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June 15, 2012

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC
V6Z 2N3

Attention: Ms. Erica M. Hamilton, Commission Secretary

Dear Ms. Hamilton:

Re: FortisBC Energy Inc. ("FEI")

Application for a Certificate of Public Convenience and Necessity ("CPCN") for Constructing and Operating a Compressed Natural Gas ("CNG") Refueling Station at BFI Canada Inc. ("BFI")

British Columbia Utilities Commission (the "Commission") Order No. C-6-12 dated April 30, 2012 Compliance Filing, and

Application for Variance and Reconsideration and Revised Application for Rates for Fueling Service for BFI

On April 30, 2012, the Commission issued Order No. C-6-12 (the "Order") and Reasons for Decision ("the Decision") with respect to the application by FEI to provide CNG fueling service to BFI. The Order contained several directives, including one requiring the FEI to file updated rates based on other directives.

This submission contains two filings by FEI in response to Order No. C-6-12 as follows:

Tab 1: An application for variance and reconsideration of certain elements of Order No. C-6-12, filed on FEI's behalf by its legal counsel (the "Reconsideration Application"); and

Tab 2: A compliance filing (pursuant to an extension request granted in Order No. G-82-12) to provide an updated rate for CNG Fueling Service for BFI based on the Commission directives in Order No. C-6-12 (the "Compliance Filing").

The inter-relationship between the Reconsideration Application and the updated rates provided in the Compliance Filing is briefly discussed in the introduction to the Compliance Filing.

If you require further information or have any questions regarding this submission, please contact Shawn Hill at 604-592-7840.

Yours very truly,

FORTISBC ENERGY INC.

Original signed by: Shawn Hill

For: Diane Roy

Attachments

cc (email only): Registered Parties

Tab 1

APPLICATION FOR VARIANCE AND RECONSIDERATION OF CERTAIN ELEMENTS OF ORDER NO. C-6-12

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A. Application for Reconsideration

1. We are counsel for FortisBC Energy Inc. ("FEI" or the "Company"). This is an application by FEI pursuant to section 99 of the *Utilities Commission Act* (the "Act") for reconsideration of order item numbers 3, 5(b) and 5(e) made by the British Columbia Utilities Commission (the "Commission") in Order No. C-6-12 dated April 30, 2012 (the "Reconsideration Application").

2. On February 29, 2012, FEI applied to the Commission pursuant to sections 45 and 46 of the Act for a CPCN for construction and operation of a Compressed Natural Gas ("CNG") refuelling station at the premises of BFI Canada Inc. ("BFI") located in Coquitlam, British Columbia (the "Application"). FEI also sought approval, pursuant to sections 59-60 of the Act, of the rate design and rates established in the Fueling Station License and Use Agreement (the "BFI Agreement" or "Agreement") with BFI for the CNG fueling service as just and reasonable. The service that FEI is applying to be provided to BFI is referred to as "CNG Fueling Services" in this Reconsideration Application.

3. On April 30, 2012, the Commission issued Order No. C-6-12 dated April 30, 2012 and accompanying Reasons for Decision with respect to the Application (the "Order" or the "BFI Decision"). The Order granted a CPCN for the construction of a CNG fueling station at the premises of BFI, but declined to approve the rates proposed by FEI for providing CNG fueling service to BFI. The Commission ordered FEI to provide an updated rate filing within 30 days of the Order, and subsequently granted extensions for the updated rate filing to June 12 and then to June 15, 2012. FEI has provided the updated rate filing (the "Compliance Filing") contemporaneously with this Reconsideration Application.

4. The specific items from the Order that are at issue in this Reconsideration are the following:

> 3. FEI is directed to establish two new service classes, one for CNG Service and one for LNG Service.
>
> …
>
> 5. The Commission further directs:
>
> > b. Fortis is to recalculate the Operations and Maintenance charge in the BFI rate to reflect the cost of the CNG/LNG Service program using the figures of $569,396 for 2012 and $601,119 for 2013, to be allocated among CNG/LNG Service customers in a reasonable manner.
> >
> > …

> e. FEI is to include all other amounts paid by BFI for volumes in excess of the "take or pay" commitment in the existing rate base deferral account approved in the Waste Management Decision to capture incremental CNG and LNG Service recoveries received from actual volumes purchased in excess of minimum take or pay commitments, for refund to all non by-pass customers.

5. In this Reconsideration Application, FEI will refer to these orders as Order #3, Order #5(b), and Order #5(e) respectively.

6. In FEI's respectful submission:

   (a) In making Order #3 the Commission determined one of the high level principles that is currently before the AES Inquiry Panel. In FEI's submission, this was either an error of law, because it was contrary to principles of procedural fairness and other fundamental principles of administrative law; alternatively, it should be reconsidered on the basis of the Commission's residual category of "just cause".

   (b) In making Order #5(b), if the Commission had intended that the figures of $569,396 for 2012 and $601,119 for 2013 that are used in the Order pertain only to FEI's CNG/LNG Fuelling Services, FEI submits that the Commission erred in fact and law. If FEI were to comply with the order, it would be overcharging BFI, and undercharging other customers in relation these expenditures. In this sense, the order amounts to a cross-subsidization.

   (c) As further explained below, if the Commission does not reconsider Order #3 and vary it to allow FEI to provide the service to BFI within the existing natural gas class of service, then in FEI's submission the Commission must reconsider and vary Order #5(e), as ordering FEI to provide excess revenue earned on BFI's CNG Fuelling Service to the natural gas class of service will violate section 60 of the Act (an error of law) if FEI is required to provide the service to BFI in a separate class.

7. The specific relief sought by FEI is described in the Conclusion section below.

B. Procedure for Reconsideration and Proposed Process for this Application

8. The Commission's default process for addressing reconsideration applications is to proceed in two phases.

9. The first phase is a preliminary examination in which the application is assessed in light of some or all of the following questions:

> Should there be a reconsideration by the Commission?
>
> If there is to be reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?

> If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

10. The Commission also considers whether the claim of error is substantiated on a prima facie basis and/or the error has significant material implications in deciding whether to proceed to the second phase.

11. After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for allowing reconsideration:

    1. the Commission has made an error in fact or law;

    2. there has been a fundamental change in circumstances or facts since the Decision;

    3. a basic principle had not been raised in the original proceedings; or

    4. a new principle has arisen as a result of the Decision.

12. In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.

13. In some cases, the Commission has addressed stages 1 and 2 at the same time as a means of enhancing the efficiency of the process. FEI submits that a single-phase process would be an appropriate way to address this Reconsideration Application, particularly in light of the interest of keeping costs down for all concerned. FEI requests that the Commission consider this submission as speaking to both phases of the reconsideration process, and interveners should be invited to provide their submissions on both phases, to which FEI will reply.

C. Reconsideration of Order #3 of Order C-6-12

Introduction

14. Order #3 of Order No. C-6-12 directs FEI as follows:

> 3. FEI is directed to establish two new service classes, one for CNG Service and one for LNG Service.

15. FEI submits that the Commission should reconsider and rescind this order, and direct that FEI is permitted to provide the service to BFI within the existing natural gas class of service pending the outcome of the AES Inquiry.

Material Implications

This order has material implications. The issue is of importance not only to FEI's business but also to the development of natural gas as a transportation fuel as envisioned by the Province in its recently issued Natural Gas Strategy and the recent Section 18 Regulation (discussed below). Deciding this issue in this proceeding, with apparent finality, means that the broad policy issue will have been decided on the basis of an inadequate record, without the full participation of interested parties, and with the potential to run contrary to the intent of the newly issued regulation. Significantly, if the decision stands and the AES Inquiry Panel disagrees with the decision, then the result could be inconsistent decisions from the same tribunal, which is a circumstances that for obvious reasons should be avoided. It makes the most sense to preserve the status quo under the orders issued prior to the BFI Decision, having the CNG Fueling Service in a single class of service including both core natural gas customers and CNG/LNG Fuelling Service customers. The single class of service, FEI submits, means that this class of service is a self-contained unit and that a rate for this class of service should be set without regard to the rates fixed for any other unit pursuant to section 60(1)(c) of the Act.

The Regulatory Context

16. The BFI Decision directs FEI to create two new classes of service, one for CNG Fuelling Service and one for LNG Fuelling Service. FEI submits that the Commission should not have addressed the class of service issue in the BFI Application with such apparent finality as the issue was not argued by any party in the BFI Application and was not dealt with in any meaningful detail in the evidence. This is hardly surprising given the regulatory context within which the BFI proceeding took place.

17. First, the Application was brought under FEI's Commission approved General Terms and Conditions section 12B (GT&C 12B), approved on February 7, 2012[1], which specify the terms and conditions for FEI to provide CNG and LNG fueling services. The approved GT&C 12B came out of the earlier NGV Decision, issued July 19, 2011[2], in which there was no suggestion made that FEI should provide these services through a separate class of service.

18. Second, FEI's 2012-2013 Revenue Requirements Application filed May 4, 2011, and the Commission decision approving FEI's Revenue Requirements, issued on April 12, 2012[3], are premised on FEI providing CNG/LNG service within the natural gas class of service. The Revenue Requirements decision was issued only three weeks prior to the BFI Decision.

19. Finally, the issue of whether CNG/LNG Fuelling Services should be provided by FEI as a separate class of service is an issue that is currently before another panel of the Commission in the AES Inquiry that has been ongoing since May of 2011.[4] The Inquiry had been presented as the forum in which issues such as how CNG/LNG Fuelling Services are to be provided by FEI would be addressed on a go-forward basis.

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1 Order G-14-12.

2 Order G-128-11.

3 Order G-44-12.

4 On May 24, 2011, the Commission issued Order G-95-11 establishing the Alternative Energy Services (AES) Inquiry. On July 8, 2011, the Commission issued Order G-118-11, which established the scope of the AES Inquiry.

Consistent with that view, the Inquiry is the forum in which a broader group of participants have advanced evidence and submissions on the issue.

20. The class of service issue was specifically addressed by the FEU in response to information requests in the AES Inquiry and in their submissions. Other parties to the Inquiry have spoken to this issue in their submissions in the Inquiry as well. It was FEI's expectation, which it submits in the circumstances was a reasonable one, that as the issue of separate classes of service was being addressed in the AES Inquiry, and as significant resources have gone into this process, that it would not be addressed by the Panel in the BFI proceeding.

21. None of the interveners in the AES Inquiry who have spoken in favour of separate classes of service for FEI's CNG/LNG Fuelling Service filed information requests or submissions in the BFI proceeding. This suggests that other parties to the AES Inquiry also understood that the Inquiry is the forum within which this issue is being addressed.

22. The Commission's approach in the BFI Decision of deciding, with apparent finality, key issues at play in the AES Inquiry (at least with regard to BFI) is in marked contrast to the approach taken on the Delta SD Decision, in which the Commission was careful to note that it was putting in place a framework for the Delta SD that could be revisited based on the outcome of the Inquiry. Specifically, in the Delta SD Decision, the Commission stated:

> The Commission Panel respects the AES Inquiry Scoping Order, which provides that the Commission does not intend to frustrate on-going business activity. Accordingly, the Panel proceeds with deliberations only on the Delta SD Project to make its public interest determination. The Panel will not pre-judge the AES Inquiry findings and will review Delta SD solely within the existing regulatory construct. The Panel will defer any determinations of the higher level principles to the AES Inquiry. Our Decision is not intended to be precedent-setting or become a template for future thermal projects.[5]

23. In the conclusion to the DSD Decision, the Commission Panel made clear that "a separate class of service for thermal energy services" is one of the "higher level principles deferred to the AES Inquiry…."[6]

24. In FEI's respectful submission, the Commission Panel in the DSD Decision took the correct approach to dealing with the "higher level principles" that are currently being considered in the AES Inquiry. The DSD Decision approach to addressing the outstanding issues in the AES Inquiry is consistent with the jurisprudence in the administrative law context that is premised on avoiding inconsistency and making the most efficient use of judicial and private resources: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52[7], paras. 33-34.

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5 DSD Decision, p. 22.

6 DSD Decision, p. 118.

7 Please refer to Book of Authorities provided in Appendix C

25. The very same concerns described in *Figliola* (and implicitly recognized by the Panel that issued the DSD Decision) are raised in the BFI proceeding. The AES Inquiry has been understood by FEI and numerous other parties to be the forum in which the class of service issues will be decided. In reliance on this understanding, participants in the Inquiry proceeding have expended considerable time, effort and resources in addressing these issues. The AES Inquiry Panel may well disagree with the determination made in this proceeding, resulting in an inconsistency that could undermine the Commission's credibility. Here, as in the DSD proceeding, the Commission panel ought to have recognized the principles described in *Figliola*, maintained the status quo that existed prior to the BFI Decision of a single natural gas class of service, and deferred its decision on class of service to the AES Inquiry.

26. FEI further submits that by failing to take the approach that was taken by the Panel in the DSD Decision, the Commission deprived FEI of a fair hearing on the issues relating to class of service and violated the *audi alteram partem* rule. This rule, which is a fundamental component of the rules of procedural fairness, requires the tribunal to provide the parties with adequate notice and the opportunity to be heard. The essence of the *audi alteram partem* rule is to give the parties a fair opportunity of answering the case against them and correcting or contradicting any relevant statement prejudicial to their view: *Moreau-Berube v. New Brunswick (Judicial Council)*, 2002 SCC 11[8], para. 75; *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282[9], p. 339.

27. In light of the approach taken in the DSD Decision, FEI had no reason to believe that the Panel in this proceeding would decide the class of service issue that was one of the "higher level principles" being addressed in the AES Inquiry. FEI acted accordingly in presenting its case in the BFI proceeding. Had FEI been aware that the Commission would be addressing this issue in the BFI proceeding, FEI would have filed considerably more evidence and detailed submissions on this issue. For this reason, FEI respectfully submits it was denied a fair hearing on the class of service issue in the BFI Application.

28. For these reasons, FEI respectfully submits that the Commission erred in law in issuing Order #3. The Commission should have deferred a principled determination on this issue to the AES Inquiry, as the Panel chose to do in the DSD Decision. FEI submits that failing to do so was an error of law.

29. In the alternative, if the Commission disagrees that Order #3 involves an error of law, FEI submits that the Commission should approach this issue on the basis of the "any other just cause" residual category that is described in the Commission's reconsideration criteria, as these circumstances amount to just cause for reconsideration.

30. Finally, FEI submits that if the Commission does not accept these submissions and wishes to maintain the direction set out in Order #3, then at the very least the Commission should qualify the order such that it is made "subject to the outcome of the AES Inquiry", in recognition of the fact that this issue will be addressed by the Commission Panel in the AES Inquiry.

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[8] Please refer to Book of Authorities provided in Appendix C.

[9] Ibid.

The Greenhouse Gas Reduction Regulation

31. A further and related ground for reconsidering Order #3 is that the Government's *Greenhouse Gas Reduction (Clean Energy) Regulation* (the "Regulation"), B.C. Reg. No. 102/2012, issued under the *Clean Energy Act* ("CEA"), presents a fundamental change in circumstances since the Order was made that justifies reconsideration.

32. The Regulation, established pursuant to Sections 18 and 35(n) of the *Clean Energy Act*, authorizes FEI to undertake natural gas for vehicles initiatives in three main areas: vehicle incentives, CNG stations and LNG stations (along with other specified expenditures).

33. The implication of the Regulation for FEI's CNG and LNG Services is an issue that is being fully canvassed in the AES Inquiry. On May 17, 2012, the Commission Panel in the Inquiry requested participants in the process to "address matters arising from the Section 18 CEA Regulation and the implications to the evidence on record." In its submission in the AES Inquiry, the FEU have argued that the Regulation contemplates FEI providing CNG/LNG services within the broader natural gas class of service. FEU's Supplemental Submissions in the AES Inquiry discuss three reasons for this, which (in summary) are as follows:

    (a) portions of the Regulation are only meaningful in the context of CNG/LNG fueling service being part of the natural gas class of service;

    (b) the concept of separate classes of service impairs the achievement of the legislative objective, contrary to section 18(3) of the *Clean Energy Act*; and

    (c) maintaining separate classes of service for CNG/LNG Fuelling Service forecloses a source of revenue from these prescribed undertakings that would otherwise flow to core customers, and thus can be expected to have the perverse effect of being detrimental to core customers.

34. The FEU's detailed Supplemental Submissions are attached as Appendix **A** (see paras. 14 to 26).

35. Not only does the Regulation have a direct bearing on the issue of classes of service for CNG/LNG service, it also speaks to a more general concern that coloured the entire BFI Decision, and in FEI's view had a bearing on the class of service component of the decision. For example, the Panel states:

> The Panel finds the presence of both regulated and unregulated competitors in a competitive market is problematic. It underscores the need for this Panel to ensure that there is no cross-subsidization from FEI's distribution customers and also that there is no assignment of CNG/LNG-related risk to those customers.[10]

36. As stated in the FEU's Supplemental Submissions on the Regulation in the AES Inquiry, the Regulation treats public utility involvement as productive, not problematic. It specifies a role for all utility customers (also referred to in this submission as "core

[10] BFI Decision, p. 11.

customers") in making these beneficial services a success that is commensurate with the benefits these customers will see.

37. FEI submits that the Regulation represents a fundamental change in circumstances since the Order was made that justifies reconsideration. In FEI's submission the Regulation implicitly requires the inclusion of CNG/LNG Fuelling Service and LNG tanker load-out facilities within the broader natural gas class of service. It also makes clear that the Commission's view that provision of this service by FEI is "problematic" is no longer warranted. The FEU submit that for these reasons, the Commission should reconsider and rescind Order #3 as these very issues are currently before the AES Inquiry Panel and will be addressed in that forum.

LNG Was Not an Issue in the Application

38. Provision of LNG Fuelling Service was not an issue in the BFI Application, and it was not necessary for the Commission to have established a LNG class of service in the BFI Decision at all.

39. A decision made without evidentiary support is patently unreasonable (an error of law): see *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476[11], paras. 66-68. As there was no evidence before the Commission on LNG service and matters relating to this service were outside the scope of the proceeding, the order as it pertains to a new LNG class of service amounts to an error of law and should be rescinded.

Reconsideration of Order 5(e) of Order C-6-12 if Class of Service Approach is Maintained

40. Item 5(e) of Order C-6-12 directs FEI as follows:

> FEI is to include all other amounts paid by BFI for volumes in excess of the "take or pay" commitment in the existing rate base deferral account approved in the Waste Management Decision to capture incremental CNG and LNG Service recoveries received from actual volumes purchased in excess of minimum take or pay commitments, for refund to all non by-pass customers.

41. FEI submits that if the Commission does not reconsider and rescind Order #3, and continues to require separate classes of service, then Order #5(e) must be reconsidered and rescinded. The basis of FEI's submission is that if separate classes of service are maintained, then this Order violates section 60(1)(c) of the Act and amounts to an error of law.

42. Section 60 (1)(c) of the UCA provides as follows:

> 60 (1) In setting a rate under this Act
>
> (c) if the public utility provides more than one class of service, the commission must

[11] Please refer to Book of Authorities provided in Appendix C.

> (i) segregate the various kinds of service into distinct classes of service,
>
> (ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and
>
> (iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

43. Order #5(e) violates these provisions of the Act by flowing revenues from one class of service to another and as a result is based on an error of law. For this reason, if the Commission continues to require FEI to provide CNG service as a separate class of service, then Order #5(e) must be rescinded. Further details of the basis for this submission are included in paragraphs 23-25 of the FEU's Supplemental Submissions in the AES Inquiry (see Appendix A) and paragraphs 30-31 of the subsequent Reply Submission (Appendix B).

44. Further, the CNG Fueling Services are provided to benefit all FEI's non-bypass customers.

D. Reconsideration of Order 5(b) of Order C-6-12

45. Item 5(b) of Order C-6-12 provides as follows:

> Fortis is to recalculate the Operations and Maintenance charge in the BFI rate to reflect the cost of the CNG/LNG Service program using the figures of $569,396 for 2012 and $601,119 for 2013, to be allocated among CNG/LNG Service customers in a reasonable manner.

46. In making this Order, the Commission seemed to have determined that the figures of $569,396 for 2012 and $601,119 for 2013 were made up entirely of forecast expenditures related to FEI's CNG/LNG fueling services. If this is the intention of the order, then FEI submits that the Commission erred as explained below.

47. As noted at page 16 of the BFI Decision, the figures of $569,396 for 2012 and $601,119 for 2013 came from FEI's 2012-2013 RRA Application. These amounts represent FEI's operating and maintenance budgets for <u>all</u> activities[12] related to the development and promotion of natural gas for use in transportation.[13] These costs were embedded in the rates approved by the Commission in the 2012-2013 RRA Decision dated April 12, 2012.

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[12] NGT activities include: advocacy for natural gas for transportation within British Columbia, natural gas delivery service support (Rate Schedules 6, 16, 23, 25), development of marine market applications, development of Rate Schedule 16 amendments application; and guidance and advice on the Province's Greenhouse Gas Reduction Regulation

[13] Exhibit B-1, 2012/13 FEU RRA, Appendix I, Section 5, pages 14 & 15: "the promotion of NGV represents a part of FEI's core natural gas business...Of the 4.0 FTE estimate in the Table I-11, approximately 1.5 are involved in the

48. Many of these activities and costs pertain to attracting new load for transportation use to FEI's system to replace declining use amongst other natural gas customers. For example, the amounts of $569,396 for 2012 and $601,119 for 2013 cover expenditures such as FEI's developments costs related to working with the City of Surrey (and other customers) to help them understand the potential benefits of using CNG/LNG for transportation, which led them to put the requirement for this of CNG in their RFP. Without these efforts by FEI, the City of Surrey may not have put this requirement in, and the resulting benefits to all natural gas class of service customers may not have occurred.

49. These activities are to the benefit of all ratepayers by increasing system throughput and delivery revenues, and do not pertain only to CNG/LNG Fueling Service customers. Therefore, only a small portion of the $569,396 for 2012 and $601,119 for 2013 may be properly attributable to CNG and LNG Fueling service customers.

50. For this reason, FEI submits that by making the order set out in Order 5(b), the Commission erred in fact by mistakenly finding that the figures of $569,396 for 2012 and $601,119 for 2013 from the revenue requirement pertain only to FEI's CNG/LNG services, when in fact they pertain to more than these services. The implication of this error of fact is that, if FEI were to comply with the order, it would be overcharging BFI, and undercharging other customers in relation to these expenditures. FEI submits that this error results whether or not the Commission agrees to rescind its order regarding separate classes of service because it results in overcharging to BFI. FEI further submits that the order has material implication for the customer, BFI, as it increases their cost of service above what it should properly be and drives up their rate.

51. FEI further submits that an order that results in overcharging a customer has an obvious material implication for the customer. As a result, FEI submits that the "materiality" component of the reconsideration criteria are met in respect of this issue.

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fueling station installation. The balance of the FTE is involved due to the overall level of NGV activity during this development period"

E. Conclusion and Order Sought

52. For the reasons described herein, FEI seeks the following orders pursuant to section 99 of the Act:

(a) Order #3 should be reconsidered and rescinded, and the Commission should direct that FEI is permitted to provide service to BFI within the natural gas class of service; in the alternative, FEI submits that Order #3 should be qualified as "subject to the outcome of the AES Inquiry";

(b) if the Commission does not reconsider Order #3 and vary it to allow FEI to provide the service to BFI within the existing natural gas class of service, then the Commission must reconsider and rescind Order #5(e); and

(c) Order #5(b) should be reconsidered and rescinded.

All of which is respectfully submitted.

Dated: June 15, 2012 ***[original signed by David Curtis]***

David Curtis
Counsel for FortisBC Energy Inc.

Appendix A

AES INQUIRY
FEU SUPPLEMENTAL SUBMISSIONS ON GHG REGULATION

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May 25, 2012
File No.: 240148.00684/14797

BY ELECTRONIC FILING

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Ms. Alanna Gillis,
Acting Commission Secretary

Dear Sirs/Mesdames:

Re: An Inquiry into FortisBC Energy Inc. Regarding the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives

Further to the Commission's letter dated May 17, 2012, we enclose for filing in the above referenced proceeding the electronic version of the FortisBC Energy Utilities' Supplemental Submission regarding the *Greenhouse Gas Reduction (Clean Energy) Regulation*, B.C. Reg. 102/2012. Twelve hard copies of the Submission will follow by courier.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Matthew Ghikas

MTG/DHC

An Inquiry into

FortisBC Energy Inc. Regarding the Offering of Products and Services in

Alternative Energy Solutions and Other New Initiatives

Supplemental Submission of the FortisBC Energy Utilities on the *Greenhouse Gas Reduction (Clean Energy) Regulation*

May 25, 2012

TABLE OF CONTENTS

PART ONE: INTRODUCTION

1. A central issue in this Inquiry has been the proper role of the FortisBC Energy Utilities' ("FEU") CNG/LNG Fueling Service in the market. The Commission has expressed concerns in both the NGV Decision[1] and the recent BFI Decision[2] about participation by regulated public utilities in circumstances where non-regulated alternatives may exist. However, the Commission had stated in the NGV Decision, which was cited extensively in the BFI Decision, that it had decided the application on the basis that there had been no section 18 prescribed undertaking for CNG/LNG Fuelling Service.[3] There is now a prescribed undertaking by virtue of the promulgation on May 14, 2012 of the *Greenhouse Gas Reduction (Clean Energy) Regulation* (the "Regulation") under the *Clean Energy Act* ("CEA").[4] It provides clarity on the role of public utilities providing CNG/LNG Fuelling Service as well as LNG tanker truck load-out facilities.

2. The Commission's May 17, 2012 letter seeks submissions from Inquiry participants on two questions relating to the Regulation. The FEU's specific responses to the two questions posed are:

(a) The Commission should consider the Regulation, which forms part of the legal framework governing the FEU's provision of CNG/LNG Fuelling Service, in this Inquiry.

(b) The Regulation has significant implications for the outcome of the Inquiry, as it contemplates the FEU owning and operating CNG/LNG Fuelling Service and LNG tanker truck load-out facilities under a regulated model and within the broader natural gas class of service.

3. Each of these points is addressed in Parts Two and Three, respectively. In essence, however, the Regulation represents a fundamental departure from the Commission's approach in the BFI Decision to the proper role of a public utility in developing infrastructure

[1] Order G-128-11 ("NGV Decision"), pp. 18, 29.

[2] Order C-6-12 ("BFI Decision"), p. 11.

[3] NGV Decision, pp. 16-17.

[4] BC Reg. 102/2012, Deposited May 15, 2012.

necessary to serve Natural Gas Vehicles ("NGVs"). The Regulation treats public utility involvement as productive, not problematic. It specifies a role for all utility customers (also referred to in this submission as "core customers") in making these beneficial services a success that is commensurate with the benefits these customers will see. The FEU respectfully submit that the Commission Panel hearing this Inquiry must re-evaluate the Commission's preliminary approach to CNG/LNG Fuelling Service development. It must reject the arguments of market participants like Ferus and Clean Energy that challenge the propriety of the FEU providing services in circumstances where non-regulated options may exist. These public interest issues have now been answered by the Regulation, and the Regulation should be given its full effect.

PART TWO: COMMISSION SHOULD CONSIDER THE REGULATION IN THE INQUIRY

4. The initial question posed by the Commission was "whether the Section 18 CEA Regulation should form part of the evidentiary record and be entered as Exhibit A2-36." The common practice of marking legislation or binding decisions as exhibits in Commission proceedings is for ease of future reference, and the practice can be usefully employed for that purpose in this case. However, the Regulation is not evidence that needs to be marked. It is part of the applicable law. The Regulation, like all other applicable statutes and regulations currently in force, is presently binding on the Commission.

5. The Regulation has direct relevance for the FEU's provision of CNG/LNG Fuelling Service, one of the four New Initiatives before the Commission in this Inquiry. The FEU submit that the Commission must consider the applicable legal framework in place at the time the decision is being rendered, including the Regulation. Not doing so would be an error of law. The error would be a material one given the significance of the Regulation.

PART THREE: REGULATION HAS SIGNIFICANT IMPLICATIONS FOR INQUIRY

6. The Commission's second request was for parties to "address matters arising from the Section 18 CEA Regulation and the implications to the evidence on record." Section

18 of the *CEA* is a vehicle by which Government can convey to the Commission its expectations for public utility involvement in the promotion of clean energy for the purpose of reducing GHG emissions. The Regulation contains Government's prescribed undertakings. The FEU submit that the Regulation has significant implications for the outcome of the Inquiry. Three implications addressed in this Part are:

(a) The Regulation contemplates the FEU providing CNG/LNG Fuelling Service and operating LNG tanker truck load-out facilities under a regulated model;

(b) The Regulation contemplates that core customers have a stake in, and should directly support, the development of beneficial CNG/LNG facilities, which is incompatible with the creation of separate classes of service for CNG and/or LNG Fuelling Service; and

(c) The cost of service calculation specified in GT&C 12B is compatible with the Regulation, but the Regulation does necessitate three changes in how GT&C 12B is worded or applied.

The FEU have also briefly addressed vehicle incentives.

