commissioner chose not to inform the parties of the *Kellogg Brown and Root* decision and chose to continue with the hearing; whatever else may be said about that course of conduct, it must be recognized that the issue of jurisdiction had come to the Commissioner's attention.

[39] In this context, I also note that the Commissioner is not prejudiced by the parties' failure to have raised the issue of jurisdiction at the hearing. That factor is more appropriately discussed in weighing the second of the Commissioner's arguments, to which I now turn.

[40] The Commissioner argues that the raising by the applicants of the issue of jurisdiction for the first time at the judicial review hearing prevents the Commissioner from establishing an evidentiary foundation for jurisdiction. Although jurisdiction is essentially a legal issue, I agree that there may indeed be some circumstances in which fairness requires that a matter be returned to a tribunal on a jurisdictional issue so as to allow the tribunal to acquire evidence on that issue. This is not, however, such a situation. As was noted in the Background section above, the application to the Commissioner was a test case: obviously buoyed by the recent decision of the Ontario Court of Appeal, *Cash Converters* decided to challenge the Edmonton Bylaw. By design, one pawnbroker pawned an item with another pawnbroker and then complained about the Bylaw; if it had not been admitted that this was a test case, the court could have come to that conclusion on its own. Here, the test case would be easy and cheap to replicate: were I to conclude that the

Commissioner had lost jurisdiction, Cash Converters could easily have either Mr. Buryniuk, or some other person, pawn another item and set up the factual basis for another privacy challenge. Moreover, it is noteworthy that, in the proceedings before the tribunals, the lawyer for Cash Converters appeared for Mr. Buryniuk as well as for his own clients. Not only does this cement the conclusion that the proceedings were a test case, but it also establishes that Mr. Buryniuk was not required to spend any money of his own on lawyers or on preparation for the case. Therefore, even if the Commissioner were to obtain evidence from Mr. Buryniuk to the effect that he could not, or would not, re-initiate privacy proceedings, that evidence would be irrelevant. The key is whether Cash Converters, or any association to which Cash Converters belongs, would undertake not to re-initiate privacy proceedings. In the circumstances here, I am prepared to assume that Kelly Buryniuk would not renew these proceedings; I am not prepared to assume that Cash Converters would abandon the privacy challenge. In the result, therefore, a decision that the Commissioner had lost jurisdiction because of delay would only cause additional delay and expense by requiring Cash Converters to set up a new challenge to the bylaw.

[41] In the circumstances here, the issue of prejudice to Kelly Buryniuk is the only factual issue which appears to arise. Without requiring an adjournment to obtain evidence, the Commissioner could, if it chose, use copies of existing records - letters, faxes, e-mails - to argue that the applicants gave implicit approval to the extensions of time to respond to the argument that it had lost jurisdiction. I acknowledge that the Commissioner would need the opportunity of re-opening the hearing to obtain evidence of oral communications dealing with extensions of the 90 day deadline. Obviously, however, such a re-opening of the hearing would be problematic since the Commissioner would presumably have to call tribunal staff to address the issue of oral communications with counsel for the applicants with the applicants potentially being required to have their lawyers testify on the disputed issue. Should that scenario unfold, the applicants' lawyers might have to withdraw from this judicial review since they would be required to give evidence on a disputed, and crucial, fact. The applicants would thereby be prevented from relying on their counsel of choice. In summary, that type of evidence-directed resumption of the hearing is fraught with peril. Happily, I have concluded that it is not necessary to entertain such a procedure. I assume that there is no record in which the Commissioner set a new deadline, as required under the Act. Assuming that to be the case, there is, therefore, no point in re-opening the hearing to build an evidentiary foundation for implicit agreement about extensions of time since that issue would not solve the Commissioner's dilemma about time lines.

[42] In summary in relation to the Commissioner's second argument, in the circumstances here, there is no need for an improved evidentiary basis to enable this court to address the jurisdictional arguments.

[43] Finally, as to the Commissioner's third argument, I agree that parties should be encouraged to raise jurisdictional challenges in a timely way; however, if a tribunal does not have jurisdiction to deal with an issue, not even the agreement of the parties can confer jurisdiction on the tribunal. The appropriate way to deal with a deliberate, tactical, delay of the type envisaged by the Commissioner is by an order in costs against a successful, but dilatory, party.

b) Is the Commissioner in breach of the timeliness requirements?

[44] *The Commissioner is in breach of the statutory timeliness requirement.*

[45] The statutory timelines in *PIPA* and *FOIP* are the same. Therefore, it is not necessary to dispose of the arguments relating to whether the Commissioner correctly characterized his jurisdiction relative to *PIPA* and *FOIP* as a pre-requisite to dealing with the effect of failing to comply with the deadlines in each of the statutes.

[46] If the Court were to entertain this aspect of the applicants' position, relying on and adopting the Commissioner's decision in *United Food and Commercial Workers, Local 401*, the Commissioner argues that he has not breached the provisions of s. 50(5) of *PIPA*.

[47] With respect, I do not find the reasoning in *United Food and Commercial Workers, Local 401* to be persuasive. On the contrary, I conclude that the Legislature was very clear in establishing a statutory requirement that an inquiry must be completed within 90 days. Importantly, the Legislature gave to the Commissioner a very broad power to extend the time for the completion of the inquiry coupled with a virtually unlimited discretion about the length of extensions and the circumstances in which they can be granted. This is such a minimal restriction on the Commissioner's freedom to conclude an inquiry that it appears to me to be churlish to question the 90 day time limit. In any event, given the time lines in this matter, it is clear that whether the writing of a report is or is not included within the 90 days, the hearing was not completed within 90 days from the day that the written request was received by the Commissioner.

c) Are the statutory time periods mandatory or directory? What is the standard of review for the Commissioner's decision?

[48] *In the circumstances here, the statutory time periods are only directory. The standard of review for the Commissioner's decision that it had jurisdiction is reasonableness: that decision involved the potential loss of jurisdiction rather than the taking of jurisdiction.*

[49] The Commissioner argues that it did not make a decision on jurisdiction, so there is no decision to review and no need to articulate a standard of review for the non-existent decision. With respect, I disagree. For the reasons set out above, I conclude that, when the Commissioner received the decision in *Kellogg Brown and Root* and decided to continue with its investigation in this matter, and when it forwarded to the parties a communication extending the deadline for its report, the Commissioner was making a decision concerning jurisdiction: its decision was that it had jurisdiction.

[50] Having concluded that the Commissioner made a decision concerning jurisdiction, I must then determine the appropriate standard of review for that decision.

(i) Standard of review - reasonableness

[51] I do not accept the applicants' argument that the Commissioner's decision on the jurisdiction issue in question here must be correct. For some issues relating to jurisdiction correctness is obviously the appropriate standard. For example, in the situation here, the

Commissioner's decision to initiate action on Mr. Buryniuk's complaint had to have been made correctly. That would be consonant with the comment in the Supreme Court of Canada's decision in *Dunsmuir* to the effect that a decision about whether the statutory grant of power gives a tribunal the authority to take jurisdiction is one requiring a correctness analysis: see para. 59 of the decision.

[52] However, on the issue of whether a tribunal has lost jurisdiction, the correct standard of review is reasonableness. Once a tribunal has the jurisdiction to start work, a restrictive standard of interpretation could be contrary to, and could frustrate, legislative intention. There will be situations, such as that arising in *Kellogg Brown and Root*, in which a court will conclude that, in all the circumstances, a tribunal has lost jurisdiction if it does not comply with statutory time limits concerning its work; in coming to such a conclusion, the court will, as Justice Belzil did in that case, make an assessment of legislative intention. In order to allow the flexibility required to discern the intention of the Legislature in matters of loss of jurisdiction, where a number of different scenarios might each require different treatment according to the different outcomes, reasonableness is the appropriate standard. That is consonant with the comment in *Dunsmuir* describing the deferential standard of review: see para. 47.

[53] In summary, the choice of standard for review of the Commissioner's decision that the statutory deadlines were, in the circumstances here, merely directory, commences with a determination as to whether the degree of deference owed to the Commissioner's decision has been satisfactorily determined in the case law. As was pointed out by the Court of Appeal in *Alberta (Workers' Compensation Board)* there is no one correct standard of review of general application for all decisions of a specific tribunal. This theme was also reviewed in particular reference to decisions by the Privacy Commissioner by Topolniski J. in *Qualicare Heath Service Corporation*, and by Ross J. in *IMS Health Canada*. Therefore, this court should attempt to identify a decision on judicial review which dealt specifically with the issue of whether the time lines in the legislation were mandatory or directory. Because of the position which it taken on this hearing with respect to the applicable statute, the Commissioner does not identify any case law establishing the correct standard of review on this hearing. In *Kellogg Brown and Root*, Belzil J. was dealing with the interpretation of statutory dead-lines. So far as I am aware, Belzil J.'s decision is the one closest to the issues in this review application. However, his decision did not explicitly address the standard of review; implicitly, because he proceeded to make his own analysis of the interpretation of the applicable legislation., it might be thought that he was adopting the correctness approach. However, that deduction would improperly ignore his comment at para. 43:

Thus what emerges is that there is no uniform test to determine whether legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding this issue.

That is the language of reasonableness rather than the language of correctness.

[54] I acknowledge, however, that Belzil J. does not unequivocally endorse a reasonableness standard in relation to loss of jurisdiction issues generally, or that issue in this case. Therefore,

according to the principles in *Dunsmuir*, this court must undertake its own *Pushpanathan* standard of review analysis.

[55] Dealing then with the four factors in that analysis, I begin with the privative clause in s. 53 of the *Personal Information Protection Act* which states that there is no appeal of the Commissioner's decision; that is a strong indication that the Legislature intended the Commissioner to have as much deference as possible. The purpose of the legislation is clearly to weigh competing social interests - privacy for individuals on the one hand, and protection of the public interest on the other; the wording of the legislation obviously gives great breadth of action to the Commissioner. The nature of the question - are the statutory time limits mandatory or directory - itself implies a range of answers since it is clear from the case law that statutory time limits are not necessarily mandatory; reasonableness is usually the appropriate test where circumstances and outcomes have to be weighed in addition to the bare wording of the statute. Finally, the Commissioner's expertise in matters of privacy rights suggests that reasonableness is the correct standard for determining whether statutory time lines are mandatory or directory.

[56] A parallel analysis could be undertaken for the *Freedom of Information and Protection of Privacy Act*.

[57] For the reasons set out above, the court concludes that the standard of review to be applied to the Commissioner's decision is reasonableness.

(ii) Is the Commissioner's decision that he had not lost jurisdiction reasonable?