A. REGULATION ENDORSES UTILITY MODEL FOR CNG/LNG FUELLING SERVICE AND LNG TRUCK LOAD-OUT FACILITIES

7. The Commission has expressed concern about utility involvement in the provision of this service in an otherwise non-regulated market. The FEU's role is a central issue in the Inquiry. The Regulation is a full answer to the Commission's concern and intervener submissions in this regard. The Regulation recognizes the beneficial role that public utilities can play in promoting the use of natural gas as a cleaner fuel for heavy duty and vocational vehicles.

8. Sections 2(2) and (3) of the Regulation define the prescribed undertakings as being one where a public utility "constructs and operates" or "purchases and operates" a CNG/LNG Fuelling station or LNG tanker truck load-out. The Commission has determined that the provision of such services by a company that is "otherwise a public utility" is regulated.[5]

[5] NGV Decision, pp. 18-19.

9. The Regulation defines each prescribed undertaking with reference to a maximum dollar threshold for the undertaking period (ending March 31, 2017). The effect of the dollar thresholds is to establish a funding envelope within which the Commission must facilitate, and not impede, the delivery of a qualifying prescribed undertaking. It is not a mandatory level of expenditures. It is not a cap on utility expenditures related to CNG/LNG Fuelling Service of tanker-truck load-out facilities; a public utility can still bring projects forward outside of the section 18 framework for Commission approval.

10. The prescribed funding envelope for utility investment in developing CNG/LNG infrastructure, including both direct capital investment and administration and marketing, is significant:

Prescribed Undertaking	Total Investment to 2017
Public utility owned and operated CNG fueling stations and associated administration and marketing	$12 million
Public utility owned and operated LNG fueling stations and associated administration and marketing	$30.5 million
Total	$42.5 million

The amount of funding specified in the Regulation, if utilized, will enable the FEU to continue its leadership role in transforming the transportation sector in BC, while providing benefits to core natural gas customers. The Regulation is thus a clear statement that Government considers it to be appropriate for a public utility to provide regulated CNG/LNG Fuelling Service and LNG tanker truck load-out facilities, which are both important for the long-term development of the market.

11. The Commission, by contrast, determined in the BFI Decision that "the presence of both regulated and non-regulated competitors in a competitive market is problematic".[6] The Commission expressed a preference for the FEU to transfer CNG Fuelling station assets to a non-regulated affiliate, citing competitive considerations:[7]

[6] BFI Decision, p.11.

[7] BFI Decision, p.20.

> Alternatively, the Commission Panel notes that the Fuelling Station Agreement specifically contemplates the assignment by Fortis to any of its affiliates. (Exhibit B-1, Appendix A, clause 18.4) In the Panel's view, and as discussed throughout these Reasons, the necessity for proper and fair cost allocation is heightened by Fortis' entry, in its capacity as a public utility, into what would otherwise be a competitive business environment. The Panel is of the view that the BFI Project is a prime candidate for the use by Fortis of a non-regulated subsidiary to provide the fuelling service. The use of a separate entity and employment of appropriate and approved transfer pricing policies would serve to alleviate the Panel's concerns relating to cost allocation and cross-subsidization. It would also reduce costs associated with the regulatory process which this Application has necessitated. However, while FEI has clearly stated its preference not to provide CNG/LNG Services through a separate affiliate, given the above noted concerns with inadequate cost-recovery and cross-subsidization, the Panel defers the ultimate resolution of the appropriate framework for FEI's participation in a competitive, unregulated activity to the AES Inquiry.

12. The FEU submit that, despite any reservations the Commission may have about the role of public utilities in the market (as nascent or as stagnant as that market might be in the absence of the FEU's efforts), Government has embraced the timely and efficient development of beneficial CNG/LNG infrastructure through public utility involvement. The Commission must defer to Government on this key issue.

13. This development has ramifications for the process the Commission follows in assessing the FEU's pursuit of this New Initiative. The FEU submit that the Commission should use section 45 of the Act to exempt CNG/LNG Fuelling Service projects and LNG tanker truck load-out facilities from the CPCN requirement for two reasons. First, the Regulation has resolved the key public interest issues regarding the FEU's investments in CNG/LNG Fuelling Services and LNG tanker load-out facilities. Second, the purpose of a prescribed undertaking is to preclude the need to subject project investments to regulatory process. The Commission cannot deny a CPCN for a project that is in furtherance of a prescribed undertaking in any event, by virtue of section 18(3) of the *CEA*. Section 18(3) of the *CEA* provides that the Commission "must not exercise a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking." Declining to approve a CPCN for a prescribed undertaking would amount to directly or indirectly preventing a public utility from carrying out a prescribed undertaking. A CPCN exemption will mean that future filings relating to CNG/LNG Fuelling Service facilities will focus on the terms and conditions of service agreements.

B. PROVISION OF CNG/LNG FUELLING SERVICE WITHIN NATURAL GAS CLASS OF SERVICE

14. The Commission has, in the course of past proceedings, sought to insulate customers from bearing any cost or risk associated with the FEU offering CNG/LNG Fuelling Service. This culminated in the Commission creating two new classes of service – one for each of CNG and LNG Fuelling Service – with the result that the costs and risks now rest with either the CNG/LNG Fuelling Service customers or, in effect, the shareholder. In this section, the FEU explain why the Regulation implicitly requires the inclusion of CNG/LNG Fuelling Service and LNG tanker load-out facilities within the broader natural gas class of service. Three notable reasons why this is the case are:

(a) Portions of the Regulation are only meaningful if the CNG/LNG Fuelling Service is included within the broader natural gas class of service; and

(b) Separate classes of service impair the achievement of the legislative objective, contrary to section 18(3) of the *CEA*; and

(c) Maintaining separate classes of service for CNG/LNG Fuelling Service forecloses a source of revenue from these prescribed undertakings that would otherwise flow to core customers, and thus can be expected to have the perverse effect of being detrimental to core customers.

(a) Portions of Regulation Redundant if Multiple Classes of Service

15. The Regulation defines a funding envelope for CNG Fuelling stations ($12 million) and LNG Fuelling stations and load-out facilities ($30.5 million). The Regulation also prescribes an amount for administration and marketing costs ($240,000 for CNG and $250,000 for LNG) within the prescribed undertaking. It is reasonable to conclude that the purpose of specifying these amounts in the Regulation is to limit the impact of the prescribed undertakings on utility ratepayers. It would be unnecessary to protect customers in this way if LNG and CNG Fuelling Services were separate classes of service, as the costs would be contained within the class of service.[8] Section 60(1)(c) of the UCA requires separate rate bases for each class of service and rates for a class of service must be fixed by considering each class of service as a "self-contained

[8] This analysis applies equally to all of those utilities to which the Regulation applies. It is difficult to see how the class of service analysis would be any different for another natural gas utility, for instance.

unit" without regard to the other classes of service. The shareholder backstops a new class of service. There would have been no justification for the Lieutenant Governor in Council to have set any limits had the Regulation been predicated on these prescribed undertakings being part of separate classes of service.

16. Similarly, the Regulation includes the following provision in respect of both CNG (section 2(2)(d)) and LNG (section 2(3)(d)):

> (d) at least 80% of the energy provided at each station during the undertaking period is provided to one or more persons under a take-or-pay agreement with a minimum term of 5 years.

It is reasonable to conclude that the purpose of specifying a minimum term and volume was to limit stranding risk facing core customers in relation to LNG and CNG fuelling stations funded under the Regulation. These requirements would be unnecessary if LNG and CNG Fuelling Services were separate classes of service with their own rate bases, as stranding risk does not extend across classes of service. The shareholder would make its investment decisions based on its risk tolerance, irrespective of minimum requirements.

17. Regulations are subject to the same rules and principles of statutory interpretation as statutes.[9] As the FEU stated in their submissions, the fundamental principle of statutory interpretation is that the words of a legislative provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature.[10] The interpretation that accords with these principles is one where core customers are protected by the funding limits and the minimum term and volume requirements in service agreements under section 2(2)(d) and 2(3)(d), not by relegating CNG/LNG Fuelling Service to separate class(es) of service.

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[9] P-A Cote, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011), at 26.

[10] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

(b) Separate Classes of Service Impair Achievement of Legislative Objectives

18. The FEU's business model has, to date, been to make investments in CNG/LNG Fuelling Service stations only where the firm contract demand is sufficient to cover the cost of service accruing during the contract term. However, the Regulation permits a prescribed expenditure to proceed with only a portion of the capacity subject to firm contract demand. Section 2(2)(c) of the Regulation [for CNG] and 2(3)(c) [for LNG] provide that "at least 80% of the energy provided at each station during the undertaking period is provided to one or more persons under a take-or-pay agreement with a minimum term of 5 years." It is self-evident that the purpose of setting the minimum percentage below 100% is to make it easier for public utilities to justify investing in new CNG/LNG Fuelling Service facilities.

19. Relegating the CNG/LNG Fuelling Service facilities to a new CNG/LNG class(es) of service is at odds with making it easier for a public utility to make a business case for new investments. The corollary of having a firm commitment of "at least 80%" is that up to 20% of the cost of service for a facility accruing during the contract term will be at risk if other customers fail to materialize. The corollary of having a shorter minimum term is that there will be more unrecovered costs at the conclusion of the initial term, and hence greater stranding risk. The creation of a separate class(es) of service for CNG/LNG Fuelling Service means that core natural gas customers are insulated from that risk, and the utility shareholder faces additional risk. The utility shareholder may decline to invest, or a risk premium may be necessary to attract investment. Either way, this mutes the effectiveness of the Regulation and brings section 18(3) into play. Section 18(3) targets "indirect" regulatory impediments, as well as direct obstacles. The FEU submit that the Regulation implicitly assumes that the residual risk where there is less than 100% firm commitments is to be spread amongst the public utility's natural gas customers as a whole.

20. This is not to say that the FEU will take on more risky projects as a matter of course, simply because the risk is spread amongst utility customers. The FEU still intend to pursue service agreements that reflect longer terms and that will permit full recovery of the cost of service accruing during the term of the service agreement. (The FEU still consider GT&C

12B to be the appropriate vehicle, as discussed below.) The point is that, from the perspective of legislative interpretation (i.e. giving meaning and effect to the Regulation), these provisions make the most sense in the context of a single class of service that includes CNG/LNG Fuelling Service.

(c) Separate Class of Service Model is Detrimental to Core Customers

21. The FEU describe below why maintaining separate classes of service for CNG and LNG Fuelling Services requires that core customers forego recoveries that they would otherwise stand to receive were the Commission to treat CNG/LNG Fuelling Service as a tariff offering within the broader natural gas class of service. Those foregone contributions take on much greater significance in the context of the Regulation, which contemplates a significant utility investment in CNG/LNG Fuelling Station assets. However, the same analysis applies to projects brought forward outside the scope of the Regulation.

22. The approved GT&C 12B for CNG/LNG Fuelling Service contemplates an appropriate allocation of costs. It can exist and be effective irrespective of whether CNG/LNG Fuelling Service is designated as a separate class(es) of service, i.e. a new class(es) of service is not necessary to ensure rates reflect the fully allocated cost of service. The Commission has, in the course of recent decisions, refined the types of costs to be included in the cost of service analysis under GT&C 12B. The only additional benefit to the core natural gas customers that arises from creating new classes of service for CNG and LNG is to insulate the core customers from stranding risk that arises if three facts exist:

- first, there is unrecovered capital investment in a fuelling station after the contract initial term; *and*
- second, the CNG/LNG Fuelling Service customer is not required under its service agreement to compensate the FEU in such circumstances for the undepreciated capital cost; *and*
- third, in the absence of such a clause, or if the customer becomes insolvent, facilities cannot otherwise be salvaged and put to use elsewhere or sold to third parties.

The stranding risk facing core customers is going to be quite limited. The FEU have, to date, negotiated lengthy service agreements that recover the full cost of service accruing during the contract term. The approved GT&C 12B requires this. The contracts to date have included a provision requiring the customer to pay for any undepreciated capital costs if the agreement is not renewed. The Commission has directed FEI to include similar provisions in future agreements[11], and acknowledged that these provisions remove most stranding risk.[12] GT&C 12B includes this requirement. The FEU evaluate creditworthiness of potential customers. Portions of fuelling facilities can be moved and reused. The Commission noted in the NGV Decision that none of the customer groups who had intervened in that proceeding had expressed any significant concern with respect to the risk of stranded assets.[13]

23. Insulating core customers from this risk by creating separate classes of service comes at a cost – or rather, a foregone benefit - to core customers that appears to have been overlooked in the BFI Decision. It is true that, all other things being equal, core customers will obtain the same benefit (delivery margin revenue) of increased throughput from a particular FEU project regardless of whether separate classes of service exist. However, the same is not true for *CNG/LNG Fuelling Service recoveries*. Establishing multiple classes of service under section 60 of the UCA means that all CNG/LNG Fuelling Service recoveries (as opposed to the commodity cost) must, at law, remain within the LNG (or CNG) class of service.[14] Rates must be set considering each class of service as a "self-contained unit". The revenue requirement of one class of service must, under section 60(1)(c)(iii), be determined "without regard to the rates fixed for any other unit". Both the cost of service and the recoveries must therefore accrue to the same class of service.

24. The CNG/LNG Fuelling Service rate will be fixed to recover the fuelling station cost of service based on a minimum contract demand, meaning that there will be excess

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[11] NGV Decision, p. 22.

[12] NGV Decision, pp. 28-29.

[13] NGV Decision, p. 21.

[14] Hence, in the 2010-2011 RRA NSA, the provision prohibiting cross-subsidization for TES was reciprocal: see Appendix A to Order G-141-09, p. 9 of 110.

revenues any time the LNG or CNG Fuelling Service customer takes volume in excess of the minimum contract demand. This can occur whenever customers are using the NGVs in their fleets more than the average utilization upon which the contract demand was based (which the operator would be motivated to do, since the operating cost of the NGVs is lower than their diesel vehicles) or if the customer decides to add new NGVs to their fleets over time. The excess revenues can only lawfully flow to core customers if the CNG/LNG Fuelling Service customer is treated as being within the same class of service as the core customers.[15] The segregation inherent in the existence of separate classes of service means that excess revenues default to the party currently bearing the risk, i.e. the shareholder, rather than representing a direct contribution to natural gas delivery margin.

25. The foregone contribution to natural gas delivery margin under a class of service framework is real, not theoretical. All of the contracts currently in place have a provision for an excess volume charge. The Commission's order in respect of Waste Management approved a deferral account to capture recoveries associated with volumes these customers are consuming above the minimum contract demand.[16] The potential excess recoveries under the existing service agreements cannot accrue to natural gas class of service customers if the existing service agreements are now to be segregated into a new class(es) of service. Again, under section 60(1)(c) the cost of service and the recoveries must both accrue to the same class of service. Given the scale of the prescribed investment under the Regulation, the potential foregone benefits to natural gas customers under a class of service model stand to exceed the limited stranding risk being avoided by the creation of separate classes of service.

(d) Summary

26. The FEU submit that the Regulation implicitly requires a single class of service including CNG/LNG Fuelling Service and LNG tanker-truck load-out facilities. It necessitates

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[15] The FEU respectfully submit that the Commission's BFI Decision violated this principle by directing (see item 5(e) of Order C-6-12) that excess revenues flow to core customers despite having created separate classes of service. In other words, the natural gas class of service obtains the benefits with no risk, while the CNG class of service assumes the risks with no benefits. The internal inconsistency is expected to be one of the bases for an application to reconsider and vary the BFI Decision.

[16] See Order G-128-11 and Order G-144-11.

revisiting the approach adopted in the BFI Decision of treating the provision of compressed natural gas and liquefied natural gas as being different classes of services from the provision of natural gas. In any event, maintaining separate classes of service for the protection of core natural gas customers no longer makes sense given the extent of their mandated contribution to the development of the CNG/LNG Fuelling Service and the associated potential for excess recoveries from CNG/LNG Fuelling Service customers.

C. IMPLICATIONS FOR GT&C 12B

27. The FEU have supported, in past applications and in this Inquiry, the general principle reflected in GT&C 12B that the costs of providing CNG/LNG Fuelling Service should be recovered from the CNG/LNG Fuelling Service customer. Although the FEU disagrees with how the Commission has applied GT&C 12B in the case of BFI,[17] the FEU continue to believe that the principle remains sound. GT&C 12B should continue to be the applicable rate schedule for any CNG/LNG Fuelling Service offered by FEI (subject to the modifications described below), whether or not a particular facility was financed as a part of a prescribed undertaking. The cost of service calculation in GT&C 12B.4 remains valid and does not need to be changed in light of the Regulation. However, the Regulation does have three implications for GT&C 12B:

(a) GT&C 12B.3 should reflect the potential to have firm contracts that recover less than the full cost of service that arises during the contract term;

(b) GT&C 12B should now include an exemption to the requirement in 12B.5 to include "buy out" provisions, to be exercised in circumstances where the requirement will impede connecting a beneficial customer; and

(c) the Commission should change the way in which it *applies* the cost of service calculation in GT&C 12B.4 to realize legitimate economies of scope and reflect the savings in CNG/LNG Fuelling Service rates.

(a) GT&C 12B Appropriate For All CNG/LNG Fuelling Service Customers

28. GT&C 12B should continue to be the applicable rate schedule for any CNG/LNG Fuelling Service offered by FEI, whether or not a particular facility was or is to be financed as a

[17] A pending application to reconsider the BFI Decision will raise one such instance.

part of a prescribed undertaking. In some circumstances, it may make sense for the FEU to bring forward a project outside of the prescribed undertaking framework. Creating a new, separate rate schedule for customers using facilities financed by the FEU as part of a prescribed undertaking would suggest a distinction from other CNG/LNG Fuelling Service customers that does not exist. The Regulation changes the nature of the Commission's oversight of prescribed undertakings; it does not change the nature of what is being provided to customers. The FEU submit that the appropriate approach is to make the minor modifications to GT&C 12B that are required to accommodate the additional flexibility contemplated by the Regulation.

(b) Adjusting GT&C 12B for Contract Demand of At Least 80% of Volume

29. The requirement in section 2(2)(d) and (3)(d) of the Regulation that "at least 80% of the energy provided at each station is provided to one or more persons under a take-or-pay agreement…" means that there will potentially be circumstances where a contract will not recover the full cost of service arising over the term of a contract. This will necessitate a revision to GT&C 12B.3, which currently contemplates a service agreement ensuring full recovery of the fuelling station cost of service arising during the contract term.

30. The FEU stress that they will, notwithstanding this change, still be looking for firm agreements to recover the full fuelling station cost of service accruing during the contract term.

(c) Adjusting the GT&C 12B.5 "Buy Out" Obligation

31. The Regulation necessitates an amendment to GT&C 12B.5 to provide for a limited exception to the "buy out" requirement.

32. GT&C 12B.5 provides:

> 12B.5 *Customer's Obligation at the Expiration of Initial Term of the Service Agreement* – If, at the expiry of the initial term of an executed Service Agreement, the Customer does not wish to renew the Service Agreement, the Customer can terminate the Service Agreement provided the Customer agrees to pay any unrecovered capital costs (including the positive or negative salvage value) associated with the fuelling stations, or agrees to similar provisions that

> permit recovery from the Customer of the remaining un-depreciated capital costs of the fuelling station. Examples of such provisions include, but are not limited to, adjusting the contract rate or adjusting the contract term.

33. In including this mandatory "buy out" provision, the Commission has prioritized insulating core customers from all risk above promoting the adoption of CNG/LNG Fuelling Service in circumstances where those ends come into conflict. The Commission expressly recognized this outcome in the NGV Decision. In the NGV Application the FEU had stated their intent to negotiate "buy out" provisions, but sought flexibility to recognize commercial constraints in negotiating these provisions.[18] The Commission rejected that argument stating:[19]

> As also noted earlier, in the case of the Waste Management Agreement, the 'take or pay' feature is bolstered by protection against unrecovered capital costs through a provision requiring Waste Management to purchase the fuelling station at its remaining undepreciated capital cost, if the contract is not renewed. However, FEI did not include such a provision in its proposed General Terms and Conditions, but stated that it can "... negotiate contractual terms that mitigate risk." (Exhibit B-1, p. 65) The Panel is of the view that, in the circumstances of this Application, a period of 5 to 10 years is a long time and, as evidenced by occurrences over the last few years, a great deal of change can occur over even a relatively short period of time. Failure to include provisions to protect against the risk of stranded assets would not be in the public interest. **Accordingly, the Commission Panel has determined that to be approved, the General Terms and Conditions must include a provision requiring the customer to pay any unrecovered capital in those cases where the initial contract is not renewed, or a similar provision that provides equivalent protection.** The Panel understands adding this provision may result in some potential customers being lost because they are not prepared to bear that risk. However, we also see no reason why the ratepayer should be required to do so either.

34. As discussed previously, the Commission had added the caveat to this analysis that no section 18 prescribed undertakings existed at that time. The Regulation now contemplates utility ratepayers having a stake in the development of these beneficial services. Moreover, the FEU submit that it is contrary to section 18(3) of the *CEA* to mandate the elimination of all risk to other natural gas customers in circumstances where doing so "may result in some potential [CNG/LNG Fuelling Service] customers being lost because they are not

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[18] The "buy out" provision is a contractual provision that requires the CNG/LNG Fuelling Service customer to pay the unrecovered amount of the investment in the event that the contract is not renewed. The Commission noted (pp. 28-29) that these types of provisions address, by and large, any stranding risk to natural gas customers generally. The Waste Management service agreement, which was the first agreement to come before the Commission, contained this provision.

[19] NGV Decision, p.6.

prepared to bear that risk". The safeguard against stranding that is stipulated in the Regulation (and hence considered adequate by Government) is that 80% of the output of a fuelling station is subject to a five-year fixed contract.

35. The FEU intend to continue seeking long-term contracts with a contract demand sufficient to recover the cost of service accruing during the contract term. However, GT&C 12B.5 should be amended to include an exception that gives the FEU the ability to bring forward a service agreement that leaves some residual risk to core customers where circumstances warrant.

(d) Benefitting From Economies of Scope

36. The Regulation has broader implications for how the Commission allocates shared costs to CNG/LNG Fuelling Service and LNG tanker load-out facilities. While no change to GT&C 12B.4 "Cost of service calculation" is necessary, the Commission should change the way in which it has applied GT&C 12B.4 to allocate common costs.

37. A theme in the FEU's submissions and evidence in this Inquiry has been that it is fair and reasonable to harness economies of scope for the mutual benefit of core natural gas ratepayers and CNG/LNG Fuelling Service customers. Not doing so means unnecessarily increasing the cost of service of CNG/LNG Fuelling Service, and represents a potential impediment to adoption. The primary rationale advanced by Inquiry participants against that position has been based on competitive considerations. The Commission concluded in the BFI Decision that, in light of the presence of competition "the public interest requires that, if FEI is to provide CNG/LNG services in its capacity as a public utility, it must do so without utilizing any potential economic leverage which it may have as a result of its status as a monopoly distributor of natural gas."[20] Government has given an unequivocal direction to the

[20] BFI Decision, p.19. The Commission made a similar comment in the NGV Decision, p.29: "Given that FEI may be in competition with other non-regulated businesses, the Commission Panel is concerned about the potential for cross subsidization by FEI's existing ratepayers. The Panel considers that the public interest would not be served by effectively providing FEI with a competitive advantage over other potential participants in the industry by allowing FEI to subsidize the costs of what would otherwise be an unregulated service, with existing

Commission that having a public utility develop a regulated CNG/LNG Fuelling Service is in the public interest, regardless of the fact that public utilities may be competing with non-regulated businesses. In effect, it validates the evidence of Dr. Ware, a competition expert, that there is nothing inherently wrong with utility participation in competive markets.[21] While the Regulation does not expressly dictate how shared costs are to be allocated, a rate design that captures economies of scope is most consistent with the purpose and intent of the Regulation of encouraging new CNG/LNG Fuelling Service customers.

D. VEHICLE INCENTIVES

38. Although vehicle incentives have not been addressed in this Inquiry, they warrant brief mention as they are a key component of the Regulation. Section 2(1) of the Regulation contemplates that public utilities can offer significant incentives, in the form of grants or interest free loans, for natural gas vehicles. The amount of the incentives that a utility can make available as a prescribed undertaking under the Regulation, plus prescribed administration and marketing costs, will total up to $62 million by March 31, 2017. The FEU intend to seek Commission approval of the manner in which the incentives will be recovered from core natural gas customers before providing any incentives ("Natural Gas for Transportation (NGT) Incentive Cost Recovery Application"). Developing the NGT Incentive Cost Recovery Application will require significant work, and it is premature to address specifics in this Inquiry. Parties will have an opportunity to comment on the NGT Incentive Cost Recovery Application in due course.

PART FOUR: CONCLUSION

39. The Regulation has significant implications for the Inquiry and should be considered. The FEU respectfully submit that, in light of the Regulation, the Commission must change the lens through which it views the FEU's involvement in CNG/LNG Fuelling Service. The Regulation requires the Commission to approach the FEU's provision of a regulated service in a

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ratepayer money. This again supports the Panel's determination that, to the extent possible, the full cost of CNG and LNG service is to be recovered from the CNG and LNG customers respectively."

[21] Ex. B-19, Att. B, para. 8.

competitive environment as valid and beneficial, not "problematic". It recognizes the vested interest that core natural gas customers have in the development of these services. The regulatory framework must promote and facilitate the FEU's CNG/LNG Fuelling Service under GT&C 12B within a single natural gas class of service.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 25, 2012 ***[original signed by Matthew Ghikas]***

Matthew Ghikas
Counsel for FortisBC Energy Utilities

Dated: May 25, 2012 ***[original signed by David Curtis]***

David Curtis
Counsel for FortisBC Energy Utilities

Appendix A

AES INQUIRY
FEU REPLY SUBMISSIONS ON GHG REGULATION

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June 8, 2012
File No.: 240148.00684/14797

BY ELECTRONIC FILING

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Erica Hamilton
Commission Secretary

Dear Sirs/Mesdames:

Re: An Inquiry into FortisBC Energy Inc. Regarding the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives

Further to the Commission's letter dated May 17, 2012, we enclose for filing in the above referenced proceeding the electronic version of the FortisBC Energy Utilities' Reply Supplemental Submission regarding the *Greenhouse Gas Reduction (Clean Energy) Regulation*, B.C. Reg. 102/2012. Twelve hard copies of the Submission will follow by courier.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Matthew Ghikas

MTG/DHC

An Inquiry into

FortisBC Energy Inc. Regarding the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives

Reply Submission of the FortisBC Energy Utilities on the *Greenhouse Gas Reduction (Clean Energy) Regulation*

June 8, 2012

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PART ONE: INTRODUCTION

1. While there is disagreement over the implications of the Regulation for *how* CNG/LNG Fuelling Service is to be regulated, the key threshold question of whether public utilities can or should participate in what would otherwise be non-regulated CNG/LNG fuelling markets has been answered by the Regulation in the affirmative. There is consensus among Inquiry participants that:

(a) the Regulation is part of the applicable law and should be considered by the Commission in deciding the issues raised in the Inquiry; and

(b) the FEU are able to provide CNG/LNG Fuelling Service and tanker truck load-out facilities under a regulated model.

2. This Reply Submission provides the FEU's response to the key points raised in Intervener submissions, primarily those of Ferus LNG, Clean Energy and BCOAPO. The FEU have not sought to address the arguments on a line by line basis, and thus its silence should not be construed as agreement.[1]

PART TWO: REPLY TO INTERVENER SUBMISSIONS

3. In this Part, the FEU make the following points in reply to intervener submissions:

(a) There is no ambiguity regarding to whom the Regulation applies.

(b) Commission oversight and the Regulation co-exist with respect to CNG/LNG Fuelling Service, but the Commission's role is focussed on approving a rate design that does not have the effect of impeding, directly or indirectly, the success of the prescribed undertakings.

(c) The status of a CNG/LNG Fuelling Service project as falling within a prescribed undertaking continues after the expiry of the Regulation.

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[1] The FEU have used the same defined terms as in their May 25, 2012, Supplemental Submission on the Regulation. Unless otherwise noted, all references to submissions provided by other parties are a reference to the submissions filed in respect of the Regulation on June 1, 2012, and in reply to the FEU's Supplemental Submission on the Regulation.

(d) The FEU can elect to bring forward CNG/LNG Fuelling Service projects outside of the prescribed undertaking, such that they are subject to the current approved requirements of GT&C 12B that achieves an appropriate cost allocation.

(e) The Regulation does not alter the regulatory compact so as to make the profit sharing proposed by BCOAPO appropriate.

(f) Vehicle incentives will be distributed according to the requirements of the Regulation, following an application to the Commission that is based on the principle that the costs are to be recovered from all core natural gas customers.