[58] *The Commissioner's decision that he had not lost jurisdiction in the circumstances here because the statutory time limits were merely directory is reasonable.*

[59] Although it is not necessary to go so far as to say that the Commissioner's decision that he had not lost jurisdiction because the statutory time limits that applied in the circumstances here were merely directory and were not mandatory was a correct decision, I am able to say that the Commissioner's decision on this issue is not only reasonable, but is also correct. The Legislature intended only that the pertinent sub-sections be directory. In coming to that conclusion, I have taken the following into account:

- once the Commissioner has finished its inquiry and issued a decision, what timeliness purpose would be served by having the process start up again from the beginning when the matter could be started up again from the beginning;

The complaint made about the Commissioner's activity is that it took too long to complete. However, the Commissioner's task is now complete. This is not a situation where tardiness can be remedied by court ordered *mandamus*: the decision has been issued. Therefore, at this point the court cannot do anything to try to speed the issuance of the decision. Moreover, the return of the matter to the Commissioner would achieve no discernible purpose since the Commissioner would just start again, but with care to comply

with the statutory mechanisms for extending both the length and the termination of the inquiry.

- the complaint here initiated an inquiry. It was presumably in the best interests of all the parties that the Commissioner have sufficient time to make whatever inquiries he thought necessary.

This is not a situation, like the one in *Kellogg, Brown and Root*, where the relief requested was prohibition. Where such a remedy is being requested, the failure of the Commissioner to stop the contested activity may itself hurt the complainant. In other words, the very failure to deal with the request for prohibition may cause harm.

- Moreover, here the complainant does not contest the delay in the Commissioner's reply to his complaint.

When purposively interpreting the legislation which establishes time lines, one must conclude that the primary party for whose benefit deadlines were introduced was the complaining party: it is presumably that party who has the greatest interest in the prompt resolution of the complaint. One can imagine certain situations in which other parties, perhaps a person being investigated, for example, would have an interest in a timely resolution of a complaint where, for example, there might be a pall thrown over that party by the very existence of an inquiry. However, it is the complainant, Mr. Buryniuk, who has the greatest interest in the prompt response to his inquiry. Although Mr. Buryniuk did, in January 2008, write to the Commissioner inquiring about the status of his complaint and noting that almost two years had elapsed since the filing of the complaint (and was told that the decision was nearing completion), during the course of this judicial review hearing, Mr. Buryniuk does not complain about delay.

- The parties who do complain about delay, the applicants for judicial review, don't contest the Commissioner's jurisdiction to embark upon the inquiry. They do not point to any prejudice which they suffered by reason of the delay in issuing the results of the inquiry.

[60] In all those circumstances, I conclude that the Commissioner's conclusion that the time lines in the statute were directory only was, at a minimum, reasonable.

4. Did the Commissioner err in determining that the Bylaw does not authorize the City Manager to require pawnshops and second hand stores to upload the personal information specified in the Bylaw electronically to BWI?

[61] *The Commissioner erred in determining that the City Manager's direction to pawnshops and second-hand stores to upload personal information was unauthorized.*

a) Standard of review

[62] *The standard of review for the Commissioner's decision on the authority for the collection of personal information in the circumstances here is the standard of correctness.*

[63] The Commissioner is, of course, an expert in the definition, and protection, of private information. However, the Commissioner is not an expert in municipal law and municipal organization; municipal bylaws are general public statute instruments with which the Commissioner has no particular familiarity, and there is no evidence that the Commissioner has frequently encountered or interpreted this particular Bylaw: *Canadian Broadcasting Corp.*, at para. 48. Therefore, the court owes no duty of deference to the Commissioner's decisions concerning the interpretation of municipal legislation and structures. In the result, although the Commissioner's decisions are protected by a privative clause, in relation to this particular issue, the standard of review is correctness rather than reasonableness.

b) Is the Commissioner's decision that the collection of personal information by a pawnshop in pursuance of the obligations under Edmonton's licensing Bylaw correct?

[64] *The Commissioner's decision that the requirement to upload information to an electronic database is unauthorized is incorrect.*

[65] On the issue of whether the uploading of personal information to an electronic database was authorized, the Commissioner reasoned:

On the contrary, the fact that the record must be "made available to a peace officer *forthwith* upon request" would suggest that the municipal council did not intend for a pawnshop or second-hand store to remove recorded information from the premises when it enacted the bylaw. It should be remembered that when the bylaw was originally enacted, paper records were the standard.

[66] He then concluded:

While I agree that the bylaw enables the City Manager to require information to be recorded electronically, I do not agree that this authority includes requiring information to be uploaded to a database established and maintained by a business under contract to the City.

Under the directive, pawnshops and second-hand stores are required to make available information collection under sections 33 and 40.2 of the bylaw to the police service as a whole, without a request by a peace officer. This requirement is much broader than that contemplated by sections 40 and 40.8 of the bylaw

. . .

I do not find that uploading information to a database administered by a private company under a contract with the City is the same thing as recording personal information, nor do I

find that uploading information is implicit in the authority to determine how information is recorded.

[67] As the Commissioner himself noted in the decision under review, he is not authorized to assess the validity of the bylaw itself. Bylaws are presumptively valid in the same way that statutes are presumptively valid: *Newell (County)*, *Gulf Canada Resources*. The validity of the bylaw in question here cannot be collaterally attacked: *Garland*. The Commissioner is not, therefore, in the same position as were the courts which decided *Royal City Jewellers* and *Cash Converters*: those courts were authorized to conclude that the bylaws pursuant to which personal information was collected were not validly enacted. Indeed, the complainant, Buryniuk conceded that the Bylaw with which we are concerned was properly passed. The Commissioner must proceed on the basis that the Edmonton Bylaw was validly enacted.

[68] As the complainant also fairly conceded, the Bylaw authorizes the City Manager to dictate forms of reporting. Similarly, it was conceded that electronic reporting is merely a means or mechanism of reporting; as the Commissioner recognized, it is clearly within the City Manager's authority to dictate to pawnshops that they will report electronically.

[69] With respect, I am of the view that the Commissioner has given the bylaw an interpretation which is neither purposive nor functional. The purpose of the bylaw is to minimize the social problem that could be caused if pawnshops and second-hand stores became nothing more than legitimate "fences", or participants in a loosely organized structure for the disposition of stolen goods. This obvious potential has been recognized for over one hundred years. The requirement to record information about the pawnor, as well as about the goods, is clearly intended to discourage trades in stolen property, and to help the police investigate reports of stolen property. Nothing obliges an individual to do business with a pawnshop or a second-hand store. The requirement to provide personal information which will be made available to the police is not hidden from potential clients of pawnshops and secondhand stores. The evidence establishes that the information which is collected is not made available to anyone except the police; for example, no member of city council, no city employee, can access that information. Similarly, the service provider, SaskTel and its employees cannot access the information provided by pawnshops and second-hand stores. The system of uploading information electronically to a secure database, as implemented by the City Manager, is therefore just a system of doing, in 2005, the equivalent of what was done in 1896.

[70] In summary, since Edmonton's licensing bylaw is valid and since the direction of the City Manager to record pawnor information electronically is valid, the Commissioner erred in concluding that the bylaw does not authorize the City Manager to require pawnshops and second hand stores to upload the personal information specified in the bylaw electronically to BWI.

5. Did the Commissioner err in determining that the personal information in the database was in the custody and control of the City of Edmonton?

[71] *The Commissioner erred in determining that the personal information collected from pawnshops and second-hand stores was in the custody and control of the City of Edmonton.*

a) What is the standard of review for this decision?

[72] *The standard of review of the Commissioner's decision that the personal information in the BWI database was in the custody and control of the City of Edmonton is a standard of correctness.*

[73] The same reasons apply to this issue as those articulated in relation to the issue of the authority of the City Manager to require pawnshops to upload information to the BWI data base: the determination of the relationship between the City of Edmonton and BWI is a determination based on municipal law, which is an area outside the Commissioner's expertise. Therefore, even though the Commissioner's decisions are shielded by a privative clause, this court does not owe the Commissioner any deference in relation to the decision on this issue.

b) Is the Commissioner's decision that the personal information in the BWI database was in the custody and control of the City of Edmonton correct?

[74] *The decision that the personal information in the BWI database was in the custody and control of the City of Edmonton is incorrect.*

[75] It is appropriate to commence the analysis of this issue by noting that a municipal council, an elected body, is entitled, in a democratic system, to deference in relation to its legislative functions: *United Taxi Drivers*.

[76] Not all municipalities have their own police forces; indeed, under the *Police Act*, not every municipality is entitled to have its own police force. The municipalities which do have their own police forces must structure their relationship with such forces with extreme delicacy: a municipal police force should, on the one hand, be subject to oversight and accountability while, on the other, be free from political whims. This reality was recognized by the Alberta Legislature in the *Police Act*, which makes the Edmonton Police Commission, not City Council or the City Manager or any other civic official, responsible for the administration of police services. Moreover, the Legislature further recognized the unique relationship between a municipal police service and the municipality itself by making a municipal police service a public body and one which is separate from a local government body: ss. 1(i)(x) and 1(p) of *FOIP*.

[77] The policy underlying the provincial legislation is supported by the City of Edmonton in its Bylaw 12100, the *City of Edmonton Freedom of Information and Protection of Privacy Bylaw*. This bylaw also establishes that EPS and the City of Edmonton are separate and distinct entities for the purposes of *FOIP*.

[78] Overall then, it is clear that the City of Edmonton and the Edmonton Police Service are separate and distinct public bodies for the purposes of privacy law.

[79] The facts established before the Commissioner include the fact that, apart from the Edmonton Police Service itself and its employees, the City of Edmonton, its managers and employees, have no physical custody of pawnshop records and have no control over those records;

the lack of control over the records is clearly established by the fact that the City of Edmonton, qua municipality, is prevented from even having access to the records, much less having any control over them.

c) Conclusions: the relationship, for privacy purposes, between the City of Edmonton and EPS, control over the information in BWI's database, and the applicable privacy legislation

[80] In summary, the Edmonton Police Service is a separate public body and legal entity from the City of Edmonton for privacy law purposes although it must, for reasons of municipal law, remain within the City of Edmonton administrative structure. Because of the provisions of general municipal law, a municipal police force *cannot* contract on its own for goods and services: it must do so through the municipality of which it is an administrative component.

[81] Here, the particular contract which the City of Edmonton executed with BWI outlines the unique relationship: although the City Manager has executed the contract, the agreement is between BWI and the EPS, signed in the name of the City of Edmonton and City of Edmonton management and staff, other than EPS personnel, have no access to, or control over, the information in the database. Moreover, through the contract with BWI, the Edmonton Police Service has made reasonable security arrangements, such as firewalls, to deal with such risks as unauthorized access, collection, use, disclosure and destruction of personal information.

[82] In the result, in the context of a privacy analysis, personal information from pawnors uploaded by pawnshops into the BWI database is not in the custody or control of the City of Edmonton; rather, it is in the custody and control of the Edmonton Police Service. Also, BWI is not an employee of the City of Edmonton, but, according to the general law, a contractor with the Edmonton Police Service, and according to privacy law, an employee of EPS.