A. THERE IS NO AMBIGUITY REGARDING TO WHOM THE REGULATION APPLIES

4. All interveners agree that the Regulation permits public utilities to build, own and operate CNG/LNG Fuelling Stations. Clean Energy, however, submits that: "The new regulation does not explicitly state whether it must be the regulated public utility or whether it could be a public utility owned un-regulated subsidiary which provides the natural gas refuelling services."[2] The Regulation is unambiguous. The term "public utility" is defined in the *Utilities Commission Act* to mean a rate regulated utility, and section 18 of the *Clean Energy Act* references the *Utilities Commission Act*. A section 18 Regulation would not be required in the context of an unregulated subsidiary as an unregulated entity is, by definition, not subject to Commission oversight.

B. COMMISSION OVERSIGHT AND THE REGULATION CO-EXIST

5. The FEU's position, which appears to have been misunderstood by Ferus LNG and Clean Energy, is that Commission oversight and the Regulation can co-exist, but that the Regulation:

(a) makes a CPCN application redundant, as the Commission cannot deny a CPCN; and

(b) requires the Commission to regulate rates and CNG/LNG Fuelling Service in a way that does not indirectly prevent the FEU from developing CNG/LNG Fuelling Service.

We expand below on why a CPCN exemption is warranted and the implications for rate design.

[2] Clean Energy Submission, p. 2.

(a) CPCN Exemption Warranted to Avoid "Direct" Prevention of Prescribed Undertaking

6. Ferus LNG and Clean Energy mischaracterize the FEU's position as precluding Commission oversight generally. Ferus LNG, for instance, says that the FEU's position, "leaves no room for rate regulation, to the extent that such regulation is inconsistent with how a utility wishes to provide a prescribed undertaking."[3] Clean Energy similarly states: "FortisBC mistakenly believes Section 18's barring the commission from 'preventing' them from entering the NGV refuelling business means the Commission cannot continue to appropriately regulate their operation in the business."[4] This is not what the FEU said and it is not the FEU's position.

7. The key point that the FEU are making is that it is not open to the Commission to prevent the FEU, directly or indirectly, from proceeding with a CNG/LNG Fuelling Station. In that respect, the prescribed undertaking is akin to a CPCN. The Commission could not withhold a CPCN in the face of a prescribed undertaking, and should therefore establish an exemption. Ferus LNG, despite its criticism of the FEU, actually appears to agree with the FEU's legal argument on this point as it later states: "As such, to the extent that an activity qualifies under the Regulation as a prescribed undertaking, the Commission would not be able to prevent a public utility from engaging in such activity."[5]

8. The Commission still has a role in respect of every project. A CPCN exemption will only mean that future filings relating to CNG/LNG Fuelling Service facilities will focus on the terms and conditions of service agreements.[6] Determining the rate under a service agreement necessarily involves reviewing and accepting the cost of service, including the capital costs of the facility. The Commission also retains ongoing oversight of all rates and service (which is why the FEU are proposing changes to GT&C 12B so that it can be applied to facilities funded under the Regulation as well as those facilities constructed in the normal course).

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[3] Ferus LNG Submission, para. 13. See also Ferus LNG Submission, para. 39.

[4] Clean Energy Submission, p. 4.

[5] Ferus LNG Submission, para. 32.

[6] FEU Supplemental Submission (May 25, 2012), para. 13.

9. BCOAPO maintains that a CPCN should be required for prescribed undertakings because, in effect, key public issues remain unresolved regarding specific projects.[7] BCOAPO is not accurate as it relates to prescribed undertakings. Section 18 and the Regulation, as part of the applicable law, reflects the final word on the public interest as it relates to prescribed undertakings. Moreover, all fuelling service agreements will be reviewed by the Commission in every case, whether or not the fuelling station falls within a prescribed undertaking, for adherence to GT&C 12B (modified to accommodate the Regulation).

10. The proposed exemption for prescribed undertakings is the same approach that the FEU have been advocating in this Inquiry for CNG/LNG Fuelling Service projects brought forward (independent of the Regulation) pursuant to the already approved GT&C 12B.[8] The Regulation adds to the rationale of regulatory efficiency.

(b) Modification of Rate Design Approach to Avoid "Indirectly" Preventing

11. Clean Energy states that: "Only 'prevention' of the prescribed undertaking is barred, however, anything less than prevention would therefore, be within the Commission's discretion".[9] Ferus LNG similarly maintains that "prohibiting participating in an activity versus prescribing the rules for such participation are two entirely different matters."[10] Ferus LNG reasons that the Regulation lacks the clear and unambiguous language required to impose any limits on the Commission's ability to fix rates. The FEU submit that Ferus LNG and Clean Energy have overlooked both the purpose of the Regulation and the wording of section 18.

12. The Regulation represents Government exercising its right conferred by section 18 of the *Clean Energy Act* to encourage and facilitate public utility investment in CNG/LNG Fuelling Service. Section 18(3) of the *Clean Energy Act* drives home the Legislature's

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7 BCOAPO Submission, p. 2.

8 To be clear, the FEU continue to maintain the position described in the FEU's Initial Submissions in the Inquiry (March 15, 2012) that the Commission should implement a $5 million CPCN threshold for CNG/LNG Fuelling Service projects that are not prescribed undertakings.

9 Clean Energy Submission, p. 3.

10 Ferus LNG Submission, paras. 14 to 19.

expectation that the Commission will facilitate this investment through the way in which it regulates the public utilities. It provides:

> (3) The commission must not exercise a power under the Utilities Commission Act in a way that would directly **or** indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking. [Emphasis and double emphasis added.]

This provision includes reference to both "directly" preventing and "indirectly" preventing prescribed undertakings. The rules of statutory interpretation require that both of these words in the Act be given meaning and effect, as every word of a statute must be given meaning.[11] Ferus LNG's example of "prohibiting participating in an activity" equates to "directly" preventing a public utility from carrying out a prescribed undertaking. So what, then, does it mean for the Commission to exercise its powers to "indirectly prevent a public utility from carrying out a prescribed undertaking"? The FEU submit that this provision can only have been intended to encompass the *effects* of Commission orders, rules and guidelines regulating public utility involvement in prescribed undertakings. In other words, the Regulation does have implications for the way in which the Commission regulates services and sets rates, as the outcome of the Commission's rate setting cannot prevent the intent of the Regulation.

C. INVESTMENTS REMAIN APPROPRIATE AND PRUDENT AFTER 2017

13. Ferus LNG makes the argument that the protection afforded to public utilities under section 18 of the *Clean Energy Act* vanishes in 2017 when the Regulation expires. It states, for instance:

> Further, the Regulation only applies for a 5 year period. It is a temporary measure such that it is quite possible that any "prescribed undertakings" will no longer have such status after March 31, 2017. Since there will presumably be new projects developed throughout that time period, it is quite possible that some may be considered prescribed undertakings for only a few years or even months.[12]

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[11] *Communities Economic Development Fund v. Canadian Pickles Corp*., [1991] 3 S.C.R. 388.

[12] Ferus LNG Submission, para. 29.

This is not a sound interpretation of the Regulation or how it interacts with the *Clean Energy Act*.

14. The Regulation is, in effect, a direction from Government that it is appropriate for public utilities to invest during the "undertaking period" in the types of programs that it has defined as prescribed undertakings. A utility acting in reliance on the Regulation is acting prudently in proceeding with the investment. The investments properly become part of the utility rate base. The utility's decision to proceed with an investment under the Regulation does not suddenly become imprudent when the Regulation expires in April of 2017, such that they could be excluded from rate base for that reason. The relevance of the "undertaking period" defined in the Regulation, which ends on March 31, 2017, is to define the period within which the capital investment in the prescribed undertakings must occur in order for the facilities to fall under section 18. The implication of this "undertaking period" is that were the FEU to invest in a CNG fuelling station in, for example, August of 2017, then that station would not be a prescribed undertaking. Otherwise, any project that (i) is built within the undertaking period, (ii) meets the other requirements in the Regulation, and (iii) is identified by the FEU as being advanced as a prescribed undertaking, is subject to section 18 of the *Clean Energy Act*, including the rate setting provisions contained therein.

15. Section 18 requires cost recovery of "prescribed undertakings", and it is implausible that the Government intended that all undepreciated capital as of March 31, 2017 is not recoverable. The Regulation contemplates that every CNG/LNG Fuelling Service facility is backed by agreements at least 5 years in duration, meaning that all facilities built before 2017 as prescribed undertakings will remain in use after the Regulation expires. No public utility will invest in facilities with the expectation that a prudence review could be convened in 2017 on the basis that it had been inappropriate for the public utility to be engaged in the activities encouraged by the Regulation. Discouraging public utility investment in prescribed undertakings by exposing the utility shareholder to financial risk associated with those investments is the opposite outcome of what Government intended, and is contrary to section 18(3) of the *Clean Energy Act*. The FEU submit that it is therefore of fundamental importance

to the success of the Regulation that the Commission address Ferus LNG's argument at this time.

D. CNG/LNG SERVICES PROVIDED OUTSIDE OF A "PRESCRIBED UNDERTAKING"

16. Ferus LNG takes the position that it is not possible for the FEU to undertake CNG/LNG Fuelling Services outside of a "prescribed undertaking". It goes on to state that "should FortisBC exceed the annual or total monetary limits provided for in the Regulation, then none of the projects or stations would qualify as "prescribed undertakings".[13] The FEU submit that this argument should be rejected as it is inconsistent with the wording and purpose of the Regulation and section 18 of the *Clean Energy Act*.

17. The FEU disagree with Ferus LNG's characterization of the Regulation as imposing an absolute limit on the extent to which public utilities can provide CNG/LNG Fuelling Service. The purpose of the Regulation is to facilitate public utility involvement in CNG/LNG Fuelling Service for the purposes of achieving GHG reduction objectives. It does so by facilitating rate recovery for optional expenditures. The GHG reduction objective remains as valid for the next dollar above the envelope as it is for dollars spent within the envelope. There are other reasons, such as benefits to core customers, the CNG/LNG customer and the public generally, for building CNG/LNG Fuelling Stations. The FEU submit that the Commission retains the jurisdiction to determine whether the construction of additional facilities outside of that limit are beneficial to customers and generally in the public interest. There is no upper limit fixed in the Regulation on the spending that the FEU can commit to CNG/LNG Fuelling Service provided that the investments meet the requirements of the approved GT&C 12B.

18. Ferus LNG states that the Regulation is silent on how the Commission is to determine whether the various limits and stipulations have or have not been met in order for an activity or undertaking to be classified as a prescribed undertaking.[14] Section 18 contemplates reporting to the Minister and confers the power to make this assessment upon

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[13] Ferus LNG Submission, para. 30.

[14] Ferus LNG, Submission, para. 40.

the Minister, not the Commission. Although section 18 of the *Clean Energy Act* contemplates public utilities reporting to the Minister with respect to prescribed undertakings, the FEU will have to advise the Commission upon filing a CNG/LNG Fuelling Service agreement for approval whether it has advanced the station investment as a prescribed undertaking. The FEU will likely advance facilities outside of the Regulation where it is possible to apply the existing provisions of GT&C 12B, irrespective of whether there is unspent dollars within the prescribed undertaking envelope. This is particularly true in the case of large projects; bringing forward a large project as a prescribed undertaking has the effect of making it difficult to maintain the required average annual expenditure per station under section 2(2)(b)(i) or be under the cost cap in 2(3)(b)(i). These large projects have the potential to provide the greatest GHG benefits as well as larger benefits to core customers.

19. Ferus LNG's argument that exceeding the total expenditure limits set out in the Regulation even by one dollar means that no projects are prescribed undertakings is not supported by the wording of the Regulation. The Regulation defines a "class" that has certain attributes, and states that all undertakings that are in the class are prescribed for the purposes of section 18 of the Act. For example, in the case of section 2(2) of the Regulation, the Regulation defines the "class" in terms of:

- a description of the assets involved in the undertaking (i.e., that they are CNG fuelling stations);
- a total expenditure limit for the undertaking period in a dollar amount, including average annual per station expenditure limits; and
- a description of certain requirements for the service agreements.

20. The Regulation prescribes a funding amount of $12 million for CNG fuelling station projects. Assume for example that during the undertaking period, the FEU carry out $13 million worth of CNG fuelling station projects, each one costing $1 million (for a total of 13 projects). Assume also that all of the projects meet the descriptive requirement in section 2(2)(a), the annual expenditure requirements in 2(2)(b)(i) and (ii), and the service agreement requirements in 2(2)(c). There is no question that 12 of the 13 projects make up a "class" that

meets the definitional requirements in section 2(2) of the Regulation. That "class" is made up of 12 of the projects totalling $12 million, and all 12 of these projects will be prescribed undertakings for the purpose of the *Clean Energy Act*. Simply put, the class made up of 12 of these projects meets the requirements of the Regulation. The thirteenth project that is also commissioned during the undertaking period is not a member of the "class" defined in the Regulation, and as such is not (by definition) a prescribed undertaking. However, the fact that a non-qualifying thirteenth project is commissioned within the undertaking period does not alter the fact that a class (of 12 projects) that meets the requirements of the Regulation continues to exist.

21. Ferus LNG does not state what it considers to be the implications of its position that all of the CNG/LNG Fuelling Service projects that were once prescribed undertakings ceasing to qualify as prescribed undertakings at some future date upon the FEU spending $1 more than the funding envelope. In this scenario, the CNG/LNG Fuelling Service projects would still serve Government's GHG reduction objective, and would not suddenly become imprudent. The Commission will have reviewed and approved rates for all of the projects (brought forward under an accepted rate schedule GT&C 12B), which will have involved reviewing and accepting the cost of service to be recovered over the term of the agreement. There is no regulatory basis upon which the Commission could disallow costs associated with agreements that had been previously approved.

22. The FEU respectfully request that the Commission address Ferus LNG's argument at this time, and not leave it undecided. Only competitors benefit from this type of uncertainty, as it discourages utility investment in CNG/LNG Fuelling Service facilities. The uncertainty does not help achieve Government's objective.

E. PROVISION OF CNG/LNG FUELLING SERVICE WITHIN NATURAL GAS CLASS OF SERVICE

23. The FEU provided three reasons in its Supplemental Submission why the Regulation implicitly requires the inclusion of the CNG/LNG Fuelling Service and LNG tanker

load-out facilities within the broader natural gas class of service. For ease of reference, those three reasons are as follows:

(a) portions of the Regulation are only meaningful if the CNG/LNG Fuelling Service is included within the broader natural gas class of service;

(b) separate classes of service impair the achievement of the legislative objective, contrary to section 18(3) of the *Clean Energy Act*; and

(c) maintaining separate classes of service for CNG/LNG Fuelling Service forecloses a source of revenue from these prescribed undertakings that would otherwise flow to core customers, and thus can be expected to have the perverse effect of being detrimental to core customers.

Ferus LNG is the only party to address the issue of classes of service in detail. It maintains that the Regulation has no such implications.[15] The FEU address Ferus LNG's submissions in respect of these three points below.

FEU's Point that "Portions of the Regulation are only meaningful if the CNG/LNG Fuelling Service is included within the broader natural gas class of service"

24. Ferus LNG has not provided any answer to the FEU's first submission, which is based on principles of statutory interpretation, that portions of the Regulation are only meaningful if the CNG/LNG Fuelling Service is included within the broader natural gas class of service. Rather, Ferus LNG says only that having a separate class of service offers ratepayers certain protections.[16] Even this point is only partially correct. The current approved GT&C 12B currently provides the necessary protection for core customers. Risk to core customers is really only present in the context of projects that only meet the more relaxed cost recovery standards implicit in the Regulation. In respect of those projects, Ferus LNG's argument does not answer why the allocation of risk that it maintains is the correct allocation, is the one that is contemplated in the Regulation. The FEU have provided cogent reasons to support their interpretation of the Regulation.

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[15] Ferus LNG Submission, paras. 37 and 38.

[16] Ferus LNG Submission, paras. 43-45.

FEU's Submission that "Separate classes of service impair the achievement of the legislative objective, contrary to section 18(3) of the Clean Energy Act"

25. Ferus LNG's response to this submission of the FEU is to suggest that there is a logical inconsistency in the FEU's submission:

> … FortisBC now says that the creation of separate classes of service "..means that core natural gas customers are insulated from that risk, and the utility shareholder faces additional risk." This is in marked contrast to FortisBC's position in the Inquiry to the effect that CNG/LNG services do not transfer any material risk to the core natural gas customers (or presumably the shareholder) due to the fact that the prevailing rate design allocates so much of the risk to the CNG/LNG customer…
>
> …
>
> It is ironic that FortisBC now seeks to shift risk away from the CNG/LNG customer by suggesting changes are mandated to the rate design, while at the same time registering concerns with how separate classes of service may pass this risk onto the shareholder rather than onto the core natural gas customers.[17]

26. The FEU have been consistent, and this is an instance where Ferus LNG has missed the point of the FEU's submission. In the passage from the FEU's Reply Submission to which Ferus LNG refers[18], the FEU were referring to the existing GT&C 12B eliminating the risk to customers. It allocates most (if not all) of the stranding or construction risk to the CNG/LNG Fuelling Service customer. There is a difference, however, between the level of risk associated with CNG/LNG Fuelling Services provided under GT&C 12B in its current form and the risks associated with providing CNG/LNG Fuelling Service under agreements that contemplate only 80% recovery/a 5 year term/no "buy-out".

27. The Regulation, in contrast to the approved GT&C 12B, allows public utilities to bring forward projects that do not place as much risk on the CNG/LNG Fuelling Service customer as a means of encouraging development. These type of agreements give rise to additional risk that is not present under the currently approved GT&C 12B. In that context, it is

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[17] Ferus LNG Submission, paras. 46-47.

[18] FEU Reply Submission (April 24, 2012), para. 57.

accurate to say (as the FEU have said) that with two classes of service, "core natural gas customers are insulated from that risk, and the utility shareholder faces additional risk".[19]

28. The FEU agree with Ferus LNG that the Regulation does not expressly mandate how the risk associated with these projects should be allocated. However, the Regulation must be read against section 18(3) of the *Clean Energy Act*. When the two pieces of legislation are read together (harmoniously), it is evident that the Commission is precluded from employing a rate design (i.e. two class of service) with the objective or effect of muting the provisions in the Regulation designed to make it easier to invest.

29. In a similar vein, Ferus LNG disagrees with the import of the requirements in the Regulation relating to the requirements of CNG/LNG Fuelling Service agreements (the "at least 80%" and minimum 5-year term requirements). Ferus LNG reasons:

> While the Regulation contains certain stipulations as noted in Section C(a), they do not fetter the Commission's ratemaking jurisdiction. For example, while the Regulation talks of the minimum percentage of energy that must be provided at stations under take-or-pay contracts with a minimum term of 5 years, there is nothing in the Regulation with respect to the level of rates under such contracts (i.e. if 5 year contracts are chose as opposed to 10 year contracts, the appropriate rate may be reviewed) or with respect to the requirement for exit to cover undepreciated costs.[20]

Ferus LNG is thus making the point that rates could, in theory, be increased during the five year period to recover the full cost of service during the 5 years to account for a shorter service agreement term. The approach of trading off term for cost of service is a normal part of negotiating service agreements; however, there are two problems with relying on this possibility as the basis for interpreting the Regulation.

- First, this interpretation leaves one to wonder what was the point of including the "5 year term" and "at least 80%" provisions in the Regulation if it was not to make it easier for utilities to invest, but at the same time places some limits on the risk exposure for customers. Utilities can already negotiate these trade offs without the assistance of the Regulation. These minimum requirements would

[19] FEU Supplemental Submission (May 25, 2012), para. 19.

[20] Ferus LNG Submission, para. 56.

be unnecessary if Government had intended the residual risk to lie with the utility shareholder.

- Second, it is notable that, when it came time for Ferus LNG to expand on its point by way of examples, it focussed only on the 5 year agreement, not the 80% requirement. The Regulation contemplates circumstances in which only 80% of the cost of service will be recovered *even in circumstances where an agreement is only 5 years in duration*. This scenario necessarily results in someone other than the CNG/LNG Fuelling Service customer absorbing that risk. The Regulation implicitly contemplates that the risk will be borne by all customers. A rate design that prevents this risk allocation will deter public utility investment and run afoul of section 18(3) of the *Clean Energy Act*.

FEU's Submission that maintaining separate classes of service for CNG/LNG Fuelling Service forecloses a source of revenue from these prescribed undertakings that would otherwise flow to core customers, and thus can be expected to have the perverse effect of being detrimental to core customers

30. The FEU's position is that the separate classes of service model results in foregone revenue to other customers. Ferus LNG has not taken issue with the fact that core natural gas customers will not benefit from that revenue. It has, however, suggested that the recipient will be other customers of the CNG/LNG Fuelling Service class, not the shareholder.[21] The FEU's response is two-fold.

- First, Ferus LNG's point is only accurate where there is pooling of costs and revenues among all customers within a class of service. Pooling of costs and revenues occurs in the natural gas class of service, meaning that new throughput lowers the per GJ delivery rate for all customers. CNG/LNG Fuelling Service agreements are individual contracts. Individual CNG/LNG Fuelling Service customers would only share costs and revenues within a new CNG/LNG Fuelling Service class(es) of service to the extent that the Commission approved postage stamp CNG/LNG Fuelling Service rates or a deferral mechanism to defer costs and revenues for the class of service for future recovery/return to customers of the class of service.

- Second, and more fundamentally, Ferus LNG's point will provide small comfort to the core customers that would otherwise have received this benefit.

31. BCOAPO maintains that "if the NGT services are made part of the broader natural gas class of service, there is no incentive on FEU to reduce the costs and risks associated

[21] Ferus LNG Submission, para. 53.

with the provision of NGT services, since any losses will be recovered from its core customers".[22] This submission is based on an incorrect assumption about how costs are recovered. GT&C 12B, which the FEU submit should continue to apply to all CNG/LNG Fuelling Service with modifications to permit it to apply to all prescribed undertakings as well, currently requires costs of service incurred during a service agreement to be recovered from the CNG/LNG Fuelling Service customer. While the FEU have proposed that an amendment to GT&C 12B is required to allow for the *possibility* of a contract covered by the Regulation recovering less of the full cost of service arising over the term of a contract, the FEU will still be looking for firm agreements to recover the fuelling station cost of service accruing during the contract term.[23] The Commission oversees the cost of service at the point where the service agreements are reviewed and its oversight provides sufficient incentive for the Companies to manage costs appropriately.

F. BCOAPO'S PROFIT SHARING SUBMISSION

32. BCOAPO makes the submission that, by virtue of the Regulation "force[ing] ratepayers to invest in FEU's NGT services business"[24], ratepayers "should receive a fair share of any profits made in the business." It reasons:

> Profits for fuelling service recoveries will not accrue to FEU's NGT business because of rates set by the Commission for NGT service customers. Rather profits, if any, will accrue because of shrewd contracting on the part of FEU and higher than anticipated demand from FEU's NGT customers. On the other side of the coin, the cost of service for residential ratepayers now includes the cost of investing in FEU's NGT services business. It is appropriate for FEU to transfer 20% of any profits from its NGT services business to its core customers.[25]

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[22] BCOAPO Submission, p. 3.

[23] FEU Supplemental Submission (May 25, 2012), para. 29.

[24] BCOAPO Submission, p. 3. This appears to be an implicit acknowledgement that under the Regulation there will be circumstances where core natural gas customers will bear costs and risks associated with a service agreement.

[25] BCOAPO Submission, p. 3. Presumably, BCOAPO derives the 20% profit number from the requirement in the Regulation relating to the 80% take-or-pay condition.

The entitlement to the profits from the utility business accrue to the shareholder by virtue of its right under the *UCA* to an opportunity to earn a fair return on its investment.[26] The case law, and in particular the ATCO decision, is unequivocal that customers do not acquire an ownership interest in a utility by virtue of paying rates.[27] The BCOAPO's argument is, in reality, unrelated to whether the Regulation contemplates a single class of service.

G. VEHICLE INCENTIVES

33. Parties will have an opportunity to comment on the Natural Gas for Transportation (NGT) Incentive Cost Recovery Application in due course. However, the FEU wish to briefly address some of the comments interveners have made in their submissions on vehicle incentives.

(a) Fair Administration of Vehicle Incentives

34. The FEU agree with the general principle discussed by BCSEA[28] and alluded to by others that the distribution of vehicle incentives should be transparent under the framework put in place by the Regulation. The decision to provide vehicle incentives should be independent of whether or not the applicant is taking CNG/LNG Fuelling Service from the FEU, self-providing a fuelling station, or obtaining the service from a third party.

35. Ferus LNG maintains that only an independent third party can successfully administer a vehicle loan/incentive program.[29] Although the FEU disagree with this position, the FEU see the value in retaining a fairness monitor to oversee the distribution of vehicle incentives. The FEU are intending to take that approach in its upcoming application relating to vehicle incentives.

(b) Funding of Incentives by All Customers

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[26] *Utilities Commission Act*, ss. 59 and 60.

[27] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, para. 68.

[28] BCSEA Submission, p. 5.

[29] Ferus LNG Submission, para. 36.

36. Ferus LNG states that the *Clean Energy Act* does not say from whom (or how) a public utility should recover the costs of a prescribed undertaking, that this is a matter "left up to the Commission".[30] The FEU do not agree. One fundamental implication of the Regulation, which will be reflected in the NGT Incentive Cost Recovery Application proposal, is that the cost of the incentives, administration, marketing, training and education must be recovered in the FEU's overall natural gas revenue requirement, and not from the recipients of the incentives. There are two reasons why this is the case.

37. First, the Regulation contemplates incentives in the form of "grants" or "interest free loans". Recovering a "grant" from the NGT customer in rates turns the "grant" into what amounts to a loan. Recovering the carrying cost of a "loan" in the NGT customer's rate makes the "loan" no longer an "interest free loan". Applying accepted principles of legislative interpretation to the Regulation, the option of public utilities providing either "grants" or "interest free" loans must be given meaning.[31]

38. Second, section 18(3) of the *Clean Energy Act* provides that the Commission "must not exercise a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking." Employing a rate design that requires repayment of all grants, and recovers the carrying costs of loans from the recipients, undermines the central purpose of the Regulation, which is to promote the adoption of natural gas vehicles. Even if the rate design required recovery from the recipient of only the initial grant amount this would effectively preclude the option to the utility of providing grants and leave interest-free loans effectively as the only option.

(c) Vehicles Not Taking Natural Gas From the Utility

39. Ferus LNG maintains that the requirement for an open and competitive process means that incentives should be dispensed without regard for whether the vehicles will be

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[30] Ferus LNG Submission, para. 34.

[31] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

served by natural gas from the utility providing the incentive. Ferus LNG's position is self-serving and highly unfavourable to utility customers generally. Utility customers rely on increased throughput from the vehicles served to offset the incentive costs. Customers will bear the full cost of the incentive, without offset, in any circumstance where the incentive is used to fund vehicles that never take natural gas from the utility.

40. The FEU submit that the open and competitive process contemplated by the Regulation should include provisions that account for the amount of throughput added to the utility's system, to ensure utility customers derive benefits from the undertakings. The requirement in the Regulation is there to ensure that the rules are clear and applied to eligible recipients in a fair manner.

PART THREE: CONCLUSION

41. The FEU submit that the Commission continues to play a role in reviewing and approving rate design and the recovery of the costs of a prescribed undertaking in the utility's rates. However, in exercising this power, the Commission must avoid directly or indirectly preventing the prescribed undertaking from being carried out.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 8, 2012

[original signed by Matthew Ghikas]
Matthew Ghikas
Counsel for FortisBC Energy Utilities

Dated: June 8, 2012

[original signed by David Curtis]
David Curtis
Counsel for FortisBC Energy Utilities

Tab A

Communities Economic Development Fund v. Canadian Pickles Corporation., [1991] 3 S.C.R. 388

Communities Economic Development Fund *v.* Canadian Pickles Corp., [1991] 3 S.C.R. 388

Communities Economic Development Fund *Appellant*

v.

Rudy Vincent Maxwell *Respondent*

and

Canadian Pickles Corporation and June O'Donnell *Defendants*

Indexed as: Communities Economic Development Fund *v.* Canadian Pickles Corp.

File No.: 21816.

1991: June 3; 1991: November 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for manitoba

Guarantee -- Liability of guarantor of ultra vires loan -- Statutory corporation making loan contrary to statutory objects -- Whether loan ultra vires -- If so, whether guarantor liable to repay loan -- The Communities Economic

Development Fund Act, R.S.M. 1987, c. C155, ss. 1, 3, 7(c), 9(7), 26(2), (5) -- The Corporations Act, R.S.M. 1987, c. C225, ss. 3(1)(b), 16(3).

Corporations -- Statutory corporation making loan contrary to statutory objects -- Applicability of doctrine of ultra vires to statutory corporation -- The Communities Economic Development Fund Act, R.S.M. 1987, c. C155, ss. 1, 3, 7(c), 9(7), 26(2), (5) -- The Corporations Act, R.S.M. 1987, c. C225, ss. 3(1)(b), 16(3).