[83] Importantly as well in this context, his incorrect analysis of the relationship between the City of Edmonton and EPS has caused the Commissioner to make an error in determining which privacy statutes apply. Here, pawnshops are clearly not public bodies: their only connection to the municipality is through Edmonton's business licence bylaw. Pawnshops collect certain personal information from pawnors. This collection is made pursuant to legislation requiring the collection of information. This process is regulated by *PIPA*, not by *FOIP*: see s. 14(b) *PIPA* which reads as follows:

14. An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:

...

- (b) the collection of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the collection.

[84] That subsection would be redundant if information that was collected pursuant to a statutory requirement were automatically collected for a public body. Moreover, it is clear that Cash Converters was not acting as an agent of the City of Edmonton in collecting information: on the one hand, it was not acting as an outsourcing private organization that was undertaking municipal responsibilities, but is a business operating independently, whose profits and losses are not the profits and losses of the City of Edmonton. Moreover, in its capacity as an independent business, Cash Converters was entitled to, and did, collect more personal information from pawnors than that required under the licensing bylaw. *FOIP* is not relevant to the collection of personal information by a private organization such as Cash Converters.

[85] Two additional sequelae result from the Commissioner's incorrect analysis of the application of *PIPA* in the circumstances here. On the one hand, the Commissioner failed to take into account that some of the information provided by Mr. Buryniuk to Cash Converters was volunteered information rather than required information, and must therefore be assessed according to different standards, specifically those set out in s. 8 of *PIPA*. Perhaps more importantly, by failing to distinguish between the collection of the information and the transfer of information, the Commissioner has failed to protect personal information which remains in the possession and control of pawnshops and second hand stores.

6. Did the Commissioner err in determining that Cash Converters did not have the authority to disclose Mr. Buryniuk's personal information to the EPS by electronically uploading the information to BWI?

[86] *The Commissioner erred in concluding that Cash Converters was unauthorized to disclose Mr. Buryniuk's personal information to the Edmonton Police Service:*

a) What standard of review applies to the Commissioner's decision that Cash Converters did not have authority to disclose Mr. Buryniuk's personal information to the EPS?

[87] The standard of review which applies to this decision is a standard of correctness.

[88] The analysis of the appropriate standard of review in relation to this issue is analogous to that previously undertaken in relation to the Commissioner's decision about the collection of personal information by pawnshops: the factors which must be considered in determining whether transfer of personal information to a municipal police force is authorized center upon the interpretation of municipal legislation. The Commissioner has no special expertise in interpreting such legislation. Therefore, despite the presence of a privative clause in the Commissioner's own legislation, the court owes no special deference to the Commissioner's interpretation of municipal law.

[89] Moreover, as a matter of public policy, the Commissioner's decision interferes with the ability of the municipality to legislate in relation to pawnshops and with the ability of a municipal police force to carry on its law enforcement function.

[90] For all of those reasons, the standard of review which applies to the Commissioner's decision is one of correctness.

b) What authority authorizes the transfer of information from Cash Converters to the police?

[91] *PIPA* authorizes private organizations, such as pawnshops and second hand stores, to transfer information which they have collected to a public body pursuant to legislation. Subsections 20(b) and (c) of *PIPA* read as follows:

20. An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

...

(b) the disclosure of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the disclosure;

(c) the disclosure of the information is to a public body and that public body is authorized or required by an enactment of Alberta or Canada to collect the information from the organization;

Clearly, both subsections authorize the transfer of information by pawnshops to the Edmonton Police Service pursuant to a standing request from the Police Service for that information.

[92] In this context, it may be noted, incidentally, that *FOIP* authorizes a public body such as the EPS to collect personal information for the purposes of law enforcement: ss. 1(h) and 33(b). The latter section reads as follows:

33. No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

(b) that information is collected for the purposes of law enforcement . . .

[93] One might note, in passing, that the very fact that pawnors can learn that personal information and information about the pawned goods will be made available to the municipal police force must necessarily have, at a minimum, a salutary prophylactic effect on the pawning of goods, in addition to the direct effect of providing a database for the tracing of stolen property. The Commissioner was clearly both wrong and unreasonable in concluding that the collection of this information did not serve a law enforcement purpose.

[94] In the result, Cash Converters was authorized to disclose Mr. Buryniuk's personal information to the EPS, and the Edmonton Police Service was authorized to receive Mr. Buryniuk's personal information.

7. Did the Commissioner exceed his jurisdiction by ordering the City of Edmonton to destroy the BWI database?

[95] *The Commissioner exceeded his jurisdiction by ordering the City of Edmonton to destroy BWI's database.*

a) Because the applicants did not raise this issue at the hearing before the Commissioner, are they precluded from raising it now?

[96] *The applicants are not precluded from raising this issue now.*

[97] Because Cash Converters did not suggest to the Commissioner that he order the destruction of BWI's database, the applicants could not foresee that the Commissioner would order the City of Edmonton to destroy BWI's database. Therefore, it was impossible for the applicants to make reasonable arguments as to this specific remedy chosen by the Commissioner.

[98] Moreover, the Commissioner is not prejudiced by the raising, on judicial review, of concerns about jurisdiction to grant the remedy chosen by the tribunal. The issue of whether the remedy was within or without jurisdiction is essentially a matter of law, not of fact, or even of mixed fact and law. While the tribunal may not have a full opportunity to respond to the various alternatives suggested by the applicants, particularly BWI, the Commissioner is able to make full answer and response to the validity of the remedy it did choose to impose.

b) What is the standard of review relating to the Commissioner's order to the City of Edmonton to destroy BWI's database?

[99] *In the circumstances here, the standard for review of the order to the City of Edmonton to destroy the BWI database is correctness.*

[100] Jurisdiction in matters of relief are as nuanced as jurisdiction in relation to time limits: within the general scope of jurisdiction in matters of relief are matters of *vires* and matters of choices. The real issue with respect to jurisdiction in this proceeding is not whether the Commissioner chose a reasonable remedy, or could have chosen a more reasonable one, but a much more basic question - did the Commissioner have the jurisdiction to impose the remedy that he did impose.

[101] Two of the *Dunsmuir* factors supporting a correctness standard apply here. The first applies to the decision that the City of Edmonton is the employer of BWI and can therefore destroy BWI's database involves two questions of general law that are of central importance to the legal system and are outside the specialized area of expertise of the Commissioner - employment law and municipal law: see paras. 55 and 60.

[102] The second relates to a true question of *vires*: here, the statutory grant of power allows the Commissioner only to order a public body to destroy "personal information collected in

contravention of this Act”: s 72(3), *Protection of Privacy Act*. At a minimum, it is clear that the BWI database contains more information than “personal information collected in contravention” of the Act.

[103] Therefore, although a privative clause protects the Commissioner’s decisions from appeal, this is a situation in which the appropriate standard of review is correctness, not reasonableness.

c) Did the Commissioner have the jurisdiction to order the City of Edmonton to destroy BWI’s database?

[104] There are two reasons why the Commissioner did not have the jurisdiction to order the City of Edmonton to destroy BWI’s database:

- as noted above, the BWI is not an employee of the City of Edmonton. Therefore, the City of Edmonton is not in possession and control of the database and the City of Edmonton has no master/servant power over BWI.
- the Commissioner only has the power to order the destruction of personal information collected in contravention of the statutes which it administers. The destruction of BWI’s database would involve the destruction of much material that was collected outside of Edmonton, whose Bylaws are the only Bylaws examined by the Commissioner, and much material that was collected without infringing the statute because, for example, it was volunteered;

[105] Moreover, the Commissioner was itself in breach of principles of natural justice by devising a remedy of its own without consultation with the parties. As Jones and de Villars put it in their text of administrative law:

... there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual.

[106] The Alberta Legislature did not intend the Commissioner to act contrary to natural justice in imposing remedies about which the parties had not had the opportunity of comment.

8. Costs

[107] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard from, the 21st day to the 23rd days of October, 2008.

Dated at the City of Edmonton, Alberta this 8th day of January, 2009.

J.B. Veit
J.C.Q.B.A.

Appearances:

Cameron Ashmore, and
Kismet Fong, City of Edmonton Law Branch
for the City of Edmonton

Katrina M. Haymond, and Anne L.G. Côté, Field LLP
for the Edmonton Police Service

Thomas W. Wakeling, Q.C. and Anna Loparco, Fraser Milner Casgrain LLP
for Business Watch International Inc.

R.B. Drewry, Q.C., and
Kate Hurlburt, Emery Jamieson LLP
for the Information and Privacy Commissioner

Appendix A

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDERS F2007-001, F2007-002, P2007-001

February 15, 2008

**THE CITY OF EDMONTON
EDMONTON POLICE SERVICE
EMU INC. (CARRYING ON BUSINESS AS CASH CONVERTERS
MILL WOODS)**

Case File Numbers 3561, 3562, P0363

Office URL: www.oipc.ab.ca

Summary: The Complainant complained to the Commissioner that a second-hand store had collected his personal information under a municipal bylaw and uploaded that information to a database maintained by Business Watch International (BWI), so that the personal information was available to the Edmonton Police Service (EPS).

Under a directive (the directive) of the City of Edmonton's (the City's) City Manager, pawnshops and second-hand stores must upload the personal information collected under Bylaw 13138 to a database maintained by Business Watch International (BWI).

The Commissioner found that the City did not have the authority to require second hand stores and pawnshops to upload the Complainant's personal information to the BWI database. The Commissioner found that the City had custody over the Complainant's personal information once it was uploaded to the BWI database. The Commissioner found that the *Personal Information Protection Act* does not apply to the information collected by pawnshops under the City Manager's directive, as the information is subject to the FOIP Act because it is in the custody of the City. The Commissioner found that the City has not taken reasonable steps to safeguard the Complainant's information, or that of other second-hand store or pawnshop clients from unauthorized access, collection, use, disclosure, or destruction. In addition, the Commissioner found that both the City and

EPS contravened sections 33 and 34 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) when the Complainant's personal information was uploaded to the BWI database.

The Commissioner ordered the City to destroy the Complainant's personal information and to take immediate steps to secure the personal information of pawnshop and second-hand store clients uploaded to the BWI database under the directive, that is in the physical custody of a pawnshop or second-hand store.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 5, 15, 33, 34, 38, 40, 53, 65, 72; *Personal Information Protection Act* S.A. 2003, c. P-6.5 s. 4; *Interpretation Act* RSA 2000, c. I-8 ss. 1(1)(c), 10, 26(3); *Municipal Government Act* RSA 2000 c. M-26, ss. 7, 13; *Municipal Act* S.O. 2001, c. 24; *Municipal Freedom of Information and Privacy Protection Act* R.S.O. 1990, c. M-56, ss.1, 28; *Provincial Offences Procedures Act* RSA 2000 c. P-34, s. 1; *Police Act* R.S.A. 2000 c. P-17 s. 27; *Police Officers Collective Bargaining Act* R.S.A. 2000, c. P-18

Authorities Cited: AB: Order F2002-014, F2006-017 **BC:** Order F06-01 *British Columbia (Ministry of Energy, Mines and Petroleum Resources) (Re)* [2006] B.C.I.P.C.D. No. 2

Cases Cited: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140; *Cash Converters Canada v. Oshawa (City)*, 2007 ONCA 502;

I. BACKGROUND

[para 1] Municipal Bylaw 13138 requires pawnshops and second-hand stores in Edmonton to record the personal information of individuals who pawn or sell items. The bylaw also requires pawnshops and second-hand stores to “make this information available to a peace officer forthwith upon request”. This bylaw has existed in various forms since 1913. The current bylaw authorizes the City Manager to determine the form and manner in which pawnshops and second-hand stores record information collected under the bylaw.

[para 2] Since July 1, 2005, the City Manager has, by letter, (the directive) required pawnshops and second-hand stores to upload the information collected from clients under the bylaw to a database maintained by Business Watch International (BWI), a private company located in Saskatchewan. The City, on behalf of EPS, entered into a contract with BWI for this purpose. EPS and police services in other jurisdictions have access to this database.

[para 3] On January 30, 2006, the Complainant made a complaint to my office that Emu Inc., carrying on business as Cash Converters (Mill Woods), (Cash Converters) had required him to provide an Alberta Driver's License, his social insurance number, date of birth, place of employment, home address, telephone number, height, weight, nationality and hair and eye color to complete a transaction in which he sold a DVD player. He was

told that providing this information was necessary to comply with the municipal bylaw and that the information would be uploaded to a database maintained by BWI, a private company located in Saskatchewan. The database would then be accessible to EPS.

[para 4] The Complainant questioned whether Cash Converters had authority to record his information, whether EPS had a right to collect his information, and whether the City had the right to require him to provide his personal information to the BWI database.

[para 5] I authorized mediation to resolve these issues. As mediation was unsuccessful, the matter was scheduled for an oral inquiry, which took place from January 9 - 11, 2007.

[para 6] The City, EPS, BWI, Cash Converters and the Complainant participated in the oral inquiry and provided both initial written submissions and follow up submissions.

[para 7] Following the oral inquiry, the Ontario Court of Appeal issued its decision in *Cash Converters Canada v. Oshawa (City)*, 2007 ONCA 502. As the facts and issues in that case are similar to those before me, I decided to reconvene the inquiry as a written inquiry, and on July 13, 2007, I requested that the parties provide written submissions regarding the decision and the wording of section 13 of the *Municipal Government Act* RSA 2000 c. M-26, section 14 of the *Municipal Act* S.O. 2001, c. 24 and the *Municipal Freedom of Information and Privacy Protection Act* R.S.O. 1990, c. M-56. All the parties provided written submissions regarding the decision. I will address this issue under Issue F, which I have added.

[para 8] As the complaint relates to two public bodies under the FOIP Act and one organization under the *Personal Information and Protection of Privacy Act* (PIPA), my office has assigned three different file numbers to the complaint. However, given the interrelated nature of the issues, I have decided to write one decision.

II. RECORDS AT ISSUE

[para 9] There are no records at issue.

III. ISSUES

[para 10] The following issues are identified in the Notice of Inquiry dated June 28, 2006 for Request for Review #3561:

Issue A: Is the Complainant's personal information in the custody or under the control of the City for the purposes of the FOIP Act?

Issue B: Does the City have the authority to collect the Complainant's personal information, as provided by sections 33 and 34 of the FOIP Act?

Issue C: Does the City have the Authority to disclose the Complainant's personal information to the Edmonton Police Service, as provided by section 40(1) of the FOIP Act?

Issue D: Has the City protected the Complainant's personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction, as provided by section 38 of the FOIP Act?

[para 11] The following issue was identified in the Notice of Inquiry dated June 29, 2006 for Request for Review #3562:

Issue E: Does the Edmonton Police Service have the authority to collect the Complainant's personal information, as provided by sections 33 and 34 of the FOIP Act?

[para 12] Following the release of the Ontario Court of Appeal's decision in *Converters Canada v. Oshawa (City)*, 2007 ONCA 502, I added the following issue:

Issue F: Is there a conflict between Municipal Bylaw 13138 and section 33 of the FOIP Act for the purposes of section 14 of the *Municipal Government Act*?

[para 13] The following issues were identified in the Notice of Inquiry dated June 29, 2006 for Case File P0363:

Issue G: Is the *Personal Information Protection Act* (PIPA) inapplicable to the Complainant's personal information because the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) applies, by virtue of section 4(2) of PIPA and / or section 4(3)(e) of PIPA?

Issue H: If PIPA nonetheless applies, the Commissioner will also consider the following issues:

1. Did the Organization have the authority to collect and disclose the Complainant's personal information without consent, as provided by section 14(b) and section 20(b) of the PIPA and section 5 of the Personal Information Protection Regulation?
2. If the Organization did not have the authority to collect or disclose the complainant's personal information without consent, was the collection or disclosure in contravention of section 7(1) of PIPA, having regard to sections 8(2) and (3) of the PIPA?
3. Did the Organization collect and disclose the Complainant's personal information for purposes that are reasonable, as required by section 11(1) and section 19(1) of PIPA respectively?

4. Did the Organization collect and disclose the Complainant's personal information only to the extent that it is reasonable for meeting the purposes for which the information was collected and disclosed, as provided by section 11(2) and section 19(2) of PIPA?

IV. DISCUSSION OF ISSUES

Preliminary Questions

[para 14] I will address two preliminary questions, as answering these questions will assist me to answer the issues identified for review.

1. Does Bylaw 13138 authorize the City Manager to require pawnshops and second-hand stores to upload personal information of clients to a database?
2. Does Bylaw 13138 authorize EPS to access such a database?

[para 15] Section 7 of the *Municipal Government Act* authorizes municipalities to make bylaws. The City of Edmonton has enacted Bylaw 13138, which applies to pawn shops and second-hand stores, among other businesses, under this authority. Through this bylaw, the City requires pawnshops and second-hand stores to collect personal information from clients when items are pawned or sold. The City Manager's directive requires pawnshops and second-hand stores to upload this information to an electronic database administered by BWI, a company based in Saskatchewan. EPS has access to the database. In order to comply with the directive, a pawnshop or second-hand store must have a computer, internet access, and BWI software.

[para 16] Bylaw 13138 states, in part:

- 33 *Whenever goods are received and held as security for an advance of money the following information shall be accurately recorded:*
- (a) *the date and time the goods were received;*
 - (b) *the full name, date of birth, residential address, telephone number, gender, eye and hair colour of the Person delivering the goods;*
 - (c) *details from at least 2 pieces of identification provided by the Person delivering the goods, at least one of which must have a photograph of the Person;*
 - (d) *a complete description of each good including where available, the make, model and serial number of the good, the manufacturers name and any distinguishing marks;*

- (e) *the amount of money advanced in respect of each good; and*
- (f) *the name of the Person working in the Pawn Shop that conducted the transaction...*

40 *The information required to be recorded by this Part:*

- (a) *shall be recorded in a form and manner acceptable to the City Manager; and*
- (b) *shall be made available to a Peace Officer forthwith upon request.*

40.2 *Whenever previously owned goods are acquired or received by a Second Hand Store for re-sale, the following information shall be accurately recorded:*

- (a) *the date and time the goods are acquired or received;*
- (b) *the full name, date of birth, residential address, telephone number, gender, eye and hair colour of the person from whom the goods are acquired or received;*
- (c) *details from at least two pieces of identification provided by the Person from whom the goods are acquired at least one of which must have a photograph of the Person;*
- (d) *a complete description of each good including, where available, the make, model and serial number of the good, the manufacturer's name and any distinguishing marks;*
- (e) *the amount of money paid in respect of each good; and*
- (f) *the name of the Person working in the Second Hand Store that conducted the transaction.*

40.8 *The information required to be recorded by this Part:*

- (a) *shall be recorded in a form and manner acceptable to the City Manager; and*
- (b) *shall be made available to a Peace Officer forthwith upon request.*

[para 17] EPS argues that the City Manager's authority to prescribe the form in which pawnshops and second-hand stores record personal information collected under the bylaw amounts to authority to require the information to be stored in an electronic format

that will allow for automated reporting to the EPS. Essentially, EPS argues that the bylaw creates authority to require pawnshops and second-hand stores to submit client's personal information to an electronic database where it may be accessed and used by peace officers, because the bylaw allows the City Manager to establish the form in which information is recorded, and requires pawnshops and second-hand stores to make this information available to a peace officer on request.

[para 18] The City notes:

A review of the licensing bylaws since 1913 indicates that personal information collected and turned over to police by pawnshops has been required in all licensing bylaws.

The City also provided copies of historic bylaws to support this position and affidavit evidence from the City Manager to explain new pawnshop and second-hand store licensing requirements. The affidavit evidence explains that the City Manager may establish the form in which information is collected. However, I note that the bylaw actually states that information required to be recorded "shall be recorded in a form and manner acceptable to the City Manager".

[para 19] The Complainant argues that Bylaw 13138 does not provide sufficient authority for the City to require pawnshops and second-hand stores to submit clients' personal information to an electronic database for three reasons:

First, the effect of the Letter Directive is that all personal information recorded by the Stores is transmitted each day, as opposed to merely being made available to a peace officer upon request.

Second, all personal information is transmitted to a for-profit company, Business Watch International ("BWI") as opposed to a Peace Officer. Section 2(g) of the By-Law defines a Peace Officer as a peace officer as defined in the Provincial Offences Procedure Act RSA 2000, c. P-34. The latter Act does not include BWI or any other for-profit companies within the definition of peace officer(r).

Third, the Letter Directive requires that the personal information be transmitted whether or not there is any request by a peace officer or actual investigation.

[para 20] The Complainant agrees that the bylaw empowers the City Manager to determine the form and manner in which the information is to be recorded, but argues that it does not allow the City Manager or any other person to expand the obligations of pawnshops or second-hand stores under the bylaw.

[para 21] I agree with the Complainant's argument that the bylaw does not provide the necessary authority for the City to require a pawnshop or second-hand store to disclose information collected under the bylaw to an entity other than a peace officer, which is in effect what happens when a pawnshop or second-hand store uploads customer information to the BWI database. I also agree that the phrase "make available to a peace officer forthwith upon request" does not support an interpretation that information is to be disclosed to subscribing police services automatically and routinely.

[para 22] Sections 40 and 40.8 of the bylaw are clearly intended to address the way in which information is to be recorded, and when that information is to be made available to a peace officer. I do not read sections 40(a) or 40.8 of the bylaw as providing any authority to the City Manager other than the authority to determine the form and manner in which information is recorded. Nevertheless, the City Manager has informed pawnshops and second-hand stores (the directive) that they must send information electronically to a database maintained by a private company based in Saskatchewan. This policy may have developed because the City Manager views his jurisdiction as encompassing the form and manner of collection of information. However, the bylaw makes it clear that his jurisdiction is limited to establishing the manner in which collected information is recorded.