The appellant is a lending institution created by the Manitoba *Communities Economic Development Fund Act* (the "Act"). Its objects, as set out in s. 3 of the Act, are to encourage the economic development of "remote and isolated communities" in Manitoba. In 1986, the appellant approved a loan to Canadian Pickles, a company operating in Stony Mountain, a small community some 20 kilometres north of Winnipeg. The loan was guaranteed by the directors of the company, including the respondent, who was also a shareholder. The full amount of the loan was advanced by the appellant to creditors of Canadian Pickles, to equipment manufacturers, and in trust to the respondent as Canadian Pickles' solicitor. The company later defaulted on the loan. The appellant then sued the company and the guarantors for repayment. The Court of Queen's Bench held that the loan was *ultra vires* the appellant but that the respondent was still obliged to honour his guarantee because he had encouraged the appellant to lend the money, and because he benefited from the loan as a shareholder and director of the company. Applying *Breckenridge*, the trial judge found the respondent liable on his guarantee on the principle of moneys "had and received". On appeal,

the Court of Appeal reversed the judgment and dismissed the action. This appeal raises two issues: (1) whether appellant's loan was *ultra vires*; and, if so, (2) whether the respondent is liable to repay the loan as guarantor.

Held: The appeal should be dismissed.

As a statutory corporation created for a public purpose (namely, to encourage economic development in remote and isolated regions), the appellant has only those powers which are expressly or impliedly granted to it by statute. Acts of the appellant which exceed those powers will be *ultra vires*. Here, the loan to Canadian Pickles was contrary to the statutory objects of the appellant. Stony Mountain, where the company's operation was located, is not a remote and isolated community. Appellant's loan was thus *ultra vires* because s. 9(7) of the Act prohibits the making of loans in contravention of the Act.

Both the Act and *The Corporations Act* indicate a legislative intention to retain the doctrine of *ultra vires* for the appellant with respect to loans that contravene the Act. Indeed, while s. 26(2) of the Act is a clear indication of the legislative intention to give the appellant all the powers of a natural person, and to abolish the doctrine of *ultra vires* with respect to the appellant, s. 9(7) creates a limit on the appellant's powers. Not only is no remedy provided within the statutory scheme for a breach of s. 9(7), but the remedial provisions in Part XIX of *The Corporations Act* are expressly made inapplicable to the appellant by s. 3(1)(b) of *The Corporations Act*. Section 7(c) of the Act, which allows the appellant to exercise the powers set out in Part III of *The Corporations Act*, is

intended only to give the appellant the incidental and ancillary powers necessary to further its statutory objects. Finally, s. 16(3) of Part III of *The Corporations Act*, which provides that no act of a corporation is invalid only because the act is contrary to its articles or to *The Corporations Act*, does not, when read together with s. 3(1)(b) of *The Corporations Act* and ss. 9(7) and 26(5) of the Act, abolish the doctrine of *ultra vires* with respect to loans that contravene the Act. In any event, if there is any conflict between s. 9(7) of the Act and s. 16(3) of *The Corporations Act*, it must be resolved in favour of s. 9(7), because s. 26(5) of the *Act* provides that where there is a conflict between the Act and *The Corporations Act*, the Act prevails.

The respondent is not liable to repay the *ultra vires* loan as guarantor. First, *Breckenridge* has no application in this case. The respondent received no money from the lender and, consequently, could not be liable on the basis of money "had and received". Second, on the correct interpretation of the contract of guarantee, the respondent is not liable to repay the money advanced in the event the principal debt is *ultra vires*. Under the contract, the guarantors are liable as principal debtors only in the circumstances enumerated. These circumstances do not include the invalidity of the principal debt.

Cases Cited

Distinguished: *Breckenridge Speedway Ltd. v. The Queen in right of Alberta*, [1970] S.C.R. 175; **disapproved**: *Alberta (Provincial Treasurer) v. Meadow Rue Holdings Ltd.* (1986), 45 Alta. L.R. (2d) 294; **considered**: *Bonanza*

Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566; *Ashbury Railway Carriage & Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; *Attorney-General v. Great Eastern Railway Co.* (1880), 5 App. Cas. 473; *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 355; **referred to**: *Brougham v. Dwyer* (1913), 108 L.T. 504; *Sutton's Hospital Case* (1613), 10 Co. Rep. 1a, 23a, 77 E.R. 937, 960; *Union Bank of Canada v. A. McKillop & Sons, Ltd.* (1915), 51 S.C.R. 518; *Canadian Pacific Railway Co. v. City of Winnipeg*, [1952] 1 S.C.R. 424; *Canadian Pacific Ltd. v. Telesat Canada* (1982), 133 D.L.R. (3d) 321; *Redlin v. Governors of the University of Alberta* (1979), 23 A.R. 42 (Dist. Ct.), aff'd (1980), 23 A.R. 31 (C.A.); *Alberta Mortgage and Housing Corp. v. Ciereszko*, [1986] 2 W.W.R. 57; *Hazell v. Hammersmith and Fulham London Borough Council*, [1991] 2 W.L.R. 372; *Canadian Bank of Commerce v. Cudworth Rural Telephone Co.*, [1923] S.C.R. 618; *Yeoman Credit, Ltd. v. Latter*, [1961] 2 All E.R. 294; *Heald v. O'Connor*, [1971] 1 W.L.R. 497; *General Produce v. United Bank*, [1979] 2 Lloyd's Rep. 255; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Garnham v. Tessier* (1959), 27 W.W.R. 682; *Penner v. Hutlet* (1984), 33 Man. R. (2d) 168; *Manufacturers Life Insurance Co. v. Hauser*, [1945] 3 W.W.R. 740; *Minchau v. Busse*, [1940] 2 D.L.R. 282.

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Business Corporations Act, S.A. 1981, c. B-15, s. 15(1).

Business Corporations Act, S.N.B. 1981, c. B-9.1, s. 13(1).

Business Corporations Act, 1982, S.O. 1982, c. 4, s. 15.

Canada Business Corporations Act, R.S.C., 1985, c. C-44, s. 15(1).

Communities Economic Development Fund Act, R.S.M. 1987, c. C155, ss. 1 "remote and isolated communities", 2, 3, 7(c), 9(7), 26(2), 26(5), 26(6) [ad. 1990-91, c. 12, s. 3].

Communities Economic Development Fund Act, S.M. 1971, c. 84, ss. 2, 9(c).

Communities Economic Development Fund Amendment Act, S.M. 1991-92, c. 38.

Companies Act, R.S.M. 1970, c. C160 [rep. 1976, c. 40, s. 371], s. 26(1).

Company Act, R.S.B.C. 1979, c. 59, s. 21(1).

Corporations Act, R.S.M. 1987, c. C225, ss. 1(1) "articles", "corporation", "special Act", 3(1)(b), 15(1), 16(3), 231 "complainant", 240.

Corporations Act, S.M. 1976, c. 40.

Corporations Act, S.N. 1986, c. 12, s. 30(1).

Interpretation Act, R.S.M. 1987, c. I80, s. 9.

Statute Law Amendment Act (1978), S.M. 1978, c. 49, s. 18(2).
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APPEAL from a judgment of the Manitoba Court of Appeal (1989), 62 Man. R. (2d) 170, 64 D.L.R. (4th) 489, 45 B.L.R. 261, [1990] 2 W.W.R. 547, setting aside a judgment of the Court of Queen's Bench (1989), 62 Man. R. (2d) 177, [1989] 3 W.W.R. 514, granting the appellant's action on a guarantee. Appeal dismissed.

Donald G. Murray and *Allan MacDonald*, for the appellant.

Sidney Green, Q.C., for the respondent.

//*Iacobucci J.*//

The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal raises two issues: the applicability of the doctrine of *ultra vires* to a statutory corporation, and the liability of a guarantor to repay a loan which is *ultra vires* the lender.

I. Facts

Canadian Pickles Corporation was a Manitoba company in the business of producing and selling pickles. Canadian Pickles' operation was located in Stony Mountain, some 15 or 20 kilometres north of the City of Winnipeg. The majority shareholders of Canadian Pickles were Robert and June O'Donnell and the respondent, Rudy Vincent Maxwell, a lawyer who also acted as such for Canadian Pickles. The respondent, who owned 25 per cent of the issued shares of Canadian Pickles for which he had paid the sum of $7,000 was also a director and officer of the company.

The appellant, the Communities Economic Development Fund, is a lending institution created by *The Communities Economic Development Fund Act*, R.S.M. 1987, c. C155 (the "Act"). As set out in the statute, the objects of the appellant are to encourage the economic development of "remote and isolated communities" in the province of Manitoba. The Board of Directors of the appellant did not exercise its power under its statute to pass a by-law to establish criteria of remoteness and isolation.

In the fall of 1986, Canadian Pickles approached the appellant for a loan for working capital and additional equipment. The appellant approved a loan to Canadian Pickles in the amount of $150,000. The Board of Directors of the appellant had earlier made a policy decision to grant a limited number of loans to enterprises in Southern Manitoba. As a condition for granting the loan, the appellant required a guarantee from the directors of Canadian Pickles. A document entitled "Guarantee" was signed by Robert O'Donnell, June O'Donnell and the respondent.

The full amount of the loan was advanced by the appellant to creditors of Canadian Pickles, to equipment manufacturers, and in trust to the respondent as Canadian Pickles' solicitor. Canadian Pickles defaulted on the loan. A demand was eventually made by the appellant for the full amount of the loan plus costs and interest. When payment was not forthcoming, the appellant commenced action in the Court of Queen's Bench of Manitoba against the O'Donnells and the respondent, as guarantors of the loan. The trial judge found that the respondent was liable for the full amount of the loan. The respondent appealed to the Court of Appeal for Manitoba. His appeal was allowed and the action against him was dismissed.

II. Statutory Provisions

The Communities Economic Development Fund Act, S.M. 1971, c. 84

> **2** Communities Economic Development Fund is established as a body corporate and politic and shall consist of the directors from time to time appointed under the provisions of this Act.

The Communities Economic Development Fund Act, R.S.M. 1987, c. C155

> **1** In this Act,
>
> ...
>
> "remote and isolated communities" means those communities which meet the criteria of remoteness and of isolation established under this Act, either by by-law of the board or by order of the Lieutenant Governor in Council.

2 The Communities Economic Development Fund is continued as a body corporate and consists of the directors appointed under this Act.

3 The objects of the fund are to encourage the optimum economic development of remote and isolated communities within the province and to that end

(a) to provide financial or other assistance to

(i) existing economic enterprises or to economic enterprises to be established; and

(ii) community development corporations;

(b) to emphasize and encourage the expansion and strengthening of small to medium-sized economic enterprises which are locally owned and operated; and

(c) generally to assist the minister in furthering economic development on behalf of the residents of remote and isolated communities, particularly as regards economically disadvantaged persons.

7 The fund may

...

(c) generally exercise the powers set out in Part III of The Corporations Act.

9(7) No loan shall be made under this Act or financial assistance given under this Act if the making or giving thereof contravenes any provision of this Act.

26(2) The fund and any subsidiary of the fund has [*sic*] the general capacity and powers of a common law corporation; and no act of the fund or any subsidiary of the fund and no conveyance, transfer or security given to the fund is invalid.

26(5) Where there is any conflict between any provision of this Act and a provision of The Corporations Act, the provisions of this Act prevail.

The Corporations Act, R.S.M. 1987, c. C225

INTERPRETATION AND APPLICATION

1(1) In this Act,

...

"articles" means the original or restated articles of incorporation ... and includes any Act, statute or ordinance by or under which a body corporate has been incorporated ...

...

"corporation" means a body corporate heretofore or hereafter incorporated by or under an Act of the Legislature;

...

"special Act" means an Act of the Legislature other than this Act or any Act for which this Act is substituted;

3(1) Except where it is otherwise expressly provided,

...

(b) Parts II, V and VI, Division I of Part X, and Parts XIII to XIX and Parts XXI to XXVI do not apply to a corporation created for government purposes or municipal purposes or to corporations created under The Public Schools Act or The Health Services Act.

PART III

CAPACITY AND POWERS

15(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

16(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

PART XIX

REMEDIES, OFFENCES AND PENALTIES

231 In this Part,

...

"complainant" means

...

> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates, or
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.
>
> **240** If a corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with this Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right he has, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions thereof, and upon such application the court may so order and make any further order it thinks fit.

III. Judgments of the Courts Below

A. *Manitoba Court of Queen's Bench*, [1989] 3 W.W.R. 514

Associate Chief Justice Scott (as he then was) awarded judgment against the respondent Maxwell and dealt extensively with the issue of a possible breach by the appellant of a duty owed to the respondent. The issue of a breach of duty was not raised on this appeal. On the *ultra vires* issue, the Associate Chief Justice concluded that the loan was *ultra vires* because of the appellant's failure to follow the procedures set out in the Act (at p. 527):

> Whatever may have been the policy reasons behind the board's decision to expand the definition of "remote and isolated", as evidenced by the extracts of minutes filed, the fund failed to follow the procedures mandated by the Act for such purpose, and it is therefore my opinion that the loan exceeds the statutory mandate of the fund.

Having found the loan to be *ultra vires*, the trial judge held that he was bound by the cases of *Breckenridge Speedway Ltd. v. The Queen in right of Alberta*, [1970] S.C.R. 175, and *Alberta (Provincial Treasurer) v. Meadow Rue Holdings Ltd.* (1986), 45 Alta. L.R. (2d) 294 (C.A.). The Associate Chief Justice found that the respondent was obliged to honour his guarantee even though the principal debt was *ultra vires* the lender, because the respondent had encouraged the appellant to loan the money, and because he benefitted from the loan as a shareholder and director of Canadian Pickles. Following *Breckenridge*, *supra*, the trial judge found the respondent liable on his guarantee on the principle of moneys had and received.

B. *Manitoba Court of Appeal*, [1990] 2 W.W.R. 547

The Manitoba Court of Appeal allowed the respondent's appeal, Monnin C.J.M. dissenting. The Court of Appeal was unanimous that the loan in question was *ultra vires* the appellant. The majority judgment emphasized that because the respondent had received no money from the Fund, he could not be liable for the repayment of the money on the principle of moneys "had and received." Accordingly, *Breckenridge*, *supra*, could not be said to apply. In his dissenting judgment, Monnin C.J.M. agreed with the trial judge's finding that the respondent had received a benefit from the loan as a director and shareholder of Canadian Pickles. Monnin C.J.M. would accordingly have found the respondent liable on his guarantee.

(1) Huband J.A. (O'Sullivan J.A. concurring)

Huband J.A. concluded on the basis of the decisions in *Brougham v. Dwyer* (1913), 108 L.T. 504 (K.B. Div.), and *Breckenridge, supra,* that an *ultra vires* loan is not an illegal contract, it is a nullity. A guarantor cannot be liable for guaranteeing a loan which is void from the outset. The loan being a nullity, the guarantee is a "meaningless document upon which no legal action can be founded" (p. 557).

Huband J.A. also rejected the argument that the respondent was liable on the grounds of moneys "had and received", because the respondent had received no money from the appellant (at p. 556):

> I can understand how the primary debtor, Canadian Pickles, might be said to have received money or its equivalent, or at least that it is estopped from denying its receipt. But how can that be said of the guarantor Maxwell? It is a certainty that he did not receive either money or its equivalent, and I do not see how he could possibly be estopped from so stating. I do not see how he could be held liable for repayment of moneys "had and received" when the moneys were neither had nor received by him.

Finally, Huband J.A. rejected the position of the Alberta Court of Appeal in *Meadow Rue, supra,* that the encouragement of the loan could itself create a liability. Huband J.A. rejected *Meadow Rue* on the grounds that encouragement of a loan cannot create a liability if the loan is itself a nullity (at p. 557):

> With great respect to the Alberta Court of Appeal, I do not see how the encouragement of the loan can create a liability when the loan itself is a nullity. I do not see how one can guarantee that which ... did not exist in point of law. The guarantee itself becomes a meaningless document upon which no legal action can be founded.

(2) Monnin C.J.M., (dissenting)

Monnin C.J.M. concurred with Huband J.A. in upholding the finding of the trial judge that the loan was *ultra vires* the appellant. However, the Chief Justice disagreed with the majority and would have upheld the result at trial, on the grounds that the principle in *Breckenridge*, *supra*, should apply to the respondent because the respondent received a benefit from the loan (at p. 551):

> In my view it cannot be said that he received no benefit from the loan. Maxwell was a shareholder, director and officer of Canadian Pickles and its legal representative. If the business had been successful, he and the other shareholders would have reaped the benefits and advantages of that loan by the accretion of the shares, the possibility of dividends and/or profits, as well as the probable additional legal work which would flow from a prosperous business enterprise.

Following *Meadow Rue*, *supra*, the Chief Justice accepted that a guarantor who benefits from an *ultra vires* loan will be liable to repay the loan. This is an example of "equity in action": the respondent is liable because it would be unconscionable for him not to be liable (at p. 552):

> I accept as sound, good common sense and good law the statement of Kerans J.A. in *Meadow Rue Hldg.* It would be unconscionable for Maxwell, the guarantor in this case, and under these circumstances to deny liability to the fund on the basis that he did not receive the cold cash and, further, that the fund exceeded its authority in advancing the moneys to Canadian Pickles. Maxwell is not in a position to say to the fund, "Tough luck, your document is no good, invalid and I'm under no obligation to repay one red cent."

IV. Issues

1. Was the loan by the appellant to Canadian Pickles *ultra vires* the appellant?

2. If the loan was *ultra vires*, is the respondent liable to replay the loan as guarantor?

V. Is the Loan *Ultra Vires*?

There can be no doubt that the appellant's loan to Canadian Pickles was contrary to the objects of the appellant as stated in s. 3 of the Act. Stony Mountain, where Canadian Pickles' operation was located, is not a remote and isolated community. In this regard, I accept the finding of Monnin C.J.M. (dissenting on other grounds): "The town of Stony Mountain is a prosperous and viable non-urban area. It is not remote nor is it an isolated community" (p. 550). Indeed, neither the trial judge nor any judge of the Court of Appeal differed on this point.

I would note that the appellant's board of directors is empowered by s. 1 of the Act to establish "criteria of remoteness and of isolation" by passing a by-law. I doubt that there are criteria consistent with the objects of the Act that would make Stony Mountain a remote and isolated community. Be that as it may, as already mentioned, the board of directors of the appellant chose not to attempt to bring the loan to Canadian Pickles within the objects of the Act by passing a by-law, assuming such a by-law would have been valid.

The making of a loan contrary to the statutory objects of the appellant is a violation of the prohibition in s. 9(7) of the Act against loans which contravene any provision of the Act. The question is, what are the consequences of this violation of s. 9(7) of the Act? Must the loan be *ultra vires* the appellant, or is some less drastic result possible? To answer these questions, a brief review of the law of *ultra vires* is warranted following which I shall discuss the relevant legal principles as they apply to the facts of the instant case.

A. *The Law of Ultra Vires*

A review of the law of *ultra vires* is important to establish the context in which the provisions of the Act should be interpreted. Of particular relevance is the distinction that has been made in the application of the *ultra vires* doctrine between common law and statutory corporations.

(1) Common Law Corporations

Shortly put, the doctrine of *ultra vires* has been applied to corporations created by statute or pursuant to statutory authority, but has not been applied to corporations created by the exercise of the royal prerogative. Corporations created by the exercise of the royal prerogative, known as "chartered", "letters patent" or "common law" corporations, are taken to have all the powers of a natural person. The actions of a common law corporation are not invalid because they are outside the stated objects of a corporation: *Sutton's Hospital Case* (1613), 10 Co. Rep. 1a,

23a; 77 E.R. 937, 960. Legal action may be taken against a common law corporation if it acts outside its objects, but the acts are not invalid.

The Judicial Committee of the Privy Council considered the powers of a letters patent corporation in *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566. The appellants were incorporated by letters patent issued by the Lieutenant-Governor of Ontario, under the authority both of *The Ontario Companies Act*, R.S.O. 1897, c. 191, and of all other powers and authority vested in the Lieutenant-Governor. The objects of the appellants, as stated in the letters patent, were to carry on the business of mining and exploration. The letters patent did not limit the appellants' area of operation. The appellants were carrying on mining operations in the Yukon. As a result of disagreements over certain mining leases, the appellants brought an action for damages against the respondent. The appeal came to the Judicial Committee of the Privy Council on the bare question of whether the appellants had the power to carry on operations in the Yukon.

The Judicial Committee held that the appellants did have the power to carry on operations in the Yukon, and allowed the appeal. Writing for the Committee, Viscount Haldane distinguished companies created by charter from those created by statute (at pp. 583-84):

> In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter.

Prior to the decision in *Bonanza Creek*, some Canadian courts had assumed that the doctrine of *ultra vires* did apply to chartered companies: see *Union Bank of Canada v. A. McKillop & Sons, Ltd.* (1915), 51 S.C.R. 518. After the decision, it was clear that restrictions in the charter of the company were not sufficient to make any act *ultra vires*, although other remedies might be available for breach of the charter: see F. W. Wegenast, *The Law of Canadian Companies* (1979), at pp. 141-44. However, the doctrine of *ultra vires* remained applicable to chartered companies after *Bonanza Creek* in the limited sense that an action could still be *ultra vires* the company if the act were prohibited by statute. This conclusion follows from the passage just quoted from *Bonanza Creek, supra,* at p. 583: "In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter" (emphasis added). For analysis, see Wegenast, *supra*, at pp. 141-50, and E. J. Mockler's helpful article, "The Doctrine of Ultra Vires in Letters Patent Companies", in J. S. Ziegel, ed., *Studies in Canadian Company Law* (1967).

(2) Corporations Created by or Under a Statute

The presumption at common law is that corporations created by or under a statute have only those powers which are expressly or impliedly granted to them. To the extent that a corporation acts beyond its powers, its actions are *ultra vires* and invalid. Assessing the limits of the powers of a corporation created by or under a statute is a question of the interpretation of the statute and corporation's constating documents which give the corporation its powers.

If the appropriate language is used, the powers of a corporation created by or under a statute may be as wide as those of a common law corporation. The question will turn on the language used in the statute constating documents. The point is well illustrated by the following passage from *Bonanza Creek*, *supra*, at p. 578:

> Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is ultra vires and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter.

(a) *Memorandum Corporations*

The doctrine of *ultra vires* was first applied to memorandum companies incorporated under business corporation statutes in *Ashbury Railway Carriage & Iron Co. v. Riche* (1875), L.R. 7 H.L. 653. The appellant was incorporated under the *Companies Act*, 1862. The purpose of the company, set out in its memorandum, was to carry on business as mechanical engineers and general contractors. The directors of the appellant entered into a contract with the respondent Riche. As part of the contract, the appellant was to purchase a railway concession in Belgium, and to raise

money for the construction of the railway. The House of Lords held that the transaction was *ultra vires* the appellant because it was beyond the scope of its memorandum. As a consequence, the contract was null and void, and not capable of ratification by the shareholders of the appellant. Prior to the statutory abolition in most Canadian jurisdictions of the *ultra vires* doctrine for companies incorporated under the business corporation statutes, *Ashbury Railway* and *Bonanza Creek*, *supra*, were the law in Canada.

(b) *Corporations Created by Special Act*

The applicability of the doctrine of *ultra vires* to corporations created by special act was at issue in *Attorney-General v. Great Eastern Railway Co.* (1880), 5 App. Cas. 473 (H.L.). The respondent company was incorporated by an Act of Parliament. The respondent was given a variety of powers by several statutes. The respondent purported to lease locomotives to another railway company. The appellant sought an injunction to prevent the respondent from leasing its locomotives or other rolling stock, on the grounds that the directors of the respondent had exceeded their powers. The House of Lords held that the acts in question were *intra vires* the company because expressly authorized by the statutory scheme. In so finding, their Lordships stated emphatically that the principle earlier enunciated in *Ashbury Railway*, *supra*, applied also to statutory corporations. In the words of Lord Watson, at p. 486:

> I cannot doubt that the principle by which this House, in the case of the *Ashbury Railway Company v. Riche*, tested the power of a joint stock company registered (with limited liability) under the *Companies Act* of 1862, applies with equal force to the case of a railway company

> incorporated by Act of Parliament. That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication.

The House of Lords affirmed the applicability of *Ashbury Railway* to corporations created by special act in *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 355 (H.L.). Lord Watson held that the powers of a statutory corporation are limited by the purposes of the corporation as set out in the special act (at pp. 362-63):

> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

The principle that a statutory corporation can do only what it is expressly or impliedly authorized to do by the statute creating it has been repeatedly applied by Canadian courts. The principle was approved by Locke J. in this Court, in *Canadian Pacific Railway Co. v. City of Winnipeg*, [1952] 1 S.C.R. 424, at p. 485. The principle was referred to as "trite law" in *Canadian Pacific Ltd. v. Telesat Canada* (1982), 133 D.L.R. (3d) 321 (Ont. C.A.), at p. 326. In *Redlin v. Governors of the University of Alberta* (1979), 23 A.R. 42 (Dist. Ct.), affirmed unanimously on appeal (1980), 23 A.R. 31, Stevenson Dist. Ct. J. (as he then was), said in reference to the same principle that, "One cannot quarrel with that general proposition" (p. 48). I would also refer to *Alberta Mortgage and Housing Corp. v. Ciereszko*, [1986] 2

W.W.R. 57 (Alta. Q.B.). The principle has been recently affirmed by the House of Lords in *Hazell v. Hammersmith and Fulham London Borough Council*, [1991] 2 W.L.R. 372 (H.L.).

(c) *Abolition of the Doctrine of Ultra Vires*

The doctrine of *ultra vires* has been abolished by statute for corporations incorporated under the business corporations legislation in most Canadian jurisdictions. The following jurisdictions have statutory provisions reversing the presumption that corporations have limited capacity: Canada (*Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 15(1)), Alberta (*Business Corporations Act*, S.A. 1981, c. B-15, s. 15(1)), British Columbia (*Company Act*, R.S.B.C. 1979, c. 59, s. 21(1)), Manitoba (*The Corporations Act*, R.S.M. 1987, c. C-225, s. 15(1)), New Brunswick (*Business Corporations Act*, S.N.B. 1981, c. B-9.1, s. 13(1)), Newfoundland (*The Corporations Act*, S.N. 1986, c. 12, s. 30(1)), Ontario (*Business Corporations Act, 1982*, S.O. 1982, c. 4, s. 15), Saskatchewan (*The Business Corporations Act*, R.S.S. 1978, c. B-10, s. 15(1)), and the Yukon (*Business Corporations Act*, R.S.Y. 1986, c. 15, s. 18(1)). The doctrine of *ultra vires* may still apply in the Northwest Territories, and in Nova Scotia. Prince Edward Island is a letters patent jurisdiction.

In my view, the general abolition of the doctrine of *ultra vires* is in accordance with sound policy and common sense. The original purposes of the doctrine, which were, in the words of the *1967 Interim Report of the Select Committee on Company Law* (tabled before the Ontario Legislative Assembly, at p. 25) "to

protect creditors by ensuring that the company's funds to which creditors must look for payment were not dissipated in unauthorized activities and to protect investors by allowing them to know the objects for which their money was to be used", have been largely frustrated. Subsequent statutory and case law developments have made the doctrine a protection to no one and a trap for the unwary. No less an authority than L. C. B. Gower has recommended, in *Gower's Principles of Modern Company Law* (4th ed. 1979), at p. 179, "total abolition of the *ultra vires* rule in so far as it affects the capacity of companies" and indeed referred favourably to the approach taken by the *Canada Business Corporations Act* in this respect. See Gower, *supra*, at p. 180.

However, in spite of the general trend towards abolition of the doctrine of *ultra vires*, the limited aspects of the doctrine, as seen from the above review, may be present with respect to corporations created by special act for public purposes. Not only is there a long line of cases supporting the principle, but one may argue that this protects the public interest because a company created for a specific purpose by an act of a legislature ought not to have the power to do things not in furtherance of that purpose. Of course, it is open to the legislature to rebut this presumption because, for example, the legislature may provide for other remedies short of invalidity for acts contrary to the statute. But this takes us to discussing the application of the general principles of law on *ultra vires* to the facts of this case.

B. *Application of the Law to the Facts of This Case*

The appellant is a statutory corporation, created by *The Communities Economic Development Fund Act*. The appellant was created for a public purpose, namely to encourage economic development in remote and isolated regions of Manitoba. As a statutory corporation created for a public purpose, the appellant has only those powers which are expressly or impliedly granted to it by statute. Acts of the appellant which exceed those powers will be *ultra vires*. The issue is therefore: was the appellant expressly or impliedly granted the power to act outside its statutory objects?

In determining the scope of the appellant's powers, reference must be made not only to *The Communities Economic Development Fund Act*, but also to *The Corporations Act*, R.S.M. 1987, c. C225. "Corporation" is defined in s. 1(1) of *The Corporations Act* so as to include the appellant; "articles" is defined in the same section to include the statute by which the appellant was incorporated, that is *The Communities Economic Development Fund Act*. The application of *The Corporations Act* to the appellant is however limited by s. 3(1) of *The Corporations Act*, which provides that some parts, including Part XIX, of *The Corporations Act* (dealing with remedies, offences and penalties) do not apply to a corporation, such as the appellant, created for government purposes.