[para 23] The *Concise Oxford Dictionary* Ninth Edition provides the following definition of “record”: “set down in writing or some other permanent form for later reference, esp. as an official record.” I find that there is nothing in the context of the bylaw to indicate that the municipal council intended anything other than “record”, as that word is generally understood, when it enacted this provision. On the contrary, the fact that the record must be “made available to a peace officer *forthwith* upon request” would suggest that the municipal council did not intend for a pawnshop or second-hand store to remove recorded information from the premises when it enacted the bylaw. It should be remembered that when the bylaw was originally enacted, paper records were the standard. While I agree that the bylaw enables the City Manager to require information to be recorded electronically, I do not agree that this authority includes requiring information to be uploaded to a database established and maintained by a business under contract to the City.

[para 24] Under the directive, pawnshops and second-hand stores are required to make available information collected under sections 33 and 40.2 of the bylaw to the police service as a whole, without a request by a peace officer. This requirement is much broader than that contemplated by sections 40 and 40.8 of the bylaw, under which a pawnshop or second-hand store is under no obligation to provide information collected under sections 33 and 40.2 to a peace officer until a request is made under section 40(b) or 40.8(b).

[para 25] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, Bastarache J., writing for the majority of the Supreme Court of Canada, noted:

Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, “The Consumer Interest and Regulatory Reform”, in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

In other words, while statutory bodies such as the City, or statutory office holders, such as the City Manager, may exercise discretion within a legislative framework, they cannot exercise discretion outside that framework. As D. J. Mullan notes in *Administrative Law* (2003) at p.953, “Administrative action that is not authorized by law is of no legal force or effect.”

[para 26] In the present case, the City Manager is given authority under the bylaw to determine how pawnshops and second-hand stores will record customer information. However, the City Manager has instead ordered pawnshops and second-hand stores to upload information to the BWI database. I do not find that uploading information to a database administered by a private company under a contract with the City is the same thing as recording personal information, nor do I find that uploading information is implicit in the authority to determine how information is recorded. Consequently, I find that the City Manager’s requirement that pawnshops and second-hand stores upload information to the BWI database exceeds the City Manager’s jurisdiction under the bylaw.

[para 27] For these reasons, I answer both questions in the negative.

Case File Number 3561

Issue A: Is the Complainant’s personal information in the custody or under the control of the City for the purposes of the FOIP Act?

[para 28] There is no dispute that the Complainant’s information and the information of other individuals who have pawned or sold items since July 2005, are currently stored in a database maintained by BWI and accessible to subscribing police services.

[para 29] The City of Edmonton argues that it does not possess the Complainant’s personal information and therefore does not have custody over it.

[para 30] EPS argues that the City does not have custody or control over the database or the Complainant’s personal information. It argues that pawnshops and second-hand stores are subject to PIPA when they transmit information to the BWI database and that information downloaded from the database by EPS is subject to the FOIP Act. It contends that finding that the FOIP Act applies to information collected by pawnshops and second-hand stores under sections 33 and 40.2 of Bylaw 13138 would result in a complex and confusing privacy scheme.

[para 31] The Complainant argues that the City has control over the Complainant’s personal information because the information was collected under the direction of the City, pursuant to a municipal bylaw, and entered into the database pursuant to a directive issued by the City.

[para 32] Section 4(1) of the FOIP Act explains when it applies to records. It states in part:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following...

For the FOIP Act to apply to a record, it need only be established that a public body has custody or control of the record.

[para 33] In Order F2002-014, I said:

Under the Act, custody and control are distinct concepts. “Custody” refers to the physical possession of a record, while “control” refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record. A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act.

[para 34] The City entered a contract for services with BWI. As part of that contract, BWI maintains a database of information collected by pawnshops and second-hand stores and makes that information available for download to EPS. Section 1(e) of the Act explains who is an employee of a public body. It states:

I In this Act,

(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body...

While the City argues that it entered the contract on behalf of EPS, the fact remains that the City is a party to the contract and EPS is not. As a result, BWI is an employee of the City within the meaning of section 1(e) of the FOIP Act. For this reason, I find that the personal information in the custody of BWI is also in the custody of the City.

[para 35] Consequently, I find that the Complainant’s personal information is in the custody of the City within the meaning of the FOIP Act.

Issue B: Does the City of Edmonton have the authority to collect the Complainant’s personal information, as provided by sections 33 and 34 of the FOIP Act?

Section 33

[para 36] The City did not provide submissions on this issue, as it takes the position that it does not have custody or control over the database, and consequently, does not

have control over personal information collected in the database. From this argument, I infer that it takes the position that it has not collected the Complainant's information.

[para 37] The Complainant argues that the City does not have the authority to collect the Complainant's personal information under sections 33 and 34 of the FOIP Act as the collection is not authorized by an enactment. The Complainant takes the position that the bylaw does not authorize information to be entered into a database and that the City lacks the authority to delegate its bylaw making authority to the City Manager.

[para 38] EPS argues that under section 1(3) of the FOIP Regulation, a regulation is included in the definition of "an enactment of Alberta" and that the *Interpretation Act*, which applies to the FOIP Act, defines "regulation" when that term is used in an enactment, as including a bylaw. In its follow up submissions, EPS suggested that the information required by Bylaw 13138 is not considered "sensitive personal information" within the meaning of the FOIP Act. The FOIP Act does not refer to "sensitive personal information". Rather, it contains provisions addressing situations when disclosure of personal information is an unreasonable invasion of personal privacy. I understand EPS's argument to mean that disclosure of the personal information collected under the bylaw is not an invasion of personal privacy, and even if it were, there would be few consequences in the event of a security breach.

[para 39] I find that the information required by the bylaw -- full name, date of birth, residential address, telephone number, gender, eye and hair colour of the Person delivering the goods; details from at least 2 pieces of identification provided by the Person delivering the goods, and at least one of which must have a photograph of the Person -- is personal information about an individual for the purposes of section 1(n) of the FOIP Act. In addition, as information gathered under the bylaw may include credit card and social insurance numbers, and driver's license and passport information, disclosing this personal information would, in most cases, amount to an unreasonable invasion of personal privacy, unless a provision of section 40 of the FOIP Act applies. In addition, given the sensitivity of the information, there could be far reaching consequences in the event of a security breach.

[para 40] Section 33 of the Act prohibits the collection of personal information except in certain circumstances. It states:

- 33 *No personal information may be collected by or for a public body unless*
- (a) *the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
 - (b) *that information is collected for the purposes of law enforcement,*
or
 - (c) *that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 41] Under the bylaw, pawnshops and second-hand stores are required to collect and maintain custody of information gathered under sections 33 and 40.2 of the

bylaw. Under the directive, these businesses are required to upload the personal information of customers to BWI, which in turn maintains custody of it as required by its contract with the City. Once it is uploaded to the database, subscribing police services collect this information.

[para 42] I note that section 33 of the FOIP Act prohibits collection “for” a public body as well as “by” a public body. In my view, this provision prohibits collection at the direction of a public body unless the conditions in 33 (a), (b), or (c) are met. While the City takes the position that it has not collected the Complainant’s personal information, I find that the City collects personal information when pawnshops and second-hand stores upload customer information to the BWI database, as BWI is an employee of the City under the FOIP Act. In the current system, the City effectively takes custody of personal information when a pawnshop or second-hand store uploads the information to the BWI database. Consequently I find that the City has collected the Complainant’s personal information within the meaning of section 33.

[para 43] I do not find that collection under the City Manager’s directive is expressly authorized by an enactment of Canada or Alberta for the purposes of section 33(a). While I agree that a bylaw is an enactment for the purposes of the Act, the authority for collection of information gathered under sections 33 and 40.2 of the bylaw into the BWI database does not stem from a bylaw, but rather from a directive of the City Manager to pawnshop and second-hand stores. The directive is not an enactment of Alberta or Canada under the FOIP Act, and therefore, the City cannot rely on section 33(a) of the FOIP Act to authorize the collection of information in the BWI database.

[para 44] I do not find that the collection in question is for the purpose of law enforcement as permitted by 33(b) of the FOIP Act. The affidavit evidence of the City is that the information is uploaded to the database to meet a reporting requirement imposed on pawnshops and second-hand stores. I do not find that a reporting requirement is a law enforcement purpose under section 33(b) of the FOIP Act.

[para 45] The City’s position is that it does not have custody or control of the personal information and has not collected it. Thus, by the City’s own admission, it does not use the information collected for any municipal program or activity. As a result, I infer that the information collected is therefore unnecessary for an operating program or activity of the City, as provided by section 33(c) of the FOIP Act.

[para 46] For these reasons, I find that the City collected personal information contrary to section 33 of the FOIP Act when the Complainant’s personal information, and that of other customers, was uploaded to the BWI database at the City’s direction.

Section 34

[para 47] Section 34 prohibits a Public Body from collecting personal information indirectly except in certain circumstances. It states in part:

34(1) A public body must collect personal information directly from the individual the information is about unless

- (a) another method of collection is authorized by*
 - (i) that individual,*
 - (ii) another Act or a regulation under another Act, or*
 - (iii) the Commissioner under section 53(1)(h) of this Act,*
- (b) the information may be disclosed to the public body under Division 2 of this Part,*
- (c) the information is collected in a health or safety emergency where*
 - (i) the individual is not able to provide the information directly, or*
 - (ii) direct collection could reasonably be expected to endanger the mental or physical health or safety of the individual or another person,*
- (d) the information concerns an individual who is designated as a person to be contacted in an emergency or other specified circumstances,*
- (e) the information is collected for the purpose of determining suitability for an honour or award, including an honorary degree, scholarship, prize or bursary,*
- (f) the information is collected from published or other public sources for the purpose of fund-raising,*
- (g) the information is collected for the purpose of law enforcement,*
- (h) the information is collected for the purpose of collecting a fine or a debt owed to the Government of Alberta or a public body,*
- (i) the information concerns the history, release or supervision of an individual under the control or supervision of a correctional authority,*
- (j) the information is collected for use in the provision of legal services to the Government of Alberta or a public body,*
- (k) the information is necessary*
 - (i) to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of Alberta or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or*
 - (ii) to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the Government of Alberta or a public body and is collected for that purpose,*
- (l) the information is collected for the purpose of informing the Public Trustee or the Public Guardian about clients or potential clients,*

- (m) *the information is collected for the purpose of enforcing a maintenance order under the Maintenance Enforcement Act,*
- (n) *the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body, or*
- (o) *the information is collected for the purpose of assisting in researching or validating the claims, disputes or grievances of aboriginal people.*

[para 48] Both the directive and the bylaw require pawnshops and second-hand stores to collect personal information from clients who pawn or sell items. The question is whether the City collected the Complainant's information directly or indirectly, and, if indirectly, whether this practice is authorized under section 34.

[para 49] I have found that the directive is not authorized under the bylaw. Consequently, the requirement that a pawnshop or a second-hand store upload personal information to the BWI database is without authority and results in BWI, an employee of the City, collecting personal information without authority. Furthermore, since BWI is not collecting personal information directly from the person the information is about, but from the pawnshop or second-hand store, the City is required to establish BWI's authority to collect indirectly. A directive that has no authority in law cannot establish authority to collect indirectly under section 34(1)(a)(ii).

[para 50] I do not find that any of the other provisions of section 34 apply to enable the City to collect information indirectly. In any event, the City did not provide any argument in relation to the provisions of section 34.

[para 51] For these reasons, I find that the City has collected personal information through the directive contrary to both sections 33 and 34 of the FOIP Act.

Issue C: Does the City of Edmonton have the Authority to disclose the Complainant's personal information to the Edmonton Police Service, as provided by section 40(1) of the FOIP Act?

[para 52] Section 40 of the FOIP Act sets out the situations in which a Public Body may disclose personal information. It states:

- 40(1) A public body may disclose personal information only*
- (a) in accordance with Part 1,*
 - (b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
 - (c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
 - (d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,*

- (e) *for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,*
- (f) *for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,*
- (g) *for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction in Alberta to compel the production of information or with a rule of court binding in Alberta that relates to the production of information,*
- (h) *to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member,*
- (i) *to an officer or employee of a public body or to a member of the Executive Council, if the disclosure is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or member to whom the information is disclosed,*
- (j) *for the purpose of enforcing a legal right that the Government of Alberta or a public body has against any person,*
- (k) *for the purpose of*
 - (i) *collecting a fine or debt owing by an individual to the Government of Alberta or to a public body, or to an assignee of either of them, or*
 - (ii) *making a payment owing by the Government of Alberta or by a public body to an individual,*
- (l) *for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit,*
- (m) *to the Auditor General or any other prescribed person or body for audit purposes,*
- (n) *to a member of the Legislative Assembly who has been requested by the individual the information is about to assist in resolving a problem,*
- (o) *to a representative of a bargaining agent who has been authorized in writing by the employee the information is about to make an inquiry,*
- (p) *to the Provincial Archives of Alberta or to the archives of a public body for permanent preservation,*
- (q) *to a public body or a law enforcement agency in Canada to assist in an investigation*
 - (i) *undertaken with a view to a law enforcement proceeding,*
or
 - (ii) *from which a law enforcement proceeding is likely to result,*
- (r) *if the public body is a law enforcement agency and the information is disclosed*

- (i) *to another law enforcement agency in Canada, or*
- (ii) *to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority,*
- (s) *so that the spouse or adult interdependent partner, relative or friend of an injured, ill or deceased individual may be contacted,*
- (t) *in accordance with section 42 or 43,*
- (u) *to an expert for the purposes of section 18(2),*
- (v) *for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,*
- (w) *when disclosure is by the Minister of Justice and Attorney General or an agent or lawyer of the Minister of Justice and Attorney General to a place of lawful detention,*
- (x) *for the purpose of managing or administering personnel of the Government of Alberta or the public body,*
- (y) *to the Director of Maintenance Enforcement for the purpose of enforcing a maintenance order under the Maintenance Enforcement Act,*
- (z) *to an officer of the Legislature, if the information is necessary for the performance of the duties of that officer,*
- (aa) *for the purpose of supervising an individual under the control or supervision of a correctional authority,*
- (bb) *when the information is available to the public,*
- (bb.1) *if the personal information is information of a type routinely disclosed in a business or professional context and the disclosure*
 - (i) *is limited to an individual's name and business contact information, including business title, address, telephone number, facsimile number and e-mail address, and*
 - (ii) *does not reveal other personal information about the individual or personal information about another individual,*
- (cc) *to the surviving spouse or adult interdependent partner or a relative of a deceased individual if, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy,*
- (dd) *to a lawyer or student-at-law acting for an inmate under the control or supervision of a correctional authority,*
- (ee) *if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person, or*
- (ff) *to the Administrator of the Motor Vehicle Accident Claims Act or to an agent or lawyer of the Administrator for the purpose of dealing with claims under that Act.*

(2) *Notwithstanding subsection (1), a post-secondary educational body may disclose personal information in its alumni records for the purpose of*

fund-raising activities of the post-secondary educational body if the post-secondary educational body and the person to whom the information is disclosed have entered into a written agreement

- (a) *that allows individuals a right of access to personal information that is disclosed about them under this subsection, and*
- (b) *that provides that the person to whom the information is disclosed must discontinue using the personal information of any individual who so requests.*

(3) Notwithstanding subsection (1), a post-secondary educational body may, for the purpose of assisting students in selecting courses, disclose teaching and course evaluations that were completed by students.

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 53] The City and EPS provided no evidence or argument on this point, as the position of both public bodies is that the City has neither custody nor control over pawnshop and second-hand store clients' personal information. The Complainant argues that section 40 is intended to limit disclosure of personal information contained in databases such as the BWI database, to police.

[para 54] Through its contract with BWI, the City directs when and to whom BWI may disclose personal information from the database. Consequently, I find that any disclosure made by BWI in accordance with the directive is a disclosure of the City.

[para 55] The bylaw requires pawnshops and second-hand stores to make information collected under sections 33 and 40.2 available to a peace officer forthwith upon request. However, as noted above, I do not find that this is the same thing as authorizing a peace officer to download information from a database without first making a request to a pawnshop or second-hand store. The directive is without legal authority and is not an enactment. I therefore do not find that an enactment of Alberta authorizes the City to disclose personal information obtained from pawnshop or second-hand store clients to EPS or to peace officers of other jurisdictions through the BWI database.

[para 56] I have reviewed the provisions of section 40 and do not find, based on the arguments provided and on the evidence before me, that it authorizes the City to disclose the personal information from pawnshop or second-hand store clients, including the Complainant's personal information, to EPS or to peace officers in other jurisdictions. As I find that the bylaw does not authorize disclosure by the City to EPS or other police services or subscribers to the BWI database, and, as the evidence does not establish that any other provision of section 40 authorizes such disclosure, that the City does not have authority to disclose the Complainant's personal information under section 40.

Issue D: Has the City of Edmonton protected the Complainant's personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction, as provided by section 38 of the FOIP Act?

[para 57] The City provided no evidence that it has taken steps to protect the Complainant's personal information or made reasonable security arrangements and made no submissions on this issue.

[para 58] BWI provided direct evidence from its President and CEO, explaining the steps taken to secure the database.

[para 59] The Complainant argues that the City has taken no steps to ensure the security of personal information that may be located in pawnshops, second-hand stores or police services. He comments that he is unable to evaluate the security measures taken by BWI without the ability to cross examine employees of BWI.

[para 60] I have already found that information collected under the directive is collected at the direction of the City by BWI, an employee of the City. Consequently, I found that the City has custody of the information. Section 38 imposes a duty on the head of a public body to ensure the security of personal information. It states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 61] For the reasons discussed under Issue H, I find that PIPA does not apply to the information uploaded to the BWI database by pawnshops and second-hand stores under the directive. When a public body has custody or control over personal information, this information is excluded from the application of PIPA even if it is in the custody of an organization. In such a situation, the public body has a duty to safeguard the information under the FOIP Act.

[para 62] Under the system established by the directive, in which information is collected by a pawnshop or second-hand store and uploaded to a database, the City is under a duty to ensure the security of personal information collected by these businesses and uploaded to the database and to make security arrangements to protect against the risks identified in section 38.

[para 63] The City bears the burden of proof to establish that it has taken reasonable security measures to protect the personal information that has been collected for it, as it is in the best position to provide evidence of the steps it has taken. The City provided no evidence in relation to security systems in place at BWI or at pawnshops, second-hand stores, or police services with access to the BWI database. It argues that it does not collect the information and has no access to the BWI database. From these submissions

and from the evidence, I infer that the City has taken no steps to protect personal information collected under the directive.

[para 64] I disagree with the position of EPS that a finding that PIPA does not apply to the personal information uploaded to the BWI database would result in a confusing statutory scheme. PIPA is clear that once a public body has control or custody of personal information, PIPA does not apply to that information. Instead, I find that any difficulty arising from the bylaw and the directive is the result of failing to consider the consequences under PIPA and the FOIP Act when issuing a directive without legal authority.

[para 65] I am aware that a consequence of this finding is that any obligations respecting the personal information of customers under PIPA do not apply to the information in the custody of pawnshops and second-hand stores that they upload to the databases. As a result, the City bears the statutory duty to safeguard personal information that BWI collects under the directive, even though that personal information may be physically located in a pawnshop or second-hand store or in the BWI database.

[para 66] Section 2(b) of the FOIP Act states that a purpose of the legislature in enacting the FOIP Act is:

to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure of that information.

A finding that the City has a duty under the FOIP Act to safeguard information collected under the bylaw is consistent with this purpose.

[para 67] It is also important to note that PIPA defers to the FOIP Act. Not only do sections 4(2) and 4(3)(e) make it clear that PIPA does not apply to information that is subject to the FOIP Act, but section 4(6) states that where there is a conflict between the two statutes, the FOIP Act prevails. These provisions indicate a clear legislative intent that public bodies are to be responsible for information in their custody and under their control even when that information is in the custody of an organization.

[para 68] Organizations may continue to have duties in tort or be subject to the Criminal Code in relation to the personal information; however, the City bears the statutory duty to safeguard the personal information collected under the directive.

[para 69] I agree with the following statement from Order F06-01 *British Columbia (Ministry of Energy, Mines and Petroleum Resources) (Re)* [2006] B.C.I.P.C.D. No. 2:

Outsourcing is not inconsistent with FOIPPA. It is contemplated by the extended definition of “employee”... and by section 33(f) which permits disclosure to an “employee” of personal information in the custody or under the control of a public body where the disclosure is necessary for the performance of the employee’s duties. The fact that outsourcing is contemplated FOIPPA does not, however, authorize a public body to do so in circumstances that would reduce security

arrangements for personal information below those required of the public body directly. ...I conclude that a public body cannot contract out of its obligations under the Act or immunize records from its control under the Act, by contracting out a function and labeling it “independent” or failing to enter into adequate contractual arrangements to ensure compliance with the Act.

[para 70] However, I am satisfied that BWI has, as an employee of the City, taken reasonable steps to secure the database. BWI provided direct evidence explaining the security measures, both physical and electronic, in place to protect the database. These include: a personnel security policy governing access to data by BWI employees, a Firebox firewall from WatchGuard Corporation, 128 bit encryption, 4 layers of logs recording system information which are monitored by IT personnel 24 hours a day, and secure hosting by SaskTel Data Centre. In addition, BWI provided information about the physical location of the Data Centre, which is a dedicated multi-floor site-hardened and windowless structure with a fire rating of 1.5 hours for walls and doors. Mechanical rooms, electronic control units and the power supply units are separate from the main server room. Bonded security personnel are on site and entries are electronically secured. The perimeter and corridors are monitored by closed circuit cameras and motion detectors. Access to the Data Centre requires biometric scanners and key card access. In addition, vulnerability assessments are conducted on a regular basis to ensure protection of the Data Centre infrastructure and system.

[para 71] BWI also provided an explanation of its Security Policy as it relates to the pawnshop and secondhand store client database. The policy applies to information stored on databases, computers, transmitted across internal and public networks, on paper, held on film or microfiche, presented on slides, overhead projectors, or with visual and audio media, spoken during telephone calls and meetings, and stored on removable and fixed media.