(1) Section 26(2) of *The Communities Economic Development Fund Act*

On its face, s. 26(2) grants the appellant the capacity and powers of a common law corporation. A common law corporation is a corporation with the powers of a natural person: *Canadian Pacific Railway Co. v. City of Winnipeg* and

Bonanza Creek, supra. The language used in s. 26(2) shows what Viscount Haldane referred to in *Bonanza Creek* as an "intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter" (p. 578). I find support for this position not only in the explicit grant of the "general capacity and powers of a common law corporation" to the appellant, but also in the second part of s. 26(2), which provides that no act of the appellant is invalid taken by itself. Section 26(2) is a clear indication of the legislative intention to give the appellant all the powers of a natural person, and to abolish the doctrine of *ultra vires* with respect to the appellant. However, s. 26(2) must be considered together with other sections of the Act, including s. 9(7).

(2) Section 9(7) of *The Communities Economic Development Fund Act*

Section 9(7) prohibits, using mandatory language, the making of loans in contravention of the Act. In my opinion, the section can only be interpreted as evidence of the intention of the legislature to limit the wide grant of powers made in s. 26(2) of the Act. I am bolstered in my conclusion by the fact that the Act provides no sanction or remedy for a loan made in contravention of the Act and in violation of s. 9(7). If section 9(7) were interpreted to mean only that the appellant should not make loans in contravention of the Act, the section would be superfluous: the conclusion that the appellant should not make loans in contravention of the Act follows from the most basic of interpretive law principles. It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" *(Maxwell on the Interpretation of Statutes* (12th ed. 1969),

at p. 36). Accordingly, the prohibition in s. 9(7) of the Act should be interpreted so as to create a limit on the powers of the appellant.

With many Manitoba corporations, the remedial provisions in Part XIX of *The Corporations Act* and in particular the provisions in s. 240 for obtaining a restraining order, would be available for a breach of the constating statute. However, s. 3(1)(b) of *The Corporations Act* provides that Part XIX is inapplicable to the appellant. Hence, not only is no remedy provided within the statutory scheme for a breach of s. 9(7), but the remedy which would otherwise have been available has been expressly removed. I conclude that there is not only no evidence of a legislative intention to rebut the presumption that acts of a company which contravene the constating statute of the company are *ultra vires*, but on the contrary that the evidence indicates that the legislature positively intended that acts of the appellant violating the prohibition in s. 9(7) should be *ultra vires*.

I would also refer for further support for my interpretation of the effect of ss. 9(7) and 26(2) of the Act to the decision of this Court in *Canadian Bank of Commerce v. Cudworth Rural Telephone Co*., [1923] S.C.R. 618. The respondent in that case had originally been incorporated under *The Rural Telephone Act* of Saskatchewan. It was later incorporated under *The Companies Act* of that province. The respondent was contesting its indebtedness on a promissory note on the grounds that the note was *ultra vires*. *The Rural Telephone Act* explicitly set out the means by which the respondent could raise money. These means did not include issuing promissory notes. However, s. 14(*b*) of *The Companies Act* of Saskatchewan provided, *inter alia*, that:

> Every company ... shall, ... unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, ... so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal.

The Supreme Court of Canada held, Idington J. dissenting, that the promissory note was *ultra vires* the respondent, under both the Saskatchewan *Rural Telephone Act* and *Companies Act*.

I find the reasons of Duff J. particularly helpful. Duff J. first finds that the effect of s. 14 of the Saskatchewan *Companies Act* is to rebut the normal presumption that a corporation created by or under a statute has limited powers. In other words, s. 14 confers on the respondent the general capacity of a common law corporation. He goes on to consider the effect of the provisions in *The Rural Telephone Act* in the context of the grant of the general capacity of a common law corporation by s. 14 of the Saskatchewan *Companies Act*, at pp. 628-29:

> The effect, then, of section 14 upon the companies to which it applies is not to abrogate entirely the doctrine of *ultra vires* but to establish a rule of construction which in effect is that such companies are to be deemed to have the capacities of a common law corporation, subject to such restrictions as the legislature has evidenced an intention of imposing upon it. In declaring in section 14 that the companies referred to are to have the capacities of a common law corporation, the legislature cannot be supposed to have intended to abrogate the restrictions and prohibitions which the legislature itself has shewn an intention to impose upon such companies. A company created by charter ... is necessarily subject to the restrictions imposed upon it by the legislature, and where the enactment imposing such restrictions evinces an intention that a given transaction shall not be entered into, then any attempt on the part of the company to enter into such a transaction must be inoperative in law. [Emphasis added.]

In the case at bar, the Act by s. 26(2) gives the Fund the attributes of a company created by charter, but the Act, by s. 9(7), clearly evinces an intention that a given transaction, namely a loan contrary to the Act, shall not be entered into.

(3) Section 7(c) of *The Communities Economic Development Fund Act*

Section 7(c) of the Act allows the Fund to exercise the "powers" set out in Part III of *The Corporations Act* which is entitled, "CAPACITY AND POWERS". The present provisions in Part III have the effect of statutorily abolishing the *ultra vires* doctrine with respect to corporations covered by *The Corporations Act*. In interpreting s. 7(c) of the Act it is helpful to refer to the legislative history of Part III of *The Corporations Act*. Previous versions of Part III, enacted under *The Companies Act*, R.S.M. 1970, c. C160, granted a wide range of incidental and ancillary powers to incorporated companies, as did many other companies' acts of the period.

The Act was first enacted in 1971, as *The Communities Economic Development Fund Act*, S.M. 1971, c. 84. At that time, Manitoba companies were incorporated by letters patent under *The Companies Act*. The provision now found in s. 7(c) of the Act was then found in s. 9(c) of the 1971 Act. Section 9(c) provided that: "The fund may ... generally exercise the powers set out in subsection (1) of section 26 of The Companies Act." Section 26(1) of *The Companies Act* gave a company the power "as incidental and ancillary to the objects set out in its charter" to perform a wide range of acts. The necessary link between these acts and the objects of the company is emphasized by the wording of the residual clause in s. 26(1)(cc), which provided that a company might "do all such other things as are

incidental or conducive to the attainment of the objects and the exercise of the powers of the company."

In 1976, *The Companies Act* was repealed, and the present *Corporations Act* was enacted as S.M. 1976, c. 40. Two years later, changes to the 1971 *Communities Economic Development Fund Act* made necessary by the introduction of the 1976 *Corporations Act* were introduced in *The Statute Law Amendment Act (1978)*, S.M. 1978, c. 49. The necessary change to s. 9(c) of the 1971 *Communities Economic Development Fund Act* was made by s. 18(2) of *The Statute Law Amendment Act (1978)*:

> **18(2)** Clause 9(c) of the Act is amended by striking out the words and figures "subsection (1) of section 26 of The Companies Act" thereof and substituting therefor the words and figures "Part III of The Corporations Act".

In my opinion, the legislative history of s. 7(c) of the Act, when interpreted in conjunction with the legislative history of Part III of *The Corporations Act*, indicates that s. 7(c) of the Act is intended only to give the appellant the incidental and ancillary powers necessary to further its statutory objects.

However, there remains the question of s. 16(3) of Part III of *The Corporations Act*. Like similar provisions in other corporations acts, s. 16(3) provides that no act of a corporation is invalid only because the act is contrary to its articles or to *The Corporations Act*. However, s. 16(3) of *The Corporations Act* must be read together with s. 3(1)(b) of *The Corporations Act*, and ss. 9(7) and 26(5) of *The Communities Economic Development Fund Act*. In my view, s. 16(3) of *The*

Corporations Act is part of a legislative scheme to abolish the doctrine of *ultra vires*. The remedial provisions in Part XIX of *The Corporations Act* are an integral part of that scheme. The abolition of the doctrine of *ultra vires* goes together with the creation of new statutory remedies. The fact that Part XIX is expressly made inapplicable to the Fund by s. 3(1)(b) of *The Corporations Act* is an indication of a legislative intention to retain the doctrine of *ultra vires* for the Fund, with respect to loans that contravene the Act.

I find support for this conclusion in the legislative history of s. 7(c) of the Act, which indicates a legislative intention to give the Fund only powers necessarily incidental to its objects. Furthermore, I think that s. 9(7) of the Act clearly indicates a legislative intention to prohibit actions by the Fund beyond its powers. In addition, if there is any conflict between s. 9(7) of the Act and s. 16(3) of *The Corporations Act*, it must be resolved in favour of s. 9(7) of the Act, because s. 26(5) of the Act provides that where there is a conflict between the Act and *The Corporations Act*, the Act prevails.

(4) Conclusion

I would conclude that loans made by the appellant in contravention of s. 9(7) of the Act are *ultra vires*. The loan to Canadian Pickles is *ultra vires* the appellant because it was made in contravention of s. 9(7) of the Act.

VI. Is the Respondent Liable to Repay the Loan as Guarantor?

It is the contention of the appellant that the decision of the Alberta Court of Appeal in *Meadow Rue*, *supra*, was a correct application of *Breckenridge*, *supra*. Where the principal debt is *ultra vires* the lender, the appellant submitted, the guarantor should nonetheless be liable to repay the loan. In my respectful opinion, the court in *Meadow Rue* misapplied *Breckenridge* in that it did not distinguish the borrower's obligations to the lender from the guarantor's obligations to the lender. However, before turning to the circumstances of this case, it will be useful to make some general comments about the nature of a guarantee, and about the decision of this Court in *Breckenridge*.

A. *The Nature of a Guarantee*

A guarantee is generally a contract between a guarantor and a lender. The subject of the guarantee is a debt owed to the lender by a debtor. In the contract of guarantee, the guarantor agrees to repay the lender if the debtor defaults. The exact nature of the obligation owed by the guarantor to the lender depends on the construction of the contract of guarantee, but the liability of the guarantor is usually made coterminous with that of the principal debtor. Generally speaking, if the principal debt is void or unenforceable, the contract of guarantee will likewise be void or unenforceable. See generally, J. O'Donovan and J. C. Phillips, *The Modern Contract of Guarantee* (1985), at pp. 183-93.

Contracts of guarantee are sometimes distinguished from contracts of indemnity. In a contract of indemnity, the indemnifier assumes a primary obligation to repay the debt, and is liable regardless of the liability of the principal debtor. An

indemnifier will accordingly be liable even if the principal debt is void or otherwise unenforceable. The distinction between contracts of guarantee and of indemnity ought not to be overemphasized. The resolution of a given case will turn on the correct interpretation of the contract and of the intention of the parties; attempts to label the contract as one of guarantee or of indemnity may be less than helpful. In *Yeoman Credit, Ltd. v. Latter*, [1961] 2 All E.R. 294 (C.A.), at p. 299, Harman L.J. had this to say about the distinction: "[i]t seems to me a most barren controversy [which] has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public".

B. *The Principle in Breckenridge*

In *Breckenridge, supra*, the Treasurer of Alberta agreed to lend money to the plaintiffs. The plaintiffs had transferred certain interests in real property to the Treasurer as security for the loan. The plaintiffs sought rescission of the entire agreement. The Treasurer counterclaimed for the money owing, and the plaintiffs defended the counterclaim on the grounds that the loan was *ultra vires* the Treasurer. Writing for the majority, Martland J. found that regardless of whether or not the loan was *ultra vires*, the plaintiffs could have no answer to an action for money had and received. The plaintiffs had a legal obligation to repay the funds they had received.

On the question of the security held by the Treasurer, he held that property in the security had passed to the Treasurer. Martland J. held that property had passed not only because there were no other creditors, but also because the security had been given as part of an arrangement by which the plaintiffs sought to

discharge their lawful obligation to make restitution of the money they had borrowed.

The question of the liability of a guarantor of an *ultra vires* loan did not arise in *Breckenridge*.

C. *Application of the Law to the Facts of This Case*

There are two questions to be answered here. First, is the respondent liable on the basis of the principles in *Breckenridge*? Second, even if *Breckenridge* does not apply, is the respondent nonetheless liable by the terms of the contract of guarantee?

I cannot accept the appellant's argument that the respondent is liable on the basis of *Breckenridge*. Rather, I accept the reasons on this point of the majority of the Court of Appeal below. In *Breckenridge*, the principal debtor was obliged to repay money had and received from the lender, even though the principal debt was a nullity. In this case, the respondent received no money from the lender, and consequently the respondent cannot be liable on the basis of money had and received.

With respect, I must disagree with the position of the Alberta Court of Appeal in *Meadow Rue*, *supra*, at p. 295, that the rule in *Breckenridge* is "a simple example of equity in action" that applies to the guarantor of a loan. The essence of an action for moneys had and received is that the defendant has actually received the money sued for; where the defendant has received no money the action does not lie.

See G. B. Klippert, *Unjust Enrichment* (1983), at pp. 5-7; Lord Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at pp. 3-5. I would add that an action for moneys had and received does not lie in equity: Klippert, *supra*, at pp. 13-19.

The appellant also argued that the respondent's guarantee was a security, and that property in the security should accordingly pass to the appellant, again following *Breckenridge*. This argument is without merit. Even accepting the dubious proposition that a guarantee is the equivalent of real property to which the lender has acquired title, the respondent's guarantee was not given to discharge a lawful obligation owed by the respondent to the appellant. The lawful obligation was owed to the appellant by Canadian Pickles, not by the respondent.

The question which remains is whether, on the correct interpretation of the contract, the respondent is liable to repay the loan made by the appellant to Canadian Pickles. The relevant part of the contract is clause "(b)":

> (b) That as between the Fund and the Guarantors, the Guarantors are and shall continue to be jointly and severally liable as principal debtors under all the covenants contained in the Security, notwithstanding the bankruptcy, insolvency or going into liquidation of the Borrower, voluntarily or otherwise, and notwithstanding any transaction which may take place between the Fund and Borrower or any neglect or default of the Fund which may otherwise operate as a discharge, whether partial or absolute, of the Guarantors if they were sureties only of the Borrower and, without restricting the generality of the foregoing, notwithstanding the releasing in whole or in part of the properties and assets mortgaged or charged in the Security, and notwithstanding the granting of time or other indulgences to the Borrower;

As a preliminary matter, there was, in my opinion, a valid contract between the respondent and the appellant. The validity of the contract was not

questioned by the respondent. On the face of the contract, there was the necessary consideration:

> ... in consideration of the advance to the Borrower by the Fund of the said sum of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00), or such portion thereof as may be advanced or re-advanced, (hereinafter called the "Principal Sum") and in consideration of the sum of ONE DOLLAR ($1.00) now paid by the Fund to each of the Guarantors, the receipt and sufficiency whereof is hereby acknowledged, the Guarantors do joint and severally COVENANT, PROMISE AND AGREE ...

It was the appellant's argument that the contract makes the respondent a principal debtor, regardless of the status of the obligation owed by Canadian Pickles to the appellant. In making this argument, the appellant relied principally on two phrases from clause "(b)". The phrases are "the Guarantors are and shall continue to be jointly and severally liable as principal debtors", and "which may otherwise operate as a discharge, whether partial or absolute, of the Guarantors if they were sureties only of the Borrower".

Taking the two phrases in turn, I find that the plain meaning of the first phrase read in the context of the entire clause is that the guarantors, including the respondent, will be liable as principal debtors only in the enumerated circumstances. I cannot see that the listed circumstances include the invalidity of the principal debt. A similar clause was at issue in *General Produce v. United Bank*, [1979] 2 Lloyd's Rep. 255 (Q.B. (Com. Ct.)). In that case, Lloyd J. concluded that the effect of a clause providing that the guarantor's liability would continue in spite of the release of the principal's debtor's liability by operation of law was that the creditor could treat the guarantor as a principal debtor only in the specified situation. Likewise, in

Heald v. O'Connor, [1971] 1 W.L.R. 497 (Q.B.D.), Fisher J. interpreted a clause making the guarantor "a primary obligor" in light of the entire agreement and concluded that it did not convert what was really a guarantee into an indemnity.

The second phrase which the appellant argued takes the appellant's case no further. The phrase only provides added support for the interpretation just articulated: the guarantors are liable as principal debtors only in the circumstances enumerated.

I would conclude that the correct interpretation of the contract is that the respondent is not liable to repay the money advanced in the event the principal debt is *ultra vires*. It was open to the appellant to insist upon a contract with the respondent that would have made the respondent liable in the circumstances of the case at bar. As the appellant did not do so, its claim must fail.

VII. Recent Amendments to *The Communities Economic Development Fund Act*

After the hearing of this appeal, it came to the attention of the Court that several amendments to the Act were recently passed which materially altered many of the provisions discussed above. One amendment, which appears in *The Statute Law Amendment Act, 1990-91*, S.M. 1990-91, c. 12, s. 3, amends the Act to add a new s. 26(6) which provides, *inter alia*, that no loan, guarantee or financial assistance granted by the Fund before the coming into force of the new subsection is invalid or unenforceable by reason only that the recipient economic enterprise is not located in a remote and isolated community. This amendment came into force on December

14, 1990, some six months before the appeal was argued on June 3, 1991. In addition, a series of amendments to the Act were made by *The Communities Economic Development Fund Amendment Act*, S.M. 1991-92, c. 38. This amending statute, *inter alia*, deletes the definition of "remote and isolated communities" in the Act, amends s. 9(7) referred to above, and significantly amends the newly added s. 26(6) and expressly makes this amendment retroactive to December 14, 1990. This latter group of amendments was introduced on May 27, 1991 and given Royal Assent on July 26, 1991.

On October 18, 1991, the Court, through the Registrar, formally asked for the views of the parties as to the effect of the legislative amendments on the issues in the appeal and why the amendments were not put before the Court during argument. In their respective replies, counsel for the parties agree, in essence, that the amendments do not affect the issues before the Court because the amendments do not specifically address pending litigation. Counsel pointed to s. 9 of *The Interpretation Act*, R.S.M. 1987, c. I80; see also *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, *Garnham v. Tessier* (1959), 27 W.W.R. 682 (Man. C.A.), and *Penner v. Hutlet* (1984), 33 Man. R. (2d) 168 (Q.B.); see also *Manufacturers Life Insurance Co. v. Hauser*, [1945] 3 W.W.R. 740 (Alta. S.C.), and *Minchau v. Busse*, [1940] 2 D.L.R. 282 (S.C.C.). Counsel also candidly admitted they were unaware of the legislative changes when the appeal was argued. Accordingly, as the parties agree that the recently made amendments do not affect the outcome of this appeal, they need not under the circumstances be considered further.

VIII. Disposition

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: McJannet Rich, Winnipeg.

Solicitor for the respondent: Sidney Green, Winnipeg.

Tab B

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4

SUPREME COURT OF CANADA

CITATION: ATCO Gas & Pipelines Ltd. *v.* Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

DATE: 20060209
DOCKET: 30247

BETWEEN:

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
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 87)	Bastarache J. (LeBel, Deschamps and Charron JJ. concurring)
DISSENTING REASONS: (paras. 88 to 149)	Binnie J. (McLachlin C.J. and Fish J. concurring)

ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

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

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and

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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 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 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, 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 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]

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]

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By Bastarache J.

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

By Binnie J. (dissenting)

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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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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. Schafler*, for the intervener Enbridge Gas Distribution Inc.

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

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

BASTARACHE J. —

1. Introduction

1 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.

2 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).

3 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 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).

4 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 prudency 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 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).

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?

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.

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.

1.1 *Overview of the Facts*

8 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*

9 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 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)*

10 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).

11 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 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]

12 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 ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.
>
> 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:

> 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]

16 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.

17 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)

18 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 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 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.

22 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).

23 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.

24 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.

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).

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.

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.

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.

28 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.

29 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).

30 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.

31 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.

32 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" (*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.

33 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.

34 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?*

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

40 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)).

41 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 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

> **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.

42 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).

43 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.

44 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" 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.

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.

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.

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

48 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

49 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.

50 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.

51 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.

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).

52 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.

53 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*

54 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.

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

56 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).

57 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

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)).

58 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.

59 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.

60 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 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. <u>This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.</u> [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 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).

64 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.

65 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 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: 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.

68 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).

69 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 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).

70 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, 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.

71 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*

72 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 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.

73 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.)

74 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 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.]

75 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).

76 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.

77 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 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.

78 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.

79 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 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.

80 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*

81 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?*

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

83 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.

84 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

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.

85 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 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 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.

89 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

90 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 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)

91 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 "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 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. 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.

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

94 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)

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

96 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.

97 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)

98 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.

99 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.

100 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 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.]

101 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*

102 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.

103 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). 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.)

106 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.]

107 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.]

108 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:

> . . . 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 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.

112 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"?*

113 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.

114 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 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)

115 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. <u>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.</u> In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 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:

> 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.]

117 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]

118 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]

119 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.* 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.

120 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 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.]

121 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 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]

122 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*

123 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.

124 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.

125 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.

126 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.

127 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.

128 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. <u>The Confiscation Issue</u>

129 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 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.)

130 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 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 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.]

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]

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]

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.

133 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.

134 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

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly 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 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).

138 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 ratebase. 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]

139 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

140 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.

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 ratemaking 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 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

145 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.)

146 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.

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.

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 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.

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,

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.

. . .

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 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 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

(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 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.

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 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

(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,

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.

Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Appendix C
BOOK OF AUTHORITIES

BOOK OF AUTHORITIES

INDEX

SUPREME COURT OF CANADA

CITATION: British Columbia (Workers' Compensation Board) *v.* Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422

DATE: 20111027
DOCKET: 33648

BETWEEN:

Workers' Compensation Board of British Columbia
Appellant
and
Guiseppe Figliola, Kimberley Sallis, Barry Dearden and British Columbia Human Rights Tribunal
Respondents
- and -
Attorney General of British Columbia, Coalition of BC Businesses, Canadian Human Rights Commission, Alberta Human Rights Commission and Vancouver Area Human Rights Coalition Society
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 55)	Abella J. (LeBel, Deschamps, Charron and Rothstein JJ. concurring)
REASONS CONCURRING IN RESULT: (paras. 56 to 99)	Cromwell J. (McLachlin C.J. and Binnie and Fish JJ. concurring)

British Columbia (Workers' Compensation Board) *v.* Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422

Workers' Compensation Board of British Columbia *Appellant*

v.

Guiseppe Figliola,
Kimberley Sallis, Barry Dearden and
British Columbia Human Rights Tribunal *Respondents*

and

Attorney General of British Columbia,
Coalition of BC Businesses,
Canadian Human Rights Commission,
Alberta Human Rights Commission and
Vancouver Area Human Rights Coalition Society *Interveners*

Indexed as: British Columbia (Workers' Compensation Board) *v.* Figliola

2011 SCC 52

File No.: 33648.

2011: March 16; 2011: October 27.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Judicial review — Standard of review — Patent unreasonableness — Injured workers receiving compensation pursuant to British Columbia's Workers' Compensation Board chronic pain policy — Workers filing appeal with Board's Review Division claiming policy breached s. 8 of British Columbia Human Rights Code — Board rejecting that policy breached Human Rights Code — Workers subsequently filing complaints with Human Rights Tribunal repeating same arguments — Human Rights Tribunal deciding that this was appropriate question for Tribunal to determine — What is the scope of Tribunal's discretion to determine whether the substance of a complaint has been "appropriately dealt with" when two bodies share jurisdiction over human rights — Whether exercise of discretion by Tribunal was patently unreasonable — Human Rights Code, R.S.B.C. 1996, c. 210, ss. 8, 27(1) — Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 59.

The complainant workers suffered from chronic pain and sought compensation from British Columbia's Workers' Compensation Board. Pursuant to the Board's chronic pain policy, they received a fixed compensation award. They appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and

discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* ("*Code*"). The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint and concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

The complainants appealed this decision to the Workers' Compensation Appeal Tribunal ("WCAT"). Before the appeal was heard, the legislation was amended removing WCAT's authority to apply the *Code*. Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division.

The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f) of the *Code*, the complaints had already been "appropriately dealt with" by the Review Division. The Tribunal rejected both arguments and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should receive the benefit of a full Tribunal hearing. On judicial review, the Tribunal's decision was set aside. The Court of Appeal, however, concluded that the Tribunal's decision was not patently unreasonable and restored its decision.

Held: The appeal should be allowed, the Tribunal's decision set aside and the complaints dismissed.

Per LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Section 27(1)(f) of the *Code* is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack and abuse of process — doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness.

Read as a whole, s. 27(1)(f) does not codify these actual doctrines or their technical explications, it embraces their underlying principles. As a result, the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Relying on these principles will lead the Tribunal to ask itself whether there was concurrent jurisdiction to decide the issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with" under s. 27(1)(f). The Tribunal's strict adherence to the

application of issue estoppel was an overly formalistic interpretation of s. 27(1)(f), particularly of the phrase “appropriately dealt with”, and had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation.

Section 27(1)(f) does not represent a statutory invitation either to judicially review another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies.

The discretion in s. 27(1)(f) was intended to be limited. This is based not only on the language of s. 27(1)(f) and the legislative history, but also on the character of the other six categories of complaints in s. 27(1), all of which refer to circumstances that make hearing the complaint presumptively unwarranted, such as complaints that are not within the Tribunal’s jurisdiction, allege acts or omissions that do not contravene the *Code*, have no reasonable prospect of success, would not be of any benefit to the complainant or further the purposes of the *Code*, or are made for improper motives or bad faith.

What the complainants in this case were trying to do is relitigate in a different forum. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented a "collateral appeal" to the Tribunal, the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent. The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision: it questioned whether the Review Division's process met the necessary procedural requirements; it criticized the Review Officer for the way he interpreted his human rights mandate; it held that the decision of the Review Officer was not final; it concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal; and it suggested that Review Officers lacked expertise in interpreting or applying the *Code*.

The standard of review designated under s. 59 of the *Administrative Tribunals Act* is patent unreasonableness. Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision is patently unreasonable.

Per McLachlin C.J. and Binnie, Fish and Cromwell JJ.: Both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). A narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision. Rather, s. 27(1)(f) confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law.

The grammatical and ordinary meaning of the words of s. 27(1)(f) support an expansive view of the discretion, not a narrow one. Nor can it be suggested that s. 27(1)(f) be read narrowly because of the character of the other six categories of discretion conferred by s. 27(1). The provision's legislative history also confirms that it was the Legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider.

The Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of

substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are not the only, or even the most important considerations. The need for this necessarily broader discretion in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainants found themselves in this case and underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

In this case, the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable. While the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented;

whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to be exactly the sort of approach called for by s. 27(1)(f). The Tribunal also failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

The appeal should be allowed and the application of the Workers' Compensation Board under s. 27(1)(f) should be remitted to the Tribunal for reconsideration.

Cases Cited

By Abella J.

Referred to: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223

B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

By Cromwell J.

Referred to: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL); *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97;

Workers' Compensation Appeal Tribunal (B.C.) v. Hill, 2011 BCCA 49, 299 B.C.A.C. 129; *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 44, 59.

Attorney General Statutes Amendment Act, 2007, S.B.C. 2007, c. 14, s. 3.

Canadian Charter of Rights and Freedoms, s. 15.

Civil Code of Québec, S.Q. 1991, c. 64, art. 2848.

Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42.

Human Rights Code, R.S.B.C. 1996, c. 210, ss. 8, 25(2) [rep. & sub. 2002, c. 62, s. 11], (3) [rep. *idem*], 27(1), (2) [rep. & sub. *idem*, s. 12].

Human Rights Code Amendment Act, 2002, S.B.C. 2002, c. 62.

Workers Compensation Act, R.S.B.C. 1996, c. 492, ss. 96.4(2), 99, 245 to 250, 251.

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APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Frankel and Tysoe JJ.A.), 2010 BCCA 77, 2 B.C.L.R. (5th) 274, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 481 W.A.C. 50, 3 Admin. L.R. (5th) 49, [2010] B.C.J. No. 259 (QL), 2010 CarswellBC 330, setting aside a decision of Stromberg-Stein J., 2009 BCSC 377, 93 B.C.L.R. (4th) 384, 96 Admin. L.R. (4th) 250, [2009] B.C.J. No. 554 (QL), 2009 CarswellBC 737. Appeal allowed.

Scott A. Nielsen and *Laurel Courtenay*, for the appellant.

Lindsay Waddell, *James Sayre* and *Kevin Love*, for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden.

Jessica M. Connell and *Katherine Hardie*, for the respondent the British Columbia Human Rights Tribunal.

Jonathan G. Penner, for the intervener the Attorney General of British Columbia.

Peter A. Gall, Q.C., and *Nitya Iyer*, for the intervener the Coalition of BC Businesses.

Sheila Osborne-Brown and *Philippe Dufresne*, for the intervener the Canadian Human Rights Commission.

Janice R. Ashcroft, for the intervener the Alberta Human Rights Commission.

Ryan D. W. Dalziel, for the intervener the Vancouver Area Human Rights Coalition Society.

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

[1] ABELLA J. — Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

[2] In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

Background

[3] Guiseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.

[4] Each of them sought compensation from the British Columbia's Workers' Compensation Board for, among other things, their chronic pain. The employers were notified in each case.

[5] The Board's chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

> Where a Board officer determines that a worker is entitled to [an] award for chronic pain . . . an award equal to 2.5% of total disability will be granted to the worker.

> (*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

[6] Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers' Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect "the extent to which a particular injury is likely to impair a worker's ability to earn in the future" (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).

[7] Each complainant appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[8] At the Review Division, the Review Officer, Nick Attewell, found that only the Workers' Compensation Appeal Tribunal ("WCAT") had the authority to scrutinize policies for patent unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), and s. 245.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.

[9] The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court's decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.

[10] In careful and thorough reasons, the Review Officer concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

[11] The complainants appealed Mr. Attewell's decision to the WCAT. Before the appeal was heard, the B.C. legislature amended the *Administrative Tribunals Act* and the *Workers Compensation Act*, removing the WCAT's authority to apply the *Code* (*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14). The effect of this amendment on a Review Officer's authority to address the *Code* is not before us and was not argued by any of the parties.

[12] Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the

same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division. They did not proceed with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.

[13] The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code*, the Tribunal had no jurisdiction, and that under s. 27(1)(f), the complaints had already been appropriately dealt with by the Review Division. Those provisions state:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
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> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
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> . . .
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[14] The Tribunal rejected both arguments (2008 BCHRT 374 (CanLII)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, and relying on this Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, the Tribunal concluded that "the substance of the Complaints was not

appropriately dealt with in the review process. . . . [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing" (para. 50).

[15] On judicial review, the Tribunal's decision was set aside by Justice Stromberg-Stein (2009 BCSC 377, 93 B.C.L.R. (4th) 384). She concluded that the same issues had already been "conclusively decided" by the Review Officer and that the Tribunal had failed to take into proper account the principles of *res judicata*, collateral attack, and abuse of process (paras. 40 and 54). She found that for the Tribunal to proceed would be a violation of the principles of consistency, finality and the integrity of the administration of justice. In her view, the complaints to the Tribunal were merely a veiled attempt to circumvent judicial review:

> The Tribunal would be ruling on the correctness of the Review Division decision. That is not the role of the Tribunal and to do so constitutes an abuse of process. [para. 56]

[16] As for which standard of review applied, her view was that the Tribunal's decision ought to be set aside whether the standard was correctness or patent unreasonableness.

[17] The Court of Appeal restored the Tribunal's decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274). It interpreted s. 27(1)(f) as reflecting the legislature's intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even

when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal's role in determining whether the previous proceeding had substantively addressed the human rights issues.

[18] On the question of the standard of review, the Court of Appeal concluded that the issue revolved around s. 27(1)(f). Since a decision under s. 27(1)(f) is discretionary, the appropriate standard according to the jurisprudence is patent unreasonableness: see *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; and *Matuszewski*. This was based on s. 59(3) of the *ATA*, which sets out the relevant standard, and on s. 59(4), which sets out a number of indicia:

> **59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
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> . . .
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> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

[19] The Court of Appeal concluded that the Tribunal's decision was not patently unreasonable.

[20] I agree with the conclusion that, based on the directions found in s. 59(3) of the *ATA*, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness. In my respectful view, however, I see the Tribunal's decision not to dismiss the complaints in these circumstances as reaching that threshold.

Analysis

[21] The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that, absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT's human rights jurisdiction, both the Workers' Compensation Board *and* the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants' human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious

question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.

[22] The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?

[23] In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-term disability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator's decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory. The Human Rights Tribunal refused to dismiss this fresh complaint.

[24] On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these

doctrines are “factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint” (para. 31).

[25] I agree with Pitfield J.’s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 448).

[26] As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.

[27] The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National*

Revenue, [1975] 2 S.C.R. 248, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant . . . is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

[28] The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.

[29] Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to

approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision":

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions . . . . [para. 35]

[30] In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 46).

[31] And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible

evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

[32] Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).

[33] Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

(See also *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 106, *per* Charron J.)

[34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

[36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

[37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their

privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

[38] What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

[39] I see the discretion in s. 27(1)(f), in fact, as being limited, based not only on the language of s. 27(1)(f), but also on the character of the other six categories of complaints in s. 27(1) in whose company it finds itself. Section 27(1) states:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> (i) benefit the person, group or class alleged to have been discriminated against, or
>
> (ii) further the purposes of this Code;
>
> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

[40] Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal's jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word "may" is

used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

[41] This is the context in which the words "appropriately dealt with" in s. 27(1)(f) should be understood. All of the other provisions with which s. 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s. 27(1)(f) idiosyncratically from the rest of s. 27(1). I concede that the word "appropriately" is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is to define it in its statutory context so that, to the extent reasonably possible, the legislature's intentions can be respected.

[42] Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commission to include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier

proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at pp. 100-101.

[43] The legislature removed these limiting factors in 2002 in the *Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62. By removing factors which argued *against* dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints. This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure "a system . . . which will be efficient and streamlined":

> In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings.
>
> . . .
>
> You have <u>the power to dismiss the complaints, as I indicated, and that has been expanded</u>. [Emphasis added.]
>
> (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

[44] This then brings us to the Tribunal's use of the *Danyluk* factors. Not only do I resist re-introducing by judicial fiat the types of factors that the legislature has expressly removed, it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel. Section 27(1)(f), on the other hand, is not limited to issue estoppel. As Pitfield J. explained in *Matuszewski*, s. 27(1)(f) does not call for the technical application of any of the common law doctrines — issue estoppel, collateral attack or abuse of process — it calls instead for an approach that applies their combined principles. Notably, neither Stromberg-Stein J. nor the Court of Appeal referred to the *Danyluk* factors in their respective analyses.

[45] Moreover, importing the *Danyluk* factors into s. 27(1)(f) would undermine what this Court mandated in *Tranchemontagne* when it directed that, absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation. That means that *Danyluk* factors such as the prior decision-maker's mandate and expertise, are presumed to be satisfied. Encouraging the Tribunal to nonetheless apply a comparative mandate and expertise approach would erode Bastarache J.'s conclusion that human rights tribunals are not the exclusive "guardian or the gatekeeper for human rights law" (*Tranchemontagne*, at para. 39).

[46] This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines

rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with". With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant's request for relitigation of the same s. 8 issue, the Tribunal was disregarding Arbour J.'s admonition in *Toronto (City)* that parties should not try to impeach findings by the "impermissible route of relitigation in a different forum" (para. 46).

[47] "Relitigation in a different forum" is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a "collateral appeal" to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:

> . . . this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

[48] The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis

represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision.

[49] To begin, it questioned whether the Review Division's process met the necessary procedural requirements. This is a classic judicial review question and not one within the mandate of a concurrent decision-maker. While the Tribunal may inquire into whether the parties had notice of the case to be met and were given an opportunity to respond, that does not mean that it can require that the prior process be a procedural mimic of the Tribunal's own, more elaborate one. But in any event, I agree with Stromberg-Stein J. that there were no complaints about the complainants' ability to know the case to be met or the Board's jurisdiction to hear it:

> Each of the complainants participated fully in the proceedings; each knew the case to be met and had the chance to meet it. Each of the complainants had the benefit of competent and experienced counsel who raised the human rights issues within the workers' compensation context. The issues were analyzed and addressed fully by the Review Division. It was implicit in their submissions to the Review Division that they accepted the Review Division had full authority to decide the human rights issue. [para. 52]

(See also *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.), at p. 705.)

As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional "judicial" procedural trappings should not be the Tribunal's concern.

[50] The Tribunal also criticized the Review Officer for the way he interpreted his human rights mandate:

> . . . the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*bona fide* justification] for the Policy. There was no analysis regarding where the onus lay in establishing a [*bona fide* justification] or what the applicable interpretive principles with respect to human rights legislation are. . . . Further, any discriminatory rule must not discriminate more than is necessary; hence, there must be consideration given to possible alternatives to the impugned rule which would be less discriminatory while still achieving the objective . . . . [para. 46]

These too are precisely the kinds of questions about the merits that are properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f).

[51] In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. "Final" means that all available means of review or appeal have been exhausted. Where a party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer's decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks "finality" they are entitled to start all over again before a different decision-maker dealing with the same subject matter (*Danyluk*, at para. 57).

[52] The Tribunal concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of issue estoppel. This too represents the strict application of issue estoppel rather than of the principles underlying all three common law doctrines. Moreover, it is worth noting, as Arbour J. observed in *Toronto (City)*, that the absence of "mutuality" does not preclude the application of abuse of process to avoid undue multiplicity (para. 37).

[53] Finally, the Tribunal suggested that Review Officers lacked expertise in interpreting or applying the *Code*. As previously mentioned, since both adjudicative bodies had concurrent jurisdiction at the time the complaint was heard and decided, this is irrelevant. Bastarache J., in *Tranchemontagne*, expressly rejected the argument that the quasi-constitutional status of human rights legislation required that there be an expert human rights body exercising a supervisory role over human rights jurisprudence. As he explained, human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering "a general culture of respect for human rights in the administrative system" (paras. 33 and 39; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650).

[54] Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true

mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties' time and resources by sending the matter back for an inevitable result.

[55] I would therefore allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In accordance with the Board's request, there will be no order for costs.

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

CROMWELL J. —

I. Introduction

[56] I agree with my colleague Abella J. that the decision of the Human Rights Tribunal was patently unreasonable (2008 BCHRT 374 (CanLII)). However, I do not, with respect, share Abella J.'s interpretation of the discretion conferred by s. 27(1)(f) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, nor do I agree with her decision not to remit the complaints to the Tribunal.

[57] I do not subscribe to my colleague's understanding of what lies at the heart of the common law finality doctrines or of the principles underlying s. 27(1)(f) of the *Human Rights Code*. Abella J. writes that what is at the heart of these finality doctrines is preventing abuse of the decision-making process and that the discretion conferred by s. 27(1)(f) is a limited one, concerned only with finality, avoiding unnecessary relitigation and pursuing the appropriate review mechanisms. I respectfully disagree.

[58] The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.

[59] I would allow the appeal and remit the Workers' Compensation Board's motion to dismiss the complaints under s. 27(1)(f) to the Tribunal for reconsideration in light of the principles I set out.

II. Analysis

A. *Common Law Finality Doctrines*

[60] The leading authorities from this Court on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. Both emphasized the importance of balance and discretion in applying these finality doctrines.

[61] In *Danyluk*, the question was whether Ms. Danyluk's court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice (para. 19). He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however, he added that in the administrative law context, "the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process" (para. 21).

Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion "is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers": para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case": *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is "an error of principle not to address the factors for and against the exercise of the discretion . . . . The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice" (paras. 66-67).

[62] To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure;

the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an opportunity to know the case and have a chance to meet it.

[63] Nothing would be served by my reviewing the *Danyluk* factors in detail. It is particularly noteworthy, however, that in that case, the Court refused to apply issue estoppel even though Ms. Danyluk, represented by counsel, had not pursued an administrative review of the employment standards officer's decision and that her claim of substantial injustice turned largely on the facts that she had received neither notice of the employer's allegation nor an opportunity to respond (para. 80). Also of importance was that the legislation did not view the employment standards proceedings as an exclusive forum for complaints of this nature (para. 69). To characterize *Danyluk* as simply emphasizing the importance of finality in litigation is an incomplete account of the Court's approach in that case.

[64] I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's

dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a "judicial balance between finality, fairness, efficiency and authority of judicial decisions" (para. 15). Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that "[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result" (para. 53). She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.

[65] I conclude that the Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.

[66] The need for this "necessarily broader" discretion (to use Binnie J.'s words at para. 62 of *Danyluk*) in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainant workers found themselves in this case. I will use the facts of Mr. Figliola's case as an example.

[67] As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers' Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the Board's Policy No. 39.01. He appealed the Board's decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.

[68] Subject to Board practices and procedures, the Review Officer may conduct a review as the officer considers appropriate: *Workers Compensation Act*, R.S.B.C. 1996, c. 492 ("Act"), s. 96.4(2). As I understand the record, the review in this case was a paper review on the basis of written submissions on behalf of Mr. Figliola. His employer did not participate and there was no oral hearing. Although the Review Officer was undoubtedly the only appropriate forum in which to review the application of the Board's policy to the facts of Mr. Figliola's case, the role of the Review Officer with respect to his other complaints is much less clear.

[69] With respect to Mr. Figliola's claims that the policy was patently unreasonable, the Review Officer found that he had no authority at all. He noted that he was bound by s. 99 of the Act to apply a Board policy that applied to the case. While the appeals tribunal to which appeals lie from the Review Division had authority to consider the validity of a policy (s. 251 of the Act), even it had no authority "to make binding determinations as to the validity of policy. Rather, it is required to refer to the Board of Directors its determinations and is bound by the decision of the Board of Directors as to whether the policy should be maintained or changed" (A.R., vol. I, at p. 6). The Review Officer reasoned that "[i]t would be odd if [the appeals tribunal] was required to go through such a process but the Review Division had even greater authority of considering and deciding whether a policy was valid" (*ibid.*). He therefore concluded that the Review Division had no general jurisdiction to find a policy of the Board invalid on the basis that it was patently unreasonable.

[70] As for Mr. Figliola's *Charter* claims, the Review Officer similarly found that he had no jurisdiction to consider them at all. As he put it,

> [a]mendments to the *Act* resulting from the *Administrative Tribunals Act* (the "*ATA*") took effect on December 3, 2004. Those amendments stated that [the appeals tribunal] has no jurisdiction over constitutional questions . . . . Although this change did not specifically refer to the Review Division, the Review Division considers that the change indicates a statutory intent that it does not have jurisdiction over constitutional questions, including *Charter* questions. [A.R., vol. I, at p. 7]

[71] Turning finally to Mr. Figliola's claims under the *Human Rights Code*, the Review Officer relied on *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, for his conclusion that he had authority to decline to apply the policy if it conflicted with the *Code*, given the provision in s. 4 of the *Code* that it prevails in the event of conflict with any other enactment. If I am reading the Review Officer's decision correctly, I understand him to reason that his statutory obligation to apply Board policies (s. 99 of the Act) conflicts with the *Code*'s prohibitions against discrimination. However, because the *Code* prevails in the event of conflict, the Review Officer can determine whether the policy is consistent with the *Code*. Assuming, without deciding, that this is the correct view and therefore that the Review Officer can assess the policy's compliance with the *Code*, there remains the question of what remedy the Review Officer can fashion if he or she concludes that the policy is not compliant. According to the Board's submissions, the process that was followed at the relevant time (although it was not formalized until later) was this: if the Review Officer found the *Code* challenge had merit, he or she would not apply the policy to the particular case. The policy itself would be referred to the Board "for inclusion in the Policy and Research Division's work plan as a high priority project" (A.F., at para. 59).

[72] As noted earlier, the Review Officer's decisions are appealable to the Workers' Compensation Appeal Tribunal ("WCAT"), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter,

including hearing evidence; it is not simply an appeal in the usual sense (ss. 245 to 250 of the Act). However, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), was amended effective October 18, 2007, removing the WCAT's jurisdiction to apply the *Code*: *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review of the merits of the Review Officer's decision on the human rights issue.

[73] The question of what this amendment did to the Review Officer's authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT's jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board's policy as being patently unreasonable and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT's *Code* jurisdiction not only took away a right of review on the merits, but also had the effect of taking away the Review Officer's authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects

of the Court's decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).

[74] I simply wish to note the rather complex, changing and at times uncertain process available in the workers' compensation system to address the human rights issue in this case. To my mind, this underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The decision that is relied on by the Board in this case as being a final determination is in fact an internal review decision given after a paper review in which the employer did not participate. Whether the Review Officer had authority to consider the question is at least debatable. (Of course, Mr. Figliola's position before the Review Officer was that he did have authority.) The remedy available in the proceedings was a decision not to apply the policy and refer it to the Board for study. At the time Mr. Figliola raised the point before the Review Officer, there was a right of appeal to the WCAT which included the opportunity to call evidence. In the midst of the proceedings, that right was removed and indeed the whole authority of the WCAT to even consider *Code* issues was removed. It surely cannot be said that there was any legislative intent that the Review Officer was to have exclusive jurisdiction over the human rights questions.

[75] It seems to me that whether a Review Officer's decision in these circumstances should bar any future consideration by the Human Rights Tribunal of the underlying human rights complaint cannot properly be addressed by simply looking at the three factors identified by my colleague, viz., whether the Review Officer had concurrent jurisdiction to decide a point that was essentially the same as the one before the Human Rights Tribunal and whether there had been an opportunity to know the case to meet and a chance to meet it. There is, as *Danyluk* shows, a great deal more to it than that. The kinds of complications we see in this case are not uncommon in administrative law, although this case may present an unusually cluttered jurisdictional and procedural landscape. The point, to my way of thinking, is that these are the types of factors that call for a highly flexible approach to applying the finality doctrines, a flexibility that in my view exists both at the common law and, as I will discuss next, under s. 27(1)(f) of the *Code*.

B. *Statutory Interpretation*

[76] My colleague is of the view that s. 27(1)(f) confers a "limited" discretion, the exercise of which is to be guided uniquely "by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues" (para. 36). Putting aside for the moment whether the discretion is "limited" or "broad", I have difficulty with my colleague's treatment of the relevant factors which she identifies.

[77] I repeat the three factors identified as those to be considered: whether the previous adjudicator had concurrent authority to decide the matter, whether the issue

decided was essentially the same, and whether the previous process provided an opportunity to the parties or their privies to know the case to be met and have a chance to meet it (Abella J.'s reasons, at para. 37). However, at para. 49 of my colleague's reasons, the question of whether the Review Division's process met the "necessary procedural requirements" is dismissed as "a classic judicial review question and not one within the mandate of a concurrent decision-maker". Thus if I understand correctly, the Tribunal is to consider whether the earlier process was fair but cannot consider at all whether the earlier process met the "necessary procedural requirements". I would have thought that the "necessary procedural requirements" would include the obligation to act fairly. But if that is so, I do not understand how procedural fairness can be at the same time a question beyond the concurrent decision-maker's mandate (para. 49) and a proper factor for the Tribunal to consider in exercising its discretion under s. 27(1)(f) (para. 37).

[78] It would also seem to me that whether the adjudicator had authority to decide the matter is generally the sort of issue that is raised on judicial review, but it figures here as a factor to be considered in exercising the Tribunal's discretion (para. 37). In my respectful view, relevant factors cannot simply be dismissed as "classic judicial review question[s]" and therefore "not one within the mandate of a concurrent decision-maker" (para. 49). This was not the approach in *Danyluk*. Rather, all relevant factors need to be considered and weighed in exercising the discretion.

[79] Be that as may be, it remains that my colleague's conception of s. 27(1)(f) is that it confers a more limited discretion to apply the finality doctrines than has been recognized at common law with respect to decisions of administrative decision-makers. With respect, and for the following reasons, I cannot accept this interpretation of the provision.

[80] We must interpret the words of the provision "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": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[81] I turn first to the grammatical and ordinary sense of the words. It is difficult for me to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere. To my way of thinking, the grammatical and ordinary meaning of the words support an expansive view of the discretion, not a narrow one. I agree with my colleague that this provision reflects the principles of the finality doctrines rather than codifies their technical tenets (para. 46). However, as I discussed earlier, the "principles" of those doctrines, especially as they have developed in administrative law, include a search for balance between finality and fairness and a large measure of discretion to allow that balance to be struck in the wide variety of

decision-making contexts in which they may have to be applied. The provision's focus on the "substance" of the complaint and the use of the broad words "appropriately dealt with" seem to me clear indications that the breadth of the common law discretion is expanded, not restricted.

[82] I turn next to look at the provision in the context of the rest of the section in which it is found. It is suggested that s. 27(1)(f) should be read narrowly because the character of the other six categories of discretion conferred by s. 27(1) relates to clear circumstances in which dismissal would be appropriate. The premise of this view is that all of the other parts of s. 27(1) clearly call for a narrow discretion. Respectfully, I do not accept this premise. It is the case, of course, that some of the other grounds of discretionary dismissal set out in s. 27(1) do indeed arise in circumstances in which it would be demonstrably undesirable to proceed with the complaint: Abella J.'s reasons, at paras. 39-41. For example, it is hard to see how the Tribunal has discretion, in any meaningful sense of the word, to refuse to dismiss a complaint not within its jurisdiction (s. 27(1)(a)), or which discloses no contravention of the *Code* (s. 27(1)(b)). However, not all of the categories set out in s. 27(1) are of this character: see, e.g., *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266, at paras. 38-42. In my view, the nature of the discretion in the various paragraphs of s. 27(1) is influenced by the content of each paragraph rather than the use of "may" in the section's opening words.

[83] Section 27(1)(d) confers discretion to dismiss where the proceeding would not benefit the person, group or class alleged to have been discriminated against or would not further the purposes of the *Code*. Exercising this discretion requires the Tribunal to consider fundamental questions about the role of human rights legislation and human rights adjudication. The discretion with respect to these matters is thus wide-ranging, grounded in policy and in the Tribunal's specialized human rights mandate (*Becker*, at para. 42). It does not share the character of some of the other more straightforward provisions in s. 27(1), but is similar in breadth to the discretion set out in s. 27(1)(f). In s. 27(1)(f), the breadth of the discretion is apparent from the very general language relating to the "substance" of the complaint and whether it has been dealt with "appropriately". I see nothing in the structure of or the context provided by s. 27(1) read as a whole that suggests a narrow interpretation of the discretion to dismiss where the "substance" of a complaint has been "appropriately" dealt with.

[84] A further element of the statutory context is the provision's legislative history. That history confirms that it was the legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other

proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly (Hansard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

> The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that that test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.
>
> . . .
>
> . . . [What the amendment] does is express the principle or the test pretty broadly and pretty generally. [Emphasis added.]
>
> (*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

[85] The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider. I would also add, with respect, that the comments of the Minister of Government Services at second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, cited by Abella J., at para. 43, have nothing to do with the scope of discretion under s. 27(1)(f) or its predecessor provisions.

[86] A further aspect of the legislative context is the legal framework in which the legislation is to operate. I have developed earlier my understanding of the common law approach to the discretionary application of finality doctrines in the administrative law context. Read against that background, my view is that the provision may most realistically be viewed as further loosening the strictures of the common law doctrines.

[87] It is also part of the pre-existing legal framework that under earlier legislation (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 27), the Commissioner of Investigation and Mediation had developed a policy about how to decide whether to proceed with a complaint that had been the subject of other proceedings. That policy called for consideration of factors such as these:

> (1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.
>
> (D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at p. 100, fn. 128)

[88] The use of the broad language employed in s. 27(1)(f), introduced into the pre-existing practice, does not support the view that the discretion was narrowly conceived; it supports the opposite inference.

[89] A final contextual element relates to the similarly worded power to defer a complaint pending its resolution in another forum under s. 25(2) of the *Code*. That provision reads as follows:

> **25.** . . .
>
> (2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

[90] The power to defer a complaint is not based on the finality doctrines because when deferral is being considered there has been no other final decision. Nonetheless, the legislature chose to use essentially the same language to confer discretion to defer as it did to confer the discretion to dismiss. The repetition of this language in s. 27(1)(f) suggests to me that a broad and flexible discretion was intended.

[91] Looking at the text, context and purpose of the provision, I conclude that the discretion conferred under s. 27(1)(f) was conceived of as a broad discretion.

C. *Exercising the Discretion*

[92] As I see it, s. 27(1)(f) broadens the common law approach to the finality doctrines in two main ways. By asking whether the substance of the complaint has been addressed elsewhere, the focus must be on the substance of the complaint — its "essential character" to borrow a phrase from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 52; and *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL), at para. 21. The focus is not on the technical requirements of the common law finality doctrines, such as identity of parties, mutuality, identity of claims and so forth. The section compels attention to the substance of the matter, not to technical details of pleading or form. If the Tribunal concludes that the substance of the complaint has not in fact been dealt with previously, then its inquiry under s. 27(1)(f) is completed and there is no basis to dismiss the complaint. Where the substance of the matter has been addressed previously, the important interests in finality and adherence to proper review mechanisms are in play. It then becomes necessary for the Tribunal to exercise its discretion, recognizing that those interests must be given significant weight.

[93] Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute

is silent on the factors that may properly be considered by the Tribunal in exercising its discretion to dismiss or not to dismiss. This exercise of discretion is "necessarily case specific and depends on the entirety of the circumstances": *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.

[94] The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review mechanisms for the earlier decision is also a relevant consideration. Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration (paras. 74 and 80). The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie

J. noted in *Danyluk,* the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is "based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*" may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk,* for example, the fact that the employee had undertaken the earlier administrative proceedings at a time of "personal vulnerability" was taken into account (para. 78).

[95] The most important consideration, however, is the last one noted by Binnie J. in *Danyluk*, at para. 80: whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

[96] The Tribunal's approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*, the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal's process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal

also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply "rubber stamp" the previous decision (para. 19). This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27(1)(f).

D. *Application*

[97] At the end of the day, I agree with Abella J.'s conclusion that the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the *ATA*. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it "is based entirely or predominantly on irrelevant factors" (s. 59(4)(c)), or "fails to take statutory requirements into account" (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my

view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

[98] However, I do not agree with my colleague's proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers' Compensation Board's application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *Workers' Compensation Appeal Tribunal (B.C.) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129, at para. 51, "the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body" (see also *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52). This case does not present exceptional circumstances justifying diverging from this general rule.

[99] I would therefore allow the appeal without costs and remit the Workers' Compensation Board's application under s. 27(1)(f) to the Tribunal for reconsideration.

Appeal allowed.

Solicitor for the appellant: Workers' Compensation Board, Richmond.

Solicitor for the respondents Guiseppe Figliola, Kimberley Sallis and Barry Dearden: Community Legal Assistance Society, Vancouver.

Solicitor for the respondent the British Columbia Human Rights Tribunal: British Columbia Human Rights Tribunal, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Coalition of BC Businesses: Heenan Blaikie, Vancouver.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Alberta Human Rights Commission: Alberta Human Rights Commission, Calgary.

Solicitors for the intervener the Vancouver Area Human Rights Coalition Society: Bull, Housser & Tupper, Vancouver.

Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Office of the Executive Council, and the Judicial Council

Appellants

v.

Judge Jocelyne Moreau-Bérubé *Respondent*

Indexed as: Moreau-Bérubé *v*. New Brunswick (Judicial Council)

Neutral citation: 2002 SCC 11.

File No.: 28206.

2001: June 19; 2002: February 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for new brunswick

Administrative law -- Judicial review -- Standard of review -- Natural justice -- Rules of procedural fairness -- Provincial Judicial Council recommending that Provincial Court judge be removed from office because of statements she made in court -- Applicable standard of review of Council's decision -- Whether Council violated rules of procedural fairness by imposing penalty more severe than that

recommended by inquiry panel -- Whether Council bound to follow findings of inquiry panel -- Whether Council's decision to recommend removal of judge justified -- Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 6.11(4).

Constitutional law -- Judicial independence -- Security of tenure of judges -- Provincial legislation empowering Lieutenant-Governor in Council to remove Provincial Court judge without first addressing Legislative Assembly -- Whether procedure set out in legislation to sanction misconduct of Provincial Court judges meets minimal standards required to ensure respect for principle of judicial independence -- Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 6.11(8).

The respondent, a judge of the New Brunswick Provincial Court, made derogatory comments about the residents of the Acadian Peninsula while presiding over a sentencing hearing. Three days later, while presiding in an unrelated hearing, she made an apology. The Judicial Council received several complaints alleging misconduct and an inability on the part of the respondent to continue to perform her duties as a Provincial Court judge. The majority of a three-member inquiry panel, appointed to conduct an inquiry and report findings, concluded that the respondent's comments did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended that she receive a reprimand. Under s. 6.11(4) of the *Provincial Court Act*, the Council was then required to make a decision "[b]ased on the findings contained in the [panel's] report". Despite the panel's findings the Council concluded that the respondent's remarks created a reasonable apprehension of bias and a loss of the public trust and recommended that she be removed from her office as judge. The respondent filed an application for judicial review of the Council's decision. The Court of Queen's Bench quashed the Council's decision on the grounds that the rules of natural justice had been breached and that the Council had

exceeded its jurisdiction by ignoring findings of fact made by the panel. The majority of the Court of Appeal upheld that decision.

Held: The appeal should be allowed and the decision of the New Brunswick Judicial Council should be restored.

This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review for a decision from an administrative tribunal. Here, a consideration of the relevant factors leads to the conclusion that a high degree of deference should be afforded to the Judicial Council's decisions.

A core principle of judicial independence is the liberty of the judge to hear and decide cases without fear of external reproach. Judicial councils as well as reviewing courts must remain acutely alive to the high level of protection that applies to comments made by judges in the conduct of court proceedings. However, while judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole and that the harm alleged is not curable by the appeal process. Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the *Provincial Court Act*. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, is eminently

qualified to render a collegial decision regarding the conduct of a judge. A single judge sitting in judicial review of a decision of the Council would not enjoy a legal or judicial advantage.