[para 72] While I am satisfied that reasonable steps have been taken to secure the BWI database, the evidence of the president of BWI raises other concerns. He notes in his statement:

For stores with their own Point of Sale(POS)(pawn application used to run their business),BWI has published an upload file format so they can upload the transactions at the end of the day. This is what CashConverters does on a daily basis to get the information to BWI.Our understanding is that a copy of the information remains on the Cash Converter’s POS system, but BWI has no way to confirm this as we have no control over, or access to their POS system.

[para 73] No evidence has been provided as to the security of the Complainant’s personal information physically located at Cash Converters. However, as the City has custody of the information, the FOIP Act requires the City to take reasonable measures to ensure its security.

[para 74] For these reasons, I find that the City has a duty to protect the personal information, but has not established that it has taken appropriate steps to protect the Complainant’s personal information, or that of other pawnshop or second-hand store clients. Specifically, it has not established that it has taken any steps, reasonable or otherwise, to ensure the security of personal information located in Cash Converters or

other pawnshops or second-hand stores against unauthorized access, use, disclosure or destruction.

Case File Number 3562

Issue E: Does the Edmonton Police Service have the authority to collect the Complainant's personal information, as provided by sections 33 and 34 of the FOIP Act?

Section 33

[para 75] Under sections 1(i)(x)(B) and 1(j) of the FOIP Act, EPS is a local public body. Consequently the FOIP Act applies to EPS. However, EPS is not a peace officer within the meaning of Bylaw 13138. Under the scheme established by the City Manager's directive, EPS as a public body collects information from the BWI database.

[para 76] EPS argues that Bylaw 13138 authorizes EPS to collect the Complainant's personal information, and that of other pawnshop and second-hand store clients. In addition, EPS argues that it collects this information to identify and recover stolen goods and to assist in the apprehension of individuals engaged in criminal activity, which are law enforcement purposes.

[para 77] The Complainant argues that when EPS collects the information gathered under the directive, it is the result of a disclosure by the City that is contrary to section 40. The Complainant also argues that EPS does not collect the information in question for a law enforcement purpose, as it collects information for reasons other than those listed under section 1(h) of the FOIP Act.

[para 78] As discussed above, I find that Bylaw 13138 does not contemplate the creation of a database accessible to clients of BWI, such as EPS. As a result, I find that any collection by EPS of the information in the BWI database is not authorized by an enactment as required by section 33(a) of the FOIP Act.

[para 79] EPS provided its reasons for collecting personal information in general terms but provided no evidence that collecting the Complainant's personal information would assist EPS in achieving its law enforcement objectives under section 33(b).

[para 80] It is important to consider the meaning of "personal information" under the FOIP Act:

- 1(n) "personal information" means recorded information about an identifiable individual, including*
- (i) the individual's name, home or business address or home or business telephone number,*
 - (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*

- (iii) *the individual's age, sex, marital status or family status,*
- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) *information about the individual's health and health care history, including information about a physical or mental disability,*
- (vii) *information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) *anyone else's opinions about the individual, and*
- (ix) *the individual's personal views or opinions, except if they are about someone else;*

[para 81] Personal information under the FOIP Act is about an individual and not a class of people generally. In addition, individuals are given the right under section 65(3) of the FOIP Act to complain that their own personal information has been collected, used or disclosed in contravention of the FOIP Act, as the Complainant has done. To defend against such a complaint, a public body must establish that collecting the individual's information serves a law enforcement purpose.

[para 82] In *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 the Ontario Court of Appeal said:

Section 28(2) also allows personal information to be collected on behalf of an institution if the information is "used for the purposes of law enforcement". Of significant concern in this case is the wholesale transmission to the police of a significant amount of personal information about individuals. This transmission occurs before there is any basis to suspect that the goods that were sold to the second-hand dealer were stolen and is made with no limit as to its use by the police or by those to whom the police may share the information. Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement.

In my view, the same analysis holds true for EPS' collection of pawnshop and second-hand store clients' personal information. Through its access to the database, EPS collects this information regardless of whether there is a law enforcement need for it. Therefore it cannot be said that it collects this information for a law enforcement purpose.

[para 83] As the Complainant notes, section 1(h) of the FOIP Act defines law enforcement. It states:

- 1(h) "law enforcement" means*
- (i) policing, including criminal intelligence operations,*
 - (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation*

or by another body to which the results of the investigation are referred, or
(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;

[para 84] I do not find that the Complainant's information was collected for the purposes of policing, an investigation, or proceedings leading to penalty or sanction. Consequently, I find that the evidence does not establish that EPS collected the complainant's personal information for a law enforcement purpose within the meaning of the FOIP Act.

[para 85] EPS argues that its collection is authorized pursuant to section 33(c) as it collects information for the purposes of law enforcement, which it contends is an operating program or activity of EPS. I have already found that EPS does not collect the personal information of pawnshop and second-hand store clients for law enforcement purposes. In addition, I do not agree that the general function of a public body is the same thing as an operating program or activity of the public body, as argued by EPS. For example, the general function of a police service is law enforcement. In contrast, a public body's programs and activities would refer to specific plans and projects intended to carry out that function. As a result, I do not find that section 33(c) applies.

[para 86] For these reasons, I find that EPS collected the Complainant's information and that of other pawnshop and second-hand store clients in contravention of section 33 of the FOIP Act.

Section 34

[para 87] EPS and BWI argue that BWI is EPS' employee under the Act, as there is a service contract between the City, on behalf of EPS, and BWI. Therefore, they reason that EPS is collecting personal information directly from pawnshops. I disagree that BWI is an employee of EPS. EPS is not a party to the contract between the City and BWI. Under section 27 of the Police Act R.S.A. 2000 c. P-17, it is the responsibility of the City to maintain and establish the police service, which includes entering contracts on behalf of EPS. The Police Act does not appear to provide any ability for police services to enter into contracts. While police services are public bodies under the FOIP Act, this designation does not create any contracting ability.

[para 88] It is also important to note that a pawnshop or second-hand store is not an individual under the Act. Consequently, even if BWI were an employee of EPS, the collection of customer information from pawnshops and second-hand stores remains indirect and must be authorized by a provision of section 34. As discussed above, the authority for BWI and EPS to collect information about pawnshop and second-hand store clients is the City Manager's directive and the City's contract with BWI. The directive is

without authority and therefore the method of collection is not authorized by an Act or regulation.

[para 89] By downloading information from the BWI database, EPS collects information collected by pawnshops and second-hand stores under Bylaw 13138. As the information is not provided by the individual directly to a peace officer, this would be an indirect collection by EPS for the purposes of section 34.

[para 90] As noted above, there are prescribed circumstances in section 34 which allow a public body to collect information indirectly. However, I have already found that EPS did not collect the complainant's personal information for a law enforcement purpose. I do not find that any other provisions of section 34 apply to permit EPS to collect personal information indirectly from individuals.

[para 91] For these reasons, I find that EPS collected the Complainant's personal information, and that of other pawnshop and second-hand store customers contrary to section 34 the FOIP Act.

Issue F: Is there a conflict between Municipal Bylaw 13138 and section 33 of the FOIP Act for the purposes of section 13 of the *Municipal Government Act*?

[para 92] In *Cash Converters Canada v. Oshawa (City)*, 2007 ONCA 502, the Ontario Court of Appeal determined that a civic bylaw requiring second-hand stores to upload clients' personal information to the BWI database conflicted with section 28(2) of the *Municipal Freedom of Information and Privacy Protection Act*.

[para 93] Section 28(2) of that Act states:

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[para 94] The Court of Appeal found that the bylaw is not a statute within the meaning of the *Municipal Freedom of Information and Privacy Protection Act*. Had section 33 of the FOIP Act also used the term "statute", it is likely that Bylaw 13138 would conflict with section 33. However, section 33 uses the term "enactment". Under Issue B, I have already determined that a bylaw is an enactment within the meaning of section 33 and may expressly authorize the collection of information. As stated above, I do not find that Municipal Bylaw 13138, on its face, conflicts with section 33 of the FOIP Act.

[para 95] As discussed above, the Ontario Court of Appeal also found that the purpose for collecting information was consumer protection rather than law enforcement. In relation to whether collection was necessary for the proper administration of a lawfully authorized activity, the Court stated:

Based on the evidence in this application, the city has not demonstrated that the impugned provisions of the new by-law that mandate the collection and electronic transmission to police of detailed personal information about vendors of second-hand goods, is necessary for an effective consumer protection regime to license second-hand dealers.

Consequently, the Court found that the municipality lacked the authority to enact the bylaw and declared it to be of no force and effect.

[para 96] Unlike the City of Oshawa, the City did not amend its bylaw to require pawnshops and second-hand stores to upload information collected from clients to the BWI database. Instead, the City has relied on a policy directive to achieve this purpose. I find that while the bylaw itself does not conflict with section 33 of the FOIP Act, the system created by the directive does.

Case File Number P0363

Issue G: Is the Personal Information Protection Act (PIPA) inapplicable to the Complainant's personal information because the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) applies, by virtue of section 4(2) of PIPA and / or section 4(3)(e) of PIPA?

Issue H: If PIPA nonetheless applies, the Commissioner will also consider the following issues:

- 1. Did the Organization have the authority to collect and disclose the Complainant's personal information without consent, as provided by section 14(b) and section 20(b) of the PIPA and section 5 of the Personal Information Protection Regulation?**
- 2. If the Organization did not have the authority to collect or disclose the complainant's personal information without consent, was the collection or disclosure in contravention of section 7(1) of PIPA, having regard to sections 8(2) and (3) of the PIPA?**
- 3. Did the Organization collect and disclose the Complainant's personal information for purposes that are reasonable, as required by section 11(1) and section 19(1) of PIPA respectively?**
- 4. Did the Organization collect and disclose the Complainant's personal information only to the extent that it is reasonable for meeting the purposes for which the information was collected and disclosed, as provided by section 11(2) and section 19(2) of PIPA?**

[para 97] I will address issues G and H together as they are interrelated.

[para 98] Pawnshops and second-hand stores are organizations under PIPA. Consequently, PIPA applies to the information collected, used and disclosed by these businesses, subject to the exceptions in that Act. Section 4 of PIPA explains the Act's application. It states in part:

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

(2) Subject to the regulations, this Act does not apply to a public body or any personal information that is in the custody of or under the control of a public body.

(3) This Act does not apply to the following:

(e) personal information that is in the custody of an organization if the Freedom of Information and Protection of Privacy Act applies to that information;

[para 99] I have already found that the Complainant's personal information, uploaded to BWI under the City Manager's directive, is in the custody of the City and that the FOIP Act applies to that information. By application of section 4(2), PIPA does not apply to the City, a public body, or to information in its custody or under its control. Consequently, PIPA does not apply to the information uploaded by pawnshops or second-hand stores to the BWI database under the directive.