While the proper interpretation of s. 6.11(4) of the Act, as to whether it binds the Judicial Council to the findings of fact made by the inquiry panel, is a question of law normally attracting a "correctness" standard of review, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference where other factors of the pragmatic and functional analysis suggest such deference is the legislative intention. In this case, the Council was interpreting an operational provision within its own statute, which conferred upon it a special and unique decision-making role within the justice system. The Council must be regarded as having a reasonable degree of specialization and a high level of expertise. Reviewing courts should not intervene unless the interpretation adopted by the Council is not one that the provision can reasonably bear. Applying the proper standard of review to the interpretation given by the Council to the scope of its mandate based on its interpretation of s. 6.11(4), that standard being one of reasonableness *simpliciter*, the reviewing judge and the majority of the Court of Appeal should not have substituted their interpretation of that provision for the one adopted by the Council. In any event the interpretation given by the Council should be upheld even on a correctness standard. To suggest that the words "based on" in s. 6.11(4) have a binding effect creates a number of inconsistencies and incongruities within the Act. Moreover, any delegation of decision-making power from a tribunal to another body must be clearly and expressly authorized by statute. In this case, the Act clearly indicates that the Council is to make the decision with regard to the sanction, if any, that should be imposed. The words "based on" cannot be read to permit an abdication of that authority.

The Council's ultimate decision to recommend the respondent's removal from office, which is a question of mixed law and fact, was justifiable. The Council must serve its purpose with some degree of authority and finality, and its conclusions on questions of mixed law and fact should be afforded a high degree of deference and should not be interfered with unless they are patently unreasonable. It was within the Council's power to draw its own conclusions, and, in light of the sweeping and generalized nature of the respondent's derogatory comments, the conclusion reached by the Council was not patently unreasonable. Even on a standard of reasonableness *simpliciter*, there is no basis to interfere with the Council's decision.

Evaluating whether procedural fairness has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority. The Council did not violate the respondent's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. Acknowledging that the nature of these disciplinary proceedings imposes on the Council a stringent duty to act fairly, there was no breach of the rules of natural justice in this case.

The procedure set forth by the Act to sanction misconduct of a Provincial Court judge does meet the minimal standards required to ensure respect for the principle of judicial independence.

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Followed: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; **referred to:** *Michaud v. Institut des comptables agréés (N.-B.)* (1994), 149 N.B.R. (2d) 328; *College of Physicians and Surgeons (Ont.) v. Petrie* (1989), 32 O.A.C. 248; *Jackson v. Saint John Regional Hospital* (1993), 136 N.B.R. (2d) 64; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595; *R. v. Ewanchuk* (1998), 13 C.R. (5th) 324; *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)* (1999), 71 Alta. L.R. (3d) 214, 1999 ABQB 309, aff'd (2000), 192 D.L.R. (4th) 540, 2000 ABCA 241; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

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APPEAL from a judgment of the New Brunswick Court of Appeal (2000), 233 N.B.R. (2d) 205, 194 D.L.R. (4th) 664, [2000] N.B.J. No. 368 (QL), 2000 NBCA 12, affirming a decision of the Court of Queen's Bench (1999), 218 N.B.R. (2d) 256, [1999] N.B.J. No. 320 (QL). Appeal allowed.

Cedric L. Haines, for the appellant Her Majesty the Queen in Right of New Brunswick.

J. C. Marc Richard and *Chantal A. Thibodeau*, for the appellant the Judicial Council.

Anne E. Bertrand, *Paul Bertrand* and *Michael Phelan*, for the respondent.

The judgment of the Court was delivered by

ARBOUR J. --

I. Introduction

1 This appeal involves a decision of the Judicial Council of New Brunswick ("the Council") which recommended the removal from office of a Provincial Court judge because of statements she made in court, while presiding over a sentencing hearing. The Council concluded that her remarks created a reasonable apprehension of bias and a loss of the public trust. This Court must first establish the applicable standard of review of the Council's decision. We must then decide whether the Council violated certain rules of procedural fairness by imposing a penalty more severe than that recommended by an inquiry panel, whether and to what extent the Council was statutorily bound to follow findings of an inquiry panel, and whether the Council's final decision to recommend the removal of the judge was justified in light of the evidence at its disposal. For reasons that are set out in full below, I have concluded that the Council was entitled to decide as it did and that its decision should be restored.

II. Relevant Statutory Provisions

2 *Provincial Court Act*, R.S.N.B. 1973, c. P-21

6 Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

6.1(1) There is hereby continued a Judicial Council which shall be composed of

(*a*) the Chief Justice of New Brunswick, who shall be chairman,

(*b*) a judge of The Court of Appeal of New Brunswick, who shall be appointed by the Chief Justice of New Brunswick and who shall be the vice-chairman,

(*c*) three judges of The Court of Queen's Bench of New Brunswick who shall be appointed by the Chief Justice of that Court, of whom the Chief Justice of The Court of Queen's Bench of New Brunswick may be one of the appointees,

(*d*) two judges other than the chief judge or associate chief judge, who shall be appointed by the chief judge, and

(*e*) three other persons who shall be appointed by the Lieutenant-Governor in Council.

. . .

6.6(1) The Judicial Council shall receive and the chairman shall refer to the chief judge for investigation all written communications suggesting any misconduct, neglect of duty or inability to perform duties on the part of a judge.

. . .

6.6(3) Where a written communication comes to the attention of the chief judge, whether by way of referral from the chairman or otherwise, suggesting any misconduct, neglect of duty or inability to perform duties on the part of a judge, the chief judge shall investigate the matter.

6.7(1) The chairman shall designate one or more members of the Judicial Council for the purpose of receiving reports referred to in this section.

6.7(2) Where a written communication is received by the chief judge or associate chief judge, whether by way of referral from the chairman or otherwise, the chief judge or associate chief judge, as the case may be, shall within fifteen days after receiving the written communication, or within such longer period as the chairman permits, report on the results of the investigation to a member of the Judicial Council who has been designated by the chairman for that purpose.

6.7(3) Based upon the report, the member of the Judicial Council who receives the report shall, within ten days after receiving the report, recommend to the chairman whether or not an inquiry should be held.

6.7(4) A recommendation that an inquiry not be held is subject to review by the Judicial Council which may determine that an inquiry should be held.

6.7(5) A recommendation that an inquiry be held is not subject to review by the Judicial Council.

6.8(1) At any time after the receipt of a written communication suggesting misconduct, neglect of duty or inability to perform duties on the part of a judge, the Judicial Council may suspend the judge whose conduct is in question from the performance of the judge's duties with pay, pending the outcome of an investigation, inquiry or formal hearing, and may lift the suspension prior to the conclusion of an investigation, inquiry or formal hearing, where a change in circumstances warrants the lifting of the suspension.

. . .

6.9(1) Where an inquiry is recommended under subsection 6.7(3) or where the Judicial Council determines on review under subsection 6.7(4) that an inquiry should be held, the chairman shall

(*a*) appoint a panel consisting of three members of the Judicial Council. . . .

(*b*) appoint a barrister to act as counsel to the panel, and

(*c*) designate one of the members of the panel, other than a judge of the court, as the panel chairman.

. . .

6.9(7) The counsel to the panel shall inquire into the suggestions of misconduct, neglect of duty or inability to perform duties on the part of a judge received in a written communication referred to in section 6.6 for the purpose of gathering all information that may be relevant to preparing a formal complaint.

6.9(8) The counsel to the panel shall present the findings to the panel who shall then determine whether there is sufficient evidence to warrant holding a formal hearing.

. . .

6.9(10) Where the panel determines that there is sufficient evidence to warrant holding a formal hearing, the panel shall advise the Judicial Council that a formal hearing is to be conducted and shall instruct the counsel to the panel to prepare a formal complaint setting forth the

allegations of misconduct, neglect of duty or inability to perform duties against the judge whose conduct is in question.

. . .

6.10(1) Where the panel has made a determination under subsection 6.9(10), it shall conduct a formal hearing respecting the allegations set forth in the formal complaint referred to in subsection 6.9(10) and it has all the powers of a commissioner under the *Inquiries Act*.

. . .

6.10(3) Notice of the formal hearing together with a copy of the formal complaint referred to in subsection 6.9(10) shall be served on the judge whose conduct is in question in accordance with the regulations.

. . .

6.11(1) After the formal hearing, the panel shall report to the chairman its findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question.

6.11(2) The chairman shall place the report of the panel before the Judicial Council for a decision.

6.11(3) The Judicial Council shall give a copy of the report of the findings of the panel to the judge whose conduct is in question and shall advise the judge of the judge's right to make representations to it either in person or through counsel and either orally or in writing, respecting the report prior to the taking of action by the Judicial Council under subsection (4).

6.11(4) Based on the findings contained in the report and the representations, if any, made under subsection (3), the Judicial Council may

(*a*) dismiss the complaint,

(*b*) direct the chief judge to issue a reprimand to the judge with such conditions as the Judicial Council considers appropriate,

(*c*) where the conduct of the chief judge is in question, reprimand the chief judge with such conditions as the Judicial Council considers appropriate, or

(*d*) recommend to the Lieutenant-Governor in Council that the judge be removed from office.

. . .

6.11(8) The Lieutenant-Governor in Council shall, on receipt of the Judicial Council's recommendation under paragraph (4)(d), remove the judge from office.

III. Facts

3 The respondent, a judge of the New Brunswick Provincial Court, was presiding over a sentencing hearing in *R. v. LeBreton*, [1998] N.B.J. No. 120 (QL). The two accused had been found guilty of several charges, including breaking and entering and theft, and both had extensive criminal records. When passing sentence on February 16, 1998, the respondent said this:

> [TRANSLATION] These are people who live on welfare and we're the ones who support them; they are on drugs and they are drunk day in and day out. They steal from us left, right and centre and any which way, they find others as crooked as they are to buy the stolen property. It's a pitiful sight. If a survey were taken in the Acadian Peninsula, of the honest people as against the dishonest people, I have the impression that the dishonest people would win. We have now got to the point where we can no longer trust our neighbour next door or across the street. In the area where I live, I wonder whether I'm not myself surrounded by crooks. And, that is how people live in the Peninsula, but we point the finger at outsiders. Ah, we don't like to be singled out in the Peninsula. And it makes me sad to say this because I live in the Peninsula now. It's my home. But look at the honest people in the Peninsula, they are very few and far between, and they are becoming fewer and fewer. And do you think these people care that it cost hundreds and thousands of dollars to repair that? They don't give a damn. Are they going to pay for it? No, not a dime. All the money is spent on coke. These people, they don't give a damn. It doesn't bother them one bit, they just -- do you think you are going to arouse their sorrow and sympathy by saying that it costs hundreds and thousands of dollars. We, it bothers us because we are the ones who pay, because we have to wake up every morning and go to work. When we receive our paycheck, three quarters are taken away to support these people. They, don't care. They have nothing to do. They party all day and party all night and that's all they do. They don't care, not one bit. We on the other hand, we have to care because it is our property. These people, if they don't have enough they go to welfare and they get even more and that is how it works. So, I do not want to interrupt you, but I understand what you mean when you say that it cost thousands of dollars and counsel here understand, but the type of people we are dealing with here today in this courtroom, they couldn't care less. Whether it cost one thousand dollars to repair it or whether it cost only two cents, whether it requires six police officers to investigate, they find it funny. Their mentality is that "The pigs will not be at Tim's while they are chasing after us."
>
> (As reproduced in the New Brunswick Court of Appeal judgment, *Conseil de la magistrature (N.B.) v. Moreau-Bérubé* (2000), 233 N.B.R. (2d) 205, 2000 NBCA 12, at para. 5, hereinafter *Moreau-Bérubé* (N.B.C.A.).)

4 Three days later, while presiding in an unrelated hearing, Judge Moreau-Bérubé made this apology:

> [TRANSLATION] On Monday of this week, at the sentencing hearing of two gentlemen, I made certain remarks concerning honesty and dishonesty. I should point out that at the time, unlike this morning, I was speaking without prepared notes.
>
> After court on Monday, in rethinking about my remarks, I quickly realized that I had made a serious mistake and that the words I had spoken in open court were not those that I intended to speak and that I had in mind. In other words, my words went beyond my thinking and I misspoke myself. I certainly had no intention of impugning the honesty of my fellow citizens of the Acadian Peninsula. As a matter of fact, in a case preceding that of those two gentlemen, I had spoken of the kindness and generosity of people in this area who had given large sums of money to somebody who defrauded them. By my comments, I wanted to refer only to those directly or indirectly involved in these types of offences.
>
> Fully realizing my mistake, at the Tuesday sentencing hearing, I tried to correct my mistake, but it is obvious to me that I did not make myself quite clear or precise and that some of my statements of Tuesday were not understood.
>
> So, this morning, I very candidly, clearly and specifically offer my most sincere and profound apology to the people of the Acadian Peninsula and, in particular, to those I have offended. It was never my intention, because I am particularly concerned about the welfare of the people of this area.
>
> I have never doubted and I have no doubt about the honesty and integrity of the people of the Acadian Peninsula. I made a huge mistake, I am human. I am profoundly sorry and I apologize sincerely. Thank you.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 6.)

5 The Judicial Council, a body created under the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, received several complaints about Judge Moreau-Bérubé's comments of February 16, 1998. These complaints alleged misconduct and that Judge Moreau-Bérubé was unable, in light of her comments, to continue to perform her duties as a Provincial Court judge. The complaints were investigated by the Chief Judge and reported to a designated member of the Council, pursuant to ss. 6.6(3) and

6.7(2) respectively. Guided by ss. 6.7(3), 6.9(1), 6.9(7) and 6.9(8) of the Act, the designated Council member recommended that an inquiry be held; a three-member inquiry panel was appointed, chaired by Mr. Justice Riordon, a judge of the New Brunswick Court of Queen's Bench, and also composed of Judge Pérusse of the Provincial Court and Ms. Susan Calhoun, and the panel determined that there was sufficient evidence to warrant a formal hearing. A formal complaint was drafted by the inquiry panel, pursuant to s. 6.9(10) of the Act, as follows:

> [TRANSLATION] 1. THAT Her Honour Judge Jocelyne J. Moreau-Bérubé committed a misconduct on or about February 16, 1998, at Tracadie-Sheila, in the province of New Brunswick, as a result of remarks she made about the honesty of residents of the Acadian Peninsula at a sitting of the Provincial Court in the Acadian Peninsula.
>
> 2. THAT as a result of the remarks she made about the honesty of the residents of the Acadian Peninsula, Her Honour Judge Jocelyne J. Moreau-Bérubé is no longer able to perform her duties as a judge.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 12.)

6 As dictated by s. 6.11(1) of the Act, the panel was then required to conduct an inquiry and report its findings "of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question". To this end, the panel was required under s. 6.10(1) to hear and accept any relevant evidence, even if not admissible under normal trial rules within the province of New Brunswick (as per s. 8 of the *Inquiries Act*, R.S.N.B. 1973, c. I-11). The panel heard 17 witnesses, and 25 documents were filed.

7 The majority of the panel (Riordon J. and Ms. Susan Calhoun) made the following relevant findings of fact:

> [TRANSLATION] I must therefore conclude that the comments made by Judge Moreau-Bérubé during a trial in Tracadie-Sheila on February 16, 1998 constitute inappropriate judicial expression. The remarks were incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge makes them even more inappropriate and aggressive. My conclusion is therefore that the remarks made by Judge Moreau-Bérubé constitute and amount to misconduct on her part. By uttering those remarks, Judge Moreau-Bérubé exceeded what is considered appropriate judicial conduct and made comments denigrating the honesty of the residents of the Acadian Peninsula while she was presiding a trial.
>
> . . .
>
> In determining whether Judge Moreau-Bérubé was biassed in behaving the way she did, which would lead to a lack of public confidence in her, we have to consider whether she has established beliefs which may be an obstacle in deciding cases impartially and with an open mind. We have to determine if the inappropriate remarks made in this case amount to judicial misconduct warranting her removal from office.
>
> In applying the test, taking into account all the evidence and interpretations concerning this complaint, it is my finding that the conduct of Judge Jocelyne J. Moreau-Bérubé does not warrant her removal from office.
>
> . . .
>
> I find that bias or the appearance of bias has not been established nor have the consequences leading to a loss of public confidence.
>
> Upon considering all of the evidence adduced, I am not ready to find that Judge Moreau-Bérubé has an established belief or conviction that residents of the Acadian Peninsula are dishonest nor that her neighbours are not trustworthy nor even that there are few honest people in the Acadian Peninsula.
>
> It has not been established upon my perusal of all this evidence that Judge Moreau-Bérubé holds a strong belief detrimental or potentially detrimental to her impartiality in deciding various cases.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 22 (emphasis deleted).)

8 The majority of the panel concluded that the comments uttered by Judge Moreau-Bérubé did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended that Judge Moreau-Bérubé should receive a reprimand. The minority (Judge Pérusse) found that the comments, in the

circumstances of the case, did not constitute misconduct. The panel was unanimous that Judge Moreau-Bérubé was able to continue exercising her judicial duties.

9 Pursuant to ss. 6.11(2) and 6.11(3) of the Act, the report of the inquiry panel was presented to the Council for a decision, and a copy was sent to Judge Moreau-Bérubé so that she could make informed representations before the Council. The Council received her submissions pursuant to s. 6.11(3) of the Act, and her counsel argued that the formal complaint should be dismissed.

10 Despite findings by the panel that Judge Moreau-Bérubé did not have a pre-established belief or conviction that residents of the Acadian Peninsula are dishonest or untrustworthy, the Council characterized the issue before it as follows:

> [TRANSLATION] . . . given the finding of misconduct by the panel, the real issue before the Council is whether there is a reasonable apprehension that Judge Moreau-Bérubé would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the pre-conceived opinions and ideas that she expressed when making a determination based on the evidence in a given case.
>
> (As reproduced in *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé* (1999), 218 N.B.R. (2d) 256, at para. 39 (emphasis deleted), hereinafter *Moreau-Bérubé* (N.B.Q.B.).)

11 Section 6.11(4) dictates that, "[b]ased on the findings contained in the report and the representations, if any, made under subsection (3), the Judicial Council may

> (*a*) dismiss the complaint,
>
> (*b*) direct the chief judge to issue a reprimand to the judge with such conditions as the Judicial Council considers appropriate,
>
> (*c*) where the conduct of the chief judge is in question, reprimand the chief judge with such conditions as the Judicial Council considers appropriate, or

> (*d*) recommend to the Lieutenant-Governor in Council that the judge be removed from office."

12 The Council recommended that Judge Moreau-Bérubé be removed from her office as judge. In doing so, the Council followed the criterion established with regard to apprehension of bias in the Marshall Report (*Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990)) and asked [TRANSLATION] "[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?" (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 22.) Based on these criteria, and on a series of factors that, in its view, a reasonable observer would consider in rendering an informed judgment about an apprehension of bias, the Council came to the following conclusion:

> [TRANSLATION] Taking into account all the circumstances surrounding this matter and applying the foregoing tests and the principles of judicial impartiality and independence established by the Supreme Court of Canada in the cases referred to, we believe that in the event that Judge Moreau-Bérubé were to preside over a trial, a reasonable and well-informed person would conclude that the misconduct of the judge has undermined public confidence in her and would have a reasonable apprehension that she would not perform her duties with the impartiality that the public is entitled to expect from a judge.
>
> Accordingly, we recommend that she be removed from office.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 90.)

13 After becoming aware of the Council's decision, the respondent wrote the provincial Cabinet, asking for a stay of her removal while she applied for judicial

review. Nevertheless, the Cabinet removed the judge pursuant to s. 6.11(8), which states:

> The Lieutenant-Governor in Council shall, on receipt of the Judicial Council's recommendation under paragraph (4)(d), remove the judge from office.

14 The respondent filed an application for judicial review of the Council's decision before the New Brunswick Court of Queen's Bench, and the Council's recommendation was quashed. The majority of the New Brunswick Court of Appeal dismissed the appeal (Rice and Ryan JJ.A.), Drapeau J.A. dissenting.

IV. The Courts Below

A. *New Brunswick Court of Queen's Bench* (1999), 218 N.B.R. (2d) 256

15 The application for judicial review of the Council's decision came before Angers J. of the New Brunswick Court of Queen's Bench. The Judicial Council's decision was quashed on two main grounds. First, Angers J. found that the rules of natural justice, in particular the principle of *audi alteram partem*, had been breached since the respondent had never been advised that a penalty more severe than the one recommended by the panel could be imposed by the Council. Angers J. suggested that it was a fundamental principle that a tribunal imposing a more substantial penalty than the one which had been recommended on a joint submission, or, as in this case, by a panel committee, should indicate that it is considering such a penalty and request submissions thereon (*Michaud v. Institut des comptables agréés (N.-B.)* (1994), 149 N.B.R. (2d) 328 (C.A.); *College of Physicians and Surgeons (Ont.) v. Petrie* (1989), 32 O.A.C. 248 (Div. Ct.); *Jackson v. Saint John Regional Hospital* (1993), 136 N.B.R.

(2d) 64 (C.A.); S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at pp. 212-13).

16 Angers J. found that Judge Moreau-Bérubé had no reason to suspect that dismissal was being considered as a possible sanction. Dismissal had not been suggested during the hearing, and she had never been expressly informed that it was being considered. Moreover, while the Council had the discretion to suspend Judge Moreau-Bérubé pending its decision, she had been allowed to continue hearing cases for some 14 months after the impugned remarks were made (although, as I note later, she had been reassigned to a different district). Angers J. concluded it was a breach of natural justice not to have requested her to make submissions with the understanding that a dismissal was being considered. As he stated at para. 27:

> [TRANSLATION] . . . the defence or acceptance of a reprimand is one thing, removal from office is an entirely different matter. It is inconceivable to me that a judge would be removed from office without having been able to defend against such action since he or she did not receive any indication of such threat, except as a mere possibility under the Act.

17 As the second ground for quashing the decision of the Council, Angers J. found that the Council had exceeded its jurisdiction by ignoring findings of fact made by the panel, which included the finding that Judge Moreau-Bérubé was able to continue performing her judicial duties. Based on s. 6 of the Act, Angers J. found that the Council has the power to remove a judge simply for misconduct, and does not have to base a dismissal on a finding by the panel that the judge is unable to perform her duties as a judge. However, given that the Council had identified as a basis for her dismissal that Judge Moreau-Bérubé [TRANSLATION] "would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the pre-conceived opinions and ideas that she expressed when making

a determination based on the evidence in a given case" (see *Moreau-Bérubé* (N.B.Q.B.), *supra*, at para. 39 (emphasis deleted)), Angers J. concluded the Council had overruled certain findings of fact made by the panel. In this respect, Angers J. stated, at para. 41-42:

> [TRANSLATION] Now, the panel had expressly concluded that the judge did not have preconceived notions, that she did not really believe what she had said, that she did not have any "firm belief or conviction" in the remarks she had made. The remarks were spontaneous and off the cuff, in the context of passing sentence at the end of a particularly busy day.
>
> In my opinion, under the Act, the Council was bound by the panel's findings of fact and therefore it exceeded its jurisdiction in finding that the judge had expressed "pre-conceived opinions or beliefs".

18 Although he concluded that proper notice had not been given to the Attorney General, as required, Angers J. briefly discussed the constitutionality of the *Provincial Court Act* provisions which grant the power to remove a judge from office. He held the matter had been settled in *Valente v. The Queen*, [1985] 2 S.C.R. 673, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, where this Court recognized that removal of a provincial court judge from office did not have to be done by a legislative or executive body, and that a system such as the one in New Brunswick where the Lieutenant-Governor in Council is bound by a decision of the Judicial Council does not violate security of tenure of provincial court judges.

B. *New Brunswick Court of Appeal* (2000), 233 N.B.R. (2d) 205, 2000 NBCA 12

(1) Majority Judgment (Rice and Ryan JJ.A.)

19 The decision of Angers J. was appealed to the New Brunswick Court of Appeal on a number of grounds, including the following two:

1. The judge committed an error in law in finding that the Council had exceeded its jurisdiction and violated the rules of natural justice by not respecting the *audi alteram partem* rule.

2. The judge committed an error in law by concluding the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel.

20 On the first issue, the majority of the Court of Appeal concluded at para. 34:

> [TRANSLATION] . . . the reviewing judge was right in concluding that the Council had not observed this principle of natural justice. In my opinion, given the circumstances of this matter, the Council had to advise Judge Moreau-Bérubé that the penalty recommended by the panel could be disregarded by the Council and that she was liable to a more substantial penalty such as removal from office.

21 With regard to the second ground for appeal, the majority agreed with Angers J. that the Council committed a jurisdictional error by ignoring certain findings of fact made by the inquiry panel. While the Council may not be bound by recommendations made by the panel with regard to an appropriate sanction, the majority of the Court of Appeal concluded that findings of fact by the inquiry panel should have been afforded a high degree of deference. Rice J.A. reproduced at para. 37 the following from the Council's decision:

> [TRANSLATION] With all due respect for the opinion of the members of the majority, we are of the view that the panel is not empowered nor

> authorized to make such recommendations and that it therefore exceeded its powers. As a result, we feel it is necessary to state that the Council is not bound by the Panel's decision to make recommendations nor by the recommendations themselves. On the other hand, the Council adheres to the highest standard of deference as to the factual findings contained in the inquiry report submitted to it.

22 However, according to the majority, the Council did much more than simply disagree with recommendations made by the panel as to the sanction. Rather, the Council largely ignored certain findings of fact, replacing those with conclusions of their own. Rice J.A. referred to two key passages on that point at para. 40:

> [TRANSLATION] In light of the foregoing tests and given the finding of misconduct by the Panel, the real issue before the Council is whether there is a reasonable apprehension that Judge Moreau-Bérubé would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the preconceived opinions and ideas that she expressed when making a determination based on the evidence in a given case.
>
> . . .
>
> . . . Finally, we believe such a reasonable person would have to take into account the extreme seriousness and vehemence of the statements made by the judge, the fact that they attacked an entire community and went to the very core of the sense of integrity and honour of its every member, that the statements were made spontaneously and extemporaneously, but that given the length and the vehemence of her remarks, that they could not have been completely without thought. [Emphasis by Rice J.A.]

23 Since the inquiry panel had found that the judge had no preconceived or fixed idea with respect to the people of the Acadian Peninsula, Rice J.A. noted at para. 41 that:

> [TRANSLATION] It obviously flows from the foregoing that not only did the Council fail to recognize the jurisdiction of the panel to determine if the respondent was fit to perform her duties as a judge, but it even altered its findings with respect to the heedlessness of the remarks and the preconceived and fixed ideas of the judge as I have highlighted by underlining the relevant lines.

24 In light of this apparent "override" by the Council of the findings of fact made by the inquiry panel, the majority of the Court of Appeal concluded that the judgment of Angers J. quashing the dismissal was within his discretionary power. The majority held that the Council should have deferred to the panel in the same way that an appellate court must show deference in examining the findings of fact of a trial judge. In this case, Rice J.A. concluded the findings of fact by the inquiry panel were [TRANSLATION] "amply supported by the evidence" and [TRANSLATION] "[g]iven that evidence, they are consistent and irrefutable" (para. 45).

25 The majority of the Court of Appeal found no merit in the constitutional challenge and upheld the decision of Angers J.

(2) Dissenting Judgment

26 Drapeau J.A. concluded, as the majority did, that the constitutional challenge should be dismissed, but disagreed on the other two issues.

27 On the question of whether the Council exceeded its jurisdiction by ignoring certain findings of fact made by the inquiry panel, Drapeau J.A. decided that the heart of the issue was in the meaning to be given the words "based on" in s. 6.11(4), and whether it placed some obligation on the Judicial Council, or merely provided a foundation to assist the Council in its decision-making process.

28 Drapeau J.A. found no similarity between the expression "based on" and the expression "bound by", and suggested that the former would more appropriately be compared to "taking into account". According to the dissenting judge, equating the

words "based on" with "bound by" creates a number of inconsistencies within the Act, including:

> (i) Subsection 6.11(2) of the Act clearly provides that the panel report is to be rendered to the Council "for a decision", and the Act does not indicate anywhere that any other group or individual, including the inquiry panel, should have jurisdiction in this regard. If the Council was "bound" by findings of the panel with regard to the ability of Moreau-Bérubé J. to continue her duties as a judge, that decision would have effectively been made by the panel and not the Council.
>
> (ii) Subsection 6.11(3) grants the subject of the inquiry the right to make representations "respecting the report", which would be an empty and illusionary right if the findings of the panel were in any way entrenched and binding on the Council.
>
> (iii) Under s. 6.11(4), the Council is to make a decision "based on" not only the panel's report, but also representations made by the judge pursuant to s. 6.11(3). Thus, if the words "based on" are to be read as equivalent to "bound by", the Council would be obligated to render a sanction based on whatever the judge's submissions "respecting the report" happened to be.
>
> (My summary of Drapeau J.A., at paras. 135-141.)

29 According to Drapeau J.A., a more pragmatic approach to interpreting the words "based on" in s. 6.11(4) compels the Council [TRANSLATION] "to accept neither

the findings of the panel nor the representations of the judge whose conduct is in question, while acknowledging that the Council has the jurisdiction to attach such importance to either of these influences as it deems appropriate given the particular circumstances of each individual case" (para. 142). Drapeau J.A. found that Angers J. erred in principle in ruling that the Council had exceeded its jurisdiction in this regard, and further found that the Council was not patently unreasonable in choosing not to adopt all the findings of the panel. Since Judge Moreau-Bérubé had never testified under oath, Drapeau J.A. felt that the Council was in as good a position as the panel to draw conclusions about any preconceived opinions or fixed beliefs Judge Moreau-Bérubé might have, or whether her statements had created an appearance of bias such as to undermine the public trust in her as a judge.

30 Drapeau J.A. also disagreed with the majority on whether the Council properly respected the rules of natural justice. He acknowledged that, when considering issues of procedural fairness such as the one at bar, [TRANSLATION] "the law requires a high standard of justice when the right to continue one's profession is at stake" (para. 149). Further, Drapeau J.A. conceded that where a tribunal had lured the subject of a possible sanction into believing that a mutually agreed penalty would likely be imposed, and that there was nothing to gain in making submissions in that regard, the decision of that tribunal might not be upheld if a harsher penalty were then imposed. However, Drapeau J.A. felt that this was not a case where the subject of an inquiry had been misled in any way.

31 Judge Moreau-Bérubé had not suggested that her right to be heard had been infringed prior to the ruling of Angers J., who raised the *audi alteram partem* issue himself for the first time. Drapeau J.A. indicated that [TRANSLATION] "it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard" (para.

150). Before the Council itself, Judge Moreau-Bérubé was entitled to make representations pursuant to s. 6.11(3), and she did so, urging the Council to dismiss the complaint altogether. In the opinion of Drapeau J.A., the fact that she argued for a dismissal of the complaint re-emphasized that [TRANSLATION] "Judge Moreau-Bérubé did not concede before the Judicial Council that the Council was bound by the recommendation of its panel concerning the penalty" (para. 155).

32 Moreover, Drapeau J.A. indicated that the principal case relied on by Angers J. in his decision, *Michaud*, *supra*, involved the imposition of a harsher sanction than that envisaged as a result of a joint submission. Moreover, he noted that the enabling statute in *Michaud* gave the tribunal jurisdiction to recommend a penalty. This is clearly distinguishable from the current case, where there was no joint submission, and the inquiry panel had no statutory power to make recommendations with regard to sanction in the first place.

33 Drapeau J.A. concluded that the Judicial Council [TRANSLATION] "did not have to inform Judge Moreau-Bérubé that a recommendation for her removal could be made", and that [TRANSLATION] "[t]he Act is quite clear with respect to the actions that the Judicial Council may take following a finding of judicial misconduct" (para. 155). Based on the foregoing, Drapeau J.A. would have allowed the appeal, with the effect that the Decree of the Lieutenant-Governor in Council would be legally valid and enforceable, and Judge Moreau-Bérubé would be removed from her position as judge.

V. Issues

34 The appeal raises four issues, the first two requiring a determination of the applicable standard of review:

> 1. Did the Court of Appeal err in law by concluding that the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel?
>
> 2. Based on the panel report, representations made by Judge Moreau-Bérubé and all other evidence at the Council's disposal, was the conclusion that Judge Moreau-Bérubé could no longer serve as a Provincial Court judge justifiable?
>
> 3. Did the Court of Appeal err in law in finding that the Council had exceeded its jurisdiction and violated the rules of natural justice by not respecting the *audi alteram partem* rule?

The fourth issue is again the constitutional one:

> 4. Does the authority granted by s. 6.11(8) of the *Provincial Court Act* of New Brunswick, empowering the Lieutenant-Governor in Council to remove a Provincial Court judge without first addressing a legislative assembly, violate the principles of judicial independence, and more specifically security of tenure?

VI. Analysis

35 As indicated above, the first two issues in this appeal must be addressed in light of the standard of review applicable. I will therefore set out general observations about the level of deference with which courts should approach decisions

of judicial councils involving the security of tenure of provincial court judges, before turning to the specific issues arising from the Court of Appeal decision.

A. *Standard of Review*

36 Although articulating the applicable standard of review is a critical part of the analysis, the issue received minimal consideration in the courts below. It is important to approach the task at hand with a clear understanding of the amount of deference, if any, that should be afforded to the decision of the administrative body.

37 This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review, which focuses on a critical question best expressed by Sopinka J. in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18:

> [W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?

(See: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and generally *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.)

38 This pragmatic and functional approach creates a spectrum of levels of deference that may be required. In the words of Bastarache J. in *Pushpanathan*, *supra*, at para. 27, referring to *Southam*, *supra*, at para. 30:

> Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available to a reviewing court. But in [*Southam*] a "reasonableness *simpliciter*" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end".

The more exacting end is represented by the correctness standard, which places relatively low deference on the decision under review and allows the court wide discretion to investigate, while at the more deferential end is the patently unreasonable standard. Reasonableness *simpliciter*, or unreasonableness, falls somewhere in the middle, as described by Iacobucci J. in *Southam*, *supra*, at para. 57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

39 As articulated by this Court in *Pushpanathan*, *supra*, *Southam*, *supra*, and *Baker*, *supra*, there are four main factors, each not conclusive in and of itself, that must be considered in determining the proper standard of review for a decision from an administrative tribunal:

(i) the nature of the problem under review, and whether it constitutes a question of law, fact or mixed law and fact;

(ii) words within the tribunal's enabling statute, most importantly, whether a privative clause is present or absent;

(iii) the purpose of the tribunal's enabling statute, and whether that purpose lends itself to less or more deference; and,

(iv) whether the tribunal has any particular expertise in reference to the question under review.

40 I will now examine each of these four factors in the context of the current case.

(1) The Nature of the Problem

41 The two issues in this case where the question of an appropriate standard of review will be addressed, namely, whether the Court of Appeal erred in law by concluding the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel and whether the conclusion that Judge Moreau-Bérubé could no longer serve as a Provincial Court judge was justifiable, can be characterized as a question of law and a question of mixed law and fact respectively. The proper interpretation of s. 6.11(4), in determining the extent to which the Council may have been "bound" by the inquiry panel's report, must be characterized as a question of law. Determining whether the Council was justified in concluding that Judge Moreau-Bérubé should be removed from the bench, on the other hand, is a question of mixed law and fact. The proper articulation of the apprehension of bias threshold by the Council, based on all the evidence available to it pursuant to s. 6.11(4) of the Act, clearly involves considerations of mixed law and fact.

(2) The Words of the Tribunal's Enabling Statute

42 The New Brunswick *Provincial Court Act* does not contain a privative clause, and there is no language in the statute to suggest that decisions made by the Judicial Council are to be considered final and conclusive. While the presence of a privative clause strongly suggests a legislative intent of strong deference by courts to the tribunal's decision, the absence of such a clause is not conclusive and the proper standard of review will be a function of other applicable factors (*Pushpanathan, supra, per* Bastarache J., at para. 30).

(3) The Purpose of the Statute Empowering the Tribunal and its Expertise

43 The intended purpose and function of an administrative tribunal, and its empowering statute, will play a large role in determining the appropriate standard of review of its decisions, as will the nature and extent of its expertise. As noted by Iacobucci J. in *Southam, supra,* these two categories often overlap and I find that here they are best dealt with together.

44 Judicial councils may be viewed as unique not only amongst administrative tribunals but even amongst professional disciplinary bodies. A tribunal charged with the task of disciplining provincial court judges does not fit into the more traditional specialized against non-specialized dichotomy for purposes of evaluating the appropriate standard of review. The first provincial judicial councils emerged in 1968 and 1969 (Ontario and British Columbia), and others were created over the following two decades in every province except Prince Edward Island. New Brunswick created its first Judicial Council in 1985. Thus, these administrative bodies are a relatively recent phenomena. However, the call for judicial accountability is not. Provincial and superior court judges had previously faced disciplinary action through various means, but always through *ad hoc* processes initiated and pursued through the

legislature. For example, in 1933 Judge Stubbs, an outspoken "socialist" judge in Manitoba, was investigated for judicial misbehaviour by a commissioner appointed under the *Judges Act* (*Journals of the House of Commons*, vol. LXXII, 5th Sess., 17th Parl., January 26, 1934, at p. 18). In the case of the former Mr. Justice Landreville of the Supreme Court of Ontario, the Law Society of Upper Canada struck a "special committee" to consider what might be done about Justice Landreville's decision to remain on the bench after he had been discharged by a magistrate on charges related to a fraudulent stock transfer. A commissioner was eventually appointed under the *Inquiries Act* (the Hon. Ivan C. Rand, formerly of this Court), and Justice Landreville was found "unfit for the proper exercise of his judicial functions" (*Inquiry Re: The Honourable Justice Leo A. Landreville* (1966), at p. 108). This report was subsequently tabled to the House of Commons, and the then Minister of Justice, Pierre Trudeau, told the House that resolutions for the removal of Justice Landreville would be introduced. Before this was done, Justice Landreville resigned, citing reasons of "health and wealth", but he defended his judicial record to the end (see M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), report prepared for the Canadian Judicial Council, at pp. 84-87). In the wake of such disciplinary hearings, the need for institutions such as the present judicial councils was grounded in the "awkwardness and uncertainty" of proceedings that, prior to 1968, had dealt with matters of judicial accountability primarily by way of a "one-judge ad hoc inquiry" (see the Friedland Report, at pp. 87-89). Implicit in the need for a more specialized process was the unique and special role judicial councils serve in light of competing constitutional interests. As the Friedland Report discusses at p. 129, with regard to disciplinary hearings for judges in general:

> There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. The public has to have confidence in the judicial system

> and to feel satisfied, as Justice Minister Allan Rock stated in a speech to the judges in August, 1994 "that complaints of misconduct are evaluated objectively and disposed of fairly." At the same time, accountability could have an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.

45 Thus, in the present case, the purpose and expertise issues present themselves in a unique fashion. On the one hand, the Judicial Council is in a sense a highly specialized tribunal required to deal with constitutionally protected rights -- such as judicial independence and security of tenure of judges and the right of persons who come before the courts to a fair trial by an impartial tribunal -- in the overall public interest. On the other hand, the tribunal is composed primarily of members of the judiciary. This might invite little deference, since, arguably, no more "specialization" exists in the judges sitting as Council members than in their colleagues sitting in court. The idea that specialization leads to deference is based on the more typical scenario, where a tribunal is composed of people who are not judges and who have a specialized expertise superior to that of judges who are, on the whole, generalists.

46 Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as "responsible for preserving the integrity of the

whole of the judiciary" (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien*, *supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente*, *supra*.

47 In light of their functions, judicial discipline committees must be composed primarily of judges. Gonthier J. quoted the work of Professor H. P. Glenn in *Therrien*, *supra*, at para. 57 to demonstrate this point:

> . . . in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H. P. Glenn in his article "Indépendance et déontologie judiciaires" (1995), 55 *R. du B.* 295, at p. 308:
>
> > [TRANSLATION] If we take as our starting point the principle of judicial independence -- and I emphasize the need for this starting point in our historical, cultural and institutional context -- I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

48 Gonthier J. subsequently expressed, at para. 148, in the following terms how a decision of the Conseil de la magistrature involving the dismissal of a provincial court judge should be reviewed:

> . . . the legislature has chosen to assign the important responsibility of determining whether the conduct of a provincial court judge warrants a recommendation for removal from office exclusively to the Court of Appeal, under s. 95 *C.J.A.* This is a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects. Accordingly, this Court should only review the assessment made by the Court of Appeal if it is clearly in error or seriously unfair.

49 Although in Quebec the final decision in recommending the removal of a provincial court judge lies with the Quebec Court of Appeal, I am not persuaded that a different approach should be adopted in New Brunswick. The Judicial Council in that province is composed of at least seven judges, at least two of whom will be from the Court of Appeal. It is fair to say that the Council, in this case, is a tribunal with a rich and wide-ranging collection of judicial expertise. The Council is eminently qualified to render a collegial decision regarding the conduct of a judge, including where issues of apprehension of bias and judicial independence are involved. There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.

50 As indicated earlier, the membership of the New Brunswick Judicial Council is established by s. 6.1(1) of the Act. It is composed of the Chief Justice of New Brunswick, a judge of the New Brunswick Court of Appeal, three judges from the Court of Queen's Bench (possibly including the Chief Justice of that court), two Provincial Court judges, and three additional members as named by the Lieutenant-Governor in Council. In other words, at least 7 of 10 Council members must be judges. It is obvious that membership in this tribunal requires, in most cases, vast legal training. As compared to a single judge from the Court of Queen's Bench, it would have to be assumed that the Council is at least as qualified, and likely more

qualified in light of its collegial composition, to draw conclusions where considerations of judicial independence, security of tenure and apprehension of bias are concerned. It would be nonsensical for a single judge or an appellate court to show low deference to decisions of the Council in an area in which they have no additional expertise.

51 The Council also has in fact a certain degree of specialization over that of the reviewing court. Gonthier J. noted in *Therrien*, *supra*, at para. 147 (with reference to the Friedland Report, *supra*, at pp. 80-81), that "before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office". In making such a determination, issues surrounding bias, apprehension of bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence. This, according to Gonthier J., creates "a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects" (para. 148). Although this is clearly not the type of tribunal that develops an expertise from the sheer volume of cases before it, the fact that the Council is engaged in this special and unique role gives it some degree of specialty not enjoyed by ordinary courts of review who have never, historically, been involved in such matters.

52 In my view, there must be a degree of authority and finality in decisions made by the Council. To place decisions of the Council under liberal review standards would undermine this objective, and detract from the public's confidence in the

Council to fulfil its mandate. In *Therrien*, after highlighting at length the importance of protecting the public's perception of the judiciary as an integral institution, Gonthier J. noted at para. 112:

> [W]e also must not forget that this Court is sitting on appeal from the report of the inquiry panel of the Quebec Court of Appeal, to which a specific function has been assigned by s. 95 [of the *Courts of Justice Act*, R.S.Q., c. T-16]. As I said earlier, the Court of Appeal, when it makes its report under that provision, is called upon to play a fundamental role in terms of both the ethical process itself and the principle of judicial independence. This Court must therefore respect that jurisdiction and show it the proper deference.

53 The composition of a body such as a provincial judicial council, the special and perhaps unique purpose it plays within the framework of the justice system, and the nature of the objective it aims to fulfil all lead to the conclusion that a high degree of deference should be afforded to its decisions. Being primarily composed of members of all levels of the New Brunswick judiciary, and mandated to protect the integrity of the judiciary within the province, the Council should be characterized as a unique decision-making body with some degree of specialization, and as a tribunal with equal or better qualifications than the reviewing court to make the decisions that the legislature has vested in it. Therefore, in my opinion, the objective of the *Provincial Court Act* and the composition of the Judicial Council itself suggest that decisions of the Council should be reviewed with a great deal of deference.

B. *The Appropriate Standards of Review*

54 I wish to stress at this point that judicial councils as well as reviewing courts must remain acutely alive to the high level of protection that applies to comments made by judges in the conduct of court proceedings.

55 While the Canadian Judicial Council and provincial judicial councils receive many complaints against judges, in most cases these are matters properly dealt with through the normal appeal process. There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council (see: Marshall Report, *supra*, where the Canadian Judicial Council inquiry panel concluded that the Nova Scotia Court of Appeal had been "inappropriately harsh in their condemnation of the victim of an injustice they were mandated to correct" (p. 35) after the Court of Appeal had noted, among other things, that any injustice suffered by Mr. Marshall was "more apparent than real" (p. 36); *Report to the Canadian Judicial Council by the Inquiry Committee appointed under subsection 63(1) of the Judges Act to conduct a public inquiry into the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge* (1996), where removal from office was recommended, mainly for comments made while presiding over a sentencing hearing; and, Canadian Judicial Council file 98-128, where the Canadian Judicial Council released a letter expressing strong disapproval for comments made by a justice of the Alberta Court of Appeal in reasons delivered while sitting in his capacity as a judge in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, and *R. v. Ewanchuk* (1998), 13 C.R. (5th) 324).

56 One half of the "two-pronged" modern articulation of judicial independence (the other prong being institutional independence), without which there can be no public confidence in the justice system, rests on the individual independence of each and every judge. Within this, the core principle is the liberty of the judge to hear and decide cases without fear of external reproach. The majority of this Court stated in *Beauregard*, *supra*, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [Also see *Valente*, *supra*, *per* Le Dain J., at p. 685.]

The Canadian Judicial Council echoed this principle in the Marshall Report, *supra*, asserting that "[j]udicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal" (p. 24). Thus, the Council's inquiry panel noted, while criticizing the comments of the Nova Scotia Court of Appeal that "[w]e are deeply conscious that criticism can itself undermine public confidence in the judiciary, but on balance conclude in this case that that confidence would more severely be impaired by our failure to criticize inappropriate conduct than it would by our failure to acknowledge it" (p. 36).

57 While acting in a judicial capacity, judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen. In *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)* (1999), 71 Alta. L.R. (3d) 214, 1999 ABQB 309, aff'd (2000), 192 D.L.R. (4th) 540, 2000 ABCA 241 (*sub nom. Reilly v. Provincial Court of Alberta, Chief Judge*), Mason J. highlighted some of the consequences of this principle, citing the words of the now Chief Justice, at para. 132:

> At present, this core principle of individual judicial independence has concomitant immunities from suit and prosecution, as well as from being required to testify about the how and why of a particular decision. As McLachlin, J. stated for the majority in *MacKeigan* [*v. Hickman*, [1989] 2 S.C.R. 796] (at 830):

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence [*Valente*, *supra*; *Beauregard*, *supra*]. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence.

58 Even within the appeal process, which is designed to correct errors in the original decision and set the course for the proper development of legal principles, the judge whose decision is under review is not called to account for it. He or she is not asked to explain, endorse or repudiate the decision or the statement which is called into question by the appeal, and the result of the appeal process suffices to deliver justice to those aggrieved by the error made by the judge of first instance. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

59 The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole. The comments of Gonthier J. in *Therrien*, *supra*, at paras. 108-11 regarding the role of the judge and public perceptions of that role, bear repeating:

The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

60 Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Act. The separation of functions between judicial councils and the courts, even if it could be said that their expertise is virtually identical, serves to insulate the courts, to some extent, from the reactions that may attach to an unpopular council decision. To have disciplinary proceedings conducted by a judge's peers offers the guarantees of expertise and fairness that judicial officers are sensitive to, while avoiding the potential perception of bias or conflict that could arise if judges were to sit in court regularly in judgment of each other. As Gonthier J. made clear in *Therrien*, other judges may be the only people in a position to consider and weigh effectively all the applicable principles, and evaluation by any other group would threaten the perception of an independent judiciary. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, must in my view attract in general a high degree of deference.

(1) Statutory Interpretation

61 The question of the proper interpretation of s. 6.11(4) of the Act, as to whether it binds the Judicial Council to the findings of fact made by the inquiry panel, is a question of law, and thus might normally attract a "correctness" standard of review. However, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference (see *Pasiechnyk*, *supra*). As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 37, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative

intention". In this case, the Council was interpreting an operational provision within its own statute, which conferred upon it a special and unique decision-making role within the justice system. The Council, composed of seven judges and three lay persons, must be regarded as having a reasonable degree of specialization and a high level of expertise.

62 In light of this, and other factors reviewed above, issues of statutory interpretation by the Council should attract considerable deference and reviewing courts should not intervene unless the interpretation adopted by the Council is not one that it can reasonably bear. In any event I would uphold the interpretation given by the Council even on a correctness standard, as reflected in my analysis below.

63 As indicated above, the inquiry panel was required to investigate a two-pronged complaint that it drafted. The first branch alleged that the remarks made by the respondent constituted misconduct, and the panel concluded that it did. The second branch alleged that as a result of those remarks the respondent was [TRANSLATION] "no longer able to perform her duties as a judge". On that issue the panel found that no bias or appearance of bias had been demonstrated, that the respondent did not have pre-established beliefs and that her conduct did not justify her removal from office.

64 Pursuant to s. 6.11(4), the Council was then required to make a decision between dismissal of the complaint, reprimand and recommendation for dismissal from the bench, "[b]ased on the findings contained in the report and the representations [if any, by the respondent respecting the report]".

65 I agree with the analysis of Drapeau J.A., equating the words "based on" in s. 6.11(4) of the Act with "taking into account" as opposed to "bound by". As Drapeau J.A. has indicated, to suggest that the words have a binding impact creates a number of inconsistencies and incongruities within the Act. Moreover, any delegation of decision-making power from a tribunal to another body must be clearly and expressly authorized by statute. As Gonthier J. effectively summarized in *Therrien*, *supra*, at para. 93, "[i]t is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*". In this case, the Act clearly indicates that the Council is to make the decision with regard to the sanction, if any, that should be imposed. The words "based on" in s. 6.11(4) cannot be read to permit an abdication of that authority.

66 In this case, the Council applied the evidence available to it to the question, [TRANSLATION] "[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?" (*per* Drapeau J.A., *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 88). While the panel is required to express its "findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question" (s. 6.11(1) of the Act) (emphasis added), the Council must interpret the findings of the panel for the purposes of "taking [them] into account" in rendering a final decision. There is nothing incongruous or unfair in such an interpretation of s. 6.11(4). The Council is free to put the weight that it considers

appropriate on the findings of the panel, in light, in part, of the respondent's submissions, in order to come to a conclusion that must not be patently unreasonable.

67 Applying the proper standard of review to the interpretation given by the Council to the scope of its mandate based on its interpretation of s. 6.11(4) of its enabling statute, that standard being one of reasonableness *simpliciter*, the reviewing judge and the majority of the Court of Appeal should not have substituted their interpretation of that provision for the one adopted by the Council.

(2) Whether the Conclusions of the Council were Justifiable

68 The second issue involves whether the ultimate decision of the Council to recommend the removal from office of Judge Moreau-Bérubé was justifiable. This question is one of mixed law and fact, and presents a more direct challenge to the Council's authority. In reviewing the Council's decisions, courts are asked to pass judgment on the Council's ability to assess, weigh, and apply the evidence to a particular legal threshold while discharging its core function. This is also where all the specialization and expertise of the Council come into play. The Council must serve its purpose with some degree of authority and finality, and its conclusions on questions of mixed law and fact should be afforded a high degree of deference.

69 I agree with the standard imposed by Drapeau J.A., who alone expressed a position on the applicable standard of review, that determinations made by the Council should not be interfered with unless they are patently unreasonable.

70 The central issue that the Council had to resolve in deciding to recommend the respondent's dismissal from the bench was whether her comments evidenced bias,

or created an apprehension of bias such that she could no longer expect to enjoy the public trust in a fair and independent judiciary. Whether the proper legal test was applied is not in dispute. However, the respondent argues that the Council was patently unreasonable in ignoring certain findings made by the panel, which must be regarded as the primary trier of fact in this case, and in replacing those findings with conclusions of its own.

71 In my view, it was within the power of the Council to draw its own conclusions, and, in light of the sweeping and generalized nature of Judge Moreau-Bérubé's derogatory comments, it would be difficult to call the conclusion reached by the Council patently unreasonable. This is not a case where the Council should have deferred to the privileged position of the panel as a primary fact-finder on the critical issue of whether the misconduct of the respondent created a reasonable apprehension of bias such as to render her unfit to continue to occupy a judicial post. The power to impose the appropriate sanction, which rests solely with the Council, presupposes the power to characterize appropriately the nature and seriousness of the misconduct, based in part on the recital of events, and appreciation of these events, by the panel reporting to the Council.

72 The comments of Judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person. The expertise to decide that difficult issue rests in the Council, a large collegial body composed primarily of judges of all levels of jurisdiction in the province, but also of non-judges whose input is important in formulating that judgment. The Judicial Council has been charged by statute to guard the integrity of the provincial judicial system in New

Brunswick. In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.

73 I find nothing patently unreasonable in the Council's decision to draw its own conclusions with regard to whether the comments of Judge Moreau-Bérubé created an apprehension of bias sufficient to justify a recommendation for her removal from duties as a Provincial Court judge. Even on a standard of reasonableness *simpliciter*, I would find no basis to interfere with the Council's decision. On this record, I believe that the respondent has received a fair hearing, conducted in accordance with the will of the legislature and consistent with the requirements of both judicial independence and integrity.

(3) Procedural Fairness

74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and *Baker*, *supra*.)

75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,

[1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, *supra*, at para. 20; *Therrien*, *supra*, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).

76 The respondent argues that she had a reasonable expectation that the Council would not impose a penalty more serious than a reprimand for three main reasons:

> 1. The inquiry panel had recommended a reprimand, and had found that the respondent was able to continue performing her duties as a Provincial Court judge.
>
> 2. The Council, though it had the discretion to suspend her pending the inquiry's outcome, had allowed the respondent to discharge her judicial function for more than a year following her impugned comments. This, the respondent argues, created an expectation that the Council would proceed on the basis that she was able to continue performing her duties as a judge.

3. Dismissal had never been expressly contemplated or argued by any person at any level of the inquiry prior to the delivery of that sanction.

77 Under s. 6.11(3), the respondent had the "right to make representations to [the Council] either in person or through counsel and either orally or in writing, respecting the [panel's] report prior to the taking of action by the Judicial Council" (emphasis added). She essentially argues that when the panel recommended something less than removal from the bench, they indirectly took away her ability to argue against that sanction, and that her representations to the Council would have been affected had she known that a recommendation for removal from the bench was being considered.

78 I am not persuaded by any of these arguments. The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557; *Baker*, *supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 *J. L. & Social Pol'y* 282, at p. 297.

79 In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of

legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute. Moreover, the inquiry panel had no authority to make a recommendation to the Council about the appropriate sanction. This is made abundantly clear in the Act, where s. 6.11(1) states, "the panel shall report to the chairman its findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question". This contrasts with the decision-making role of the Council once the panel's report is complete, as stipulated in s. 6.11(4) which states that "[b]ased on the findings contained in the report . . . the Judicial Council may . . . dismiss the complaint, . . . issue a reprimand . . ., or . . . recommend . . . that the judge be removed from office". Regardless of the fact that the panel made a recommendation that it was not mandated to make, the Council had a clear and plain discretion to choose between three options. I do not believe that the respondent, a judge, who had legal advice throughout, could have misapprehended the issues that were alive before the Judicial Council. She never asserted making such an error until it was raised by Angers J. on judicial review.

80 Similarly, the Council's decision not to suspend the respondent pending the outcome of the inquiry does not limit the Council's statutorily authorized discretion. Obviously the outcome of the inquiry is not known at the outset and thus the decision of whether to suspend cannot be taken as any indication as to the inquiry's eventual outcome. Moreover, I note that while the respondent was not suspended from the bench, she was relocated to another district for the duration of the inquiry.

81 The fact that a recommendation for dismissal was not discussed prior to being issued is also not relevant. The Council has no obligation to remind the

respondent to read s. 6.11(4) carefully. While the Council might have opted, as a part of their procedure, to remind Judge Moreau-Bérubé that the Council would not be bound by any recommendations made by the inquiry panel, they chose not to, and that was within their discretion. As L'Heureux-Dubé J. noted in *Baker*, *supra*, at para. 27:

> . . . the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

82 In coming to the conclusions they did, the Court of Appeal and Angers J. relied in particular on *Michaud*, *supra*. I agree with Drapeau J.A. that *Michaud* is distinguishable. In that case, the recommended sanction was a product of a joint submission and the affected person made no representations. By contrast, Judge Moreau-Bérubé's counsel made arguments before the tribunal to the effect that no reprimand should be administered, contrary to the recommendation of the inquiry panel. This demonstrates that the respondent was well aware that the Council was not bound by the recommendations of the inquiry panel and that it would come to its own independent decision about the sanction that was appropriate in light of the misconduct. She herself was urging the Council to disregard the recommendation of the inquiry panel.

83 I agree with the comments of Drapeau J.A. who noted that [TRANSLATION] "it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard" (para. 150). Acknowledging that the nature of these disciplinary

proceedings imposes on the Council a stringent duty to act fairly, I can find no breach of the rules of natural justice in the context of this case.

C. *Constitutional Issue*

84 I agree with Angers J. and the New Brunswick Court of Appeal that this matter has been settled by this Court, and thus that the procedure set forth by the Act to sanction misconduct of a provincial court judge does meet the minimal standards required to ensure respect for the principle of judicial independence. (See *Therrien, supra*, at para. 76; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra*; *Valente, supra*.)

VII. Disposition

85 Accordingly, I would allow the appeal with costs and restore the decision of the New Brunswick Judicial Council.

Appeal allowed with costs.

Solicitor for the appellant Her Majesty the Queen in Right of New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitors for the appellant the Judicial Council: Barry Spalding Richard, Saint John.

Solicitors for the respondent: Bertrand & Bertrand, Fredericton.

Consolidated-Bathurst Packaging Ltd. *Appellant*

v.

International Woodworkers of America, Local 2-69 *Respondent*

and

The Ontario Labour Relations Board *Respondent*

INDEXED AS: IWA *v.* CONSOLIDATED-BATHURST PACKAGING LTD.

File No.: 20114.

1989: April 26; 1990: March 15.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Natural justice — Audi alteram partem rule — Right to know case to be made — Three-person panel hearing case and ultimately making decision — Case involving important and wider policy implications — Full Board meeting called to discuss policy implications of a draft decision — Facts