[para 100] In situations where pawnshops and second-hand stores maintain physical custody of the information, such as when a copy of information is kept after sending it to the BWI database, PIPA would not apply with respect to that information by virtue of section 4(3)(e). Instead, the FOIP Act applies, and responsibilities under the FOIP Act in relation to that information belong to the City.

[para 101] As I have found that PIPA does not apply to the Complainant's information, there is no need to address any further questions relating to the application of PIPA.

V. SUMMARY OF FINDINGS

[para 102] I find that the Complainant's personal information, and that of other pawnshop and second-hand store clients contained in the BWI database, is in the custody of the City for the purposes of the FOIP Act.

[para 103] I find that the City has collected the Complainant's personal information, and that of other pawnshop and second-hand store clients, contrary to section 33 and 34 of the FOIP Act.

[para 104] I find that the City does not have authority to disclose the Complainant's personal information to EPS under section 40.

[para 105] I find that the City has not met its duty to protect the personal information of the Complainant and other pawnshop and second-hand store clients under section 38.

[para 106] I find that EPS collected the Complainant's personal information, and that of other pawnshop and second-hand store customers contrary to section 33 and 34 of the FOIP Act.

[para 107] I find that Bylaw 13138 does not conflict with section 33 of the FOIP Act, but the information collection system created by the directive does.

[para 108] I find that PIPA does not apply to the Complainant's personal information or that of other pawnshop or second-hand store clients, as that information is in the custody of the City and is subject to the FOIP Act.

VI. ORDER

[para 109] I make this Order under section 72 of the FOIP Act.

Case File Number 3561

[para 110] I require the City to cease collecting personal information contrary to the FOIP Act. To comply, the City must cease requiring pawnshop and second-hand stores to upload personal information to the BWI database.

[para 111] I require the City to destroy the Complainant's personal information collected under the directive.

[para 112] I order the City to destroy the BWI database.

[para 113] I require the City to fulfill its duty under section 38 in relation to personal information of pawnshop and second-hand store clients that has been uploaded to the BWI database under the directive, and is in the physical custody of a pawnshop or second-hand store.

[para 114] I further order the City to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

[para 115] Compliance with this Order is to be certified to me by statutory declaration or affidavit.

Case File Number 3562

[para 116] I require EPS to cease collecting personal information contrary to the FOIP Act.

[para 117] I further order EPS to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

[para 118] Compliance with this Order is to be certified to me by statutory declaration or affidavit.

Case File Number P0363

[para 119] I make this Order under section 52 of PIPA.

[para 120] I find that PIPA does not apply to the Complainant's personal information.

Frank Work, Q.C.
Information and Privacy Commissioner

Tab 7

**Kappo v. Subdivision and Development Appeal Board (Municipal District of Greenview
No. 16), 2003 ABCA 146**

Date: 20030501
Docket: 0303-0022-AC

IN THE COURT OF APPEAL OF ALBERTA

REASONS FOR DECISION OF THE
HONOURABLE MR. JUSTICE RITTER

BETWEEN:

RICHARD KAPPO, COUNCILLOR
OF THE STURGEON LAKE CREE NATION,
on behalf of the STURGEON LAKE CREE NATION

Applicant

- and -

THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD
(MUNICIPAL DISTRICT OF GREENVIEW NO. 16) and
THE MUNICIPAL DISTRICT OF GREENVIEW NO. 16

Respondents

Appeal from the Decision of
The Subdivision and Development Appeal Board
(Municipal District of Greenview No. 16)
Dated December 17, 2002

COUNSEL:

J.R.W. Rath

J.P. Tannahill

For the Applicant

S.C. McNaughtan

For the Respondents

REASONS FOR DECISION OF THE
HONOURABLE MR. JUSTICE RITTER

RITTER J.A.:

[1] The applicant applies for leave to appeal a decision of the Subdivision and Development Appeal Board of the Municipal District of Greenview No. 16 (the “SDAB”), which authorized Kanatic Energy (1995) Ltd. to construct an RV Park on 39.86 hectares of land it owns in the Municipal District. In order to obtain leave, the applicant must show that the appeal involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of success: *Municipal Government Act*, R.S.A. 2000, c. M-26 (the “MGA”), s. 688(3); *Seabolt Watershed Assn. v. Yellowhead (County) Subdivision and Development Appeal Board* (2002), 303 A.R. 347, 29 M.P.L.R. (3d) 197, 2002 ABCA 124 at para. 9.

[2] The issue of law advanced by the applicant is whether the SDAB erred in law when it failed to apply its discretionary authority to determine whether there had been sufficient consultation with the applicant by the planning authority which authorized the development. The argument advanced is that, under s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “*Constitution Act*”), the application of the authority granted to the SDAB is to be accomplished subject to consideration of aboriginal rights as interpreted by the courts. These rights are said to require consultation with the applicant prior to the authorization of projects that impact on its treaty rights respecting hunting and fishing. Here, the SDAB declined to consider the existence or adequacy of consultation, which the applicant argues breached its duties under the *Constitution Act*.

[3] The respondent argues that the SDAB does not have the jurisdiction to interpret and apply constitutional law. Consequently, the issue advanced was never, and could not be, before it. In turn, the respondent submits, there is no issue of law for this court to consider and leave should be refused.

Background

[4] On April 23, 2001, the Municipal District of Greenview No. 16 (the “Municipal District”) received an application to amend its Land Use Bylaw to reclassify the NE 1/4 20-70-24-5 (the “Land”) from “agricultural” to “rural commercial”. On the same date, the Municipal District received a development permit application proposing that the Land be used for an RV Campground.

[5] On May 1, 2001, the Municipal District advised the developer that the Sturgeon Lake Area Structure Plan (the “ASP”) would have to be amended in order for the Municipal District to proceed with the application for the re-zoning of the Land under the Land Use Bylaw. This

resulted in a request from the agent of the developer that the ASP be amended to include the Land as a development area.

[6] On June 20, 2001, the Municipal District notified the applicant that it had received a request to amend the ASP. The applicant was invited to appoint a member to sit on the committee which was to review the ASP and make recommendations for changes. This invitation did not include any information regarding the underlying reason for reconsidering the ASP. The Municipal District also used local newspaper advertising to seek applicants to this committee.

[7] On July 10, 2002, after holding a public meeting, the council of the Municipal District gave final reading to a Bylaw which amended the ASP and on September 16 and 20, 2002, the Municipal District provided notice to its residents of a public hearing on September 25, 2002 to address the application to amend the Land Use Bylaw in order to re-zone the Lands from agricultural to rural commercial. Following this hearing, the Land Use Bylaw was amended.

[8] On October 9, 2002, the Development Authority of the Municipal District issued a development permit to the developer for the proposed RV Park. Notice of this decision was published in the local newspaper in accordance with the Land Use Bylaw. The applicant then filed an appeal with the respondent, and on December 17, 2002, the SDAB held a hearing to consider the appeal.

[9] At the appeal, the applicant submitted that the Municipal District had failed to meet its obligations to consult with the Sturgeon Lake Cree Nation (the “Band”), as the public processes and notices undertaken by the Municipal District were insufficient to satisfy the constitutional requirements relating to the Band’s aboriginal or treaty rights. However, the SDAB denied the appeal, holding that its jurisdiction was restricted by the provisions of s. 687 of the MGA and that it was unable to deal with the issue raised by the appellant.

Analysis

[10] The applicant argues that s. 35 of the *Constitution Act* compelled the SDAB to consider the issue of adequacy of consultation with the Band which the applicant represents. Much of the argument advanced by the applicant related to the genesis of this duty, however I need not restate the history of decisions relating to aboriginal rights for the purposes of this decision, as the respondent does not dispute the existence of a body of law that establishes a requirement of consultation in some circumstances by some government bodies and agencies. Generally, where applicable, the relevant authority is required to consult whenever there has been an aboriginal or treaty right that has been infringed, as part of the process of determining whether the

infringement can be justified. This obligation was clearly established by the Supreme Court in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 at 1113, 153 D.L.R. (4th) 193 at para. 168, where Lamer J., speaking for the majority, stated:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: ***Guerin [v. Canada]***, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321]. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[11] The respondent argues that a statutorily created administrative body such as the SDAB owes its existence to the statute which created it and acquires whatever jurisdiction it enjoys from that statute. In the case of the SDAB, it owes its existence to the MGA. Section 627 of the MGA requires that all municipalities in Alberta establish a subdivision and development appeal board. Further, council of each municipality must establish procedures and must prescribe the functions and duties of the subdivision and development appeal board for that municipal district.

Section 687(3) of the MGA provides that, in determining an appeal, the SDAB:

- (a) must comply with the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect;
- (b) must have regard to but is not bound by the subdivision and development regulations;
- (c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;
- (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,

(i) the proposed development would not

(A) unduly interfere with the amenities of the neighbourhood, or

(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, and

(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

[12] There is nothing in the MGA which gives the SDAB the power to determine constitutional issues nor is there a general power given to SDABs to determine issues of law. In **Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)**, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121 (**Cuddy Chicks**), the Supreme Court held that an administrative tribunal which has been given power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. Section 52(1) of the **Constitution Act** neither specifies which bodies may rule on constitutional issues nor confers jurisdiction on an administrative tribunal. Jurisdiction over the parties, subject matter and remedy sought must be conferred on the administrative body by its enabling legislation.

[13] Here, jurisdiction has been conferred by the enabling legislation over the subject matter and the parties. However, when pressed about remedy, the applicant suggested that, for example, restrictions on use of public land not part of the development could have been made conditions of approval. However, such conditions are not within the jurisdiction of the SDAB, as it has no jurisdiction to confer a remedy that affects the use of land which is not the subject of the appeal. Other suggested remedies included restrictions on the number of hunting and fishing licences. These would involve the SDAB directing departments of government over which the SDAB has no jurisdiction and which were not before the SDAB.

[14] The applicant argues that the decision of the Supreme Court in **Slaight Communications Inc. v. Davidson**, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 (**Slaight Communications**) is to be preferred to **Cuddy Chicks**. However, it is clear that the decision in **Slaight Communications** only stands for the principle that where a discretion is granted to a judicial officer or body, the discretion must be exercised in compliance with the Constitution. It does not deal with situations where there is no jurisdiction to deal with any of the subject matter, the parties or the remedy.

[15] For leave to be granted, there must be an arguable error: **K & C Silviculture Farms (Alberta) Ltd. v. Lacombe (County) Subdivision and Development Appeal Board**, [2001] A.J. No. 717, 2001 ABCA 133; **Sasorith v. Lindsay**, [2001] A.J. No. 715, 2001 ABCA 130. An

arguable error is not made out where there is binding Supreme Court authority which states that the SDAB did not have jurisdiction to deal with the issue raised by the applicant.

Conclusion

[16] The applicant is not able to meet the requirements for leave. His application is dismissed.

APPLICATION HEARD on APRIL 17th, 2003

DECISION FILED at EDMONTON, Alberta
this 1st day of May, 2003

RITTER J.A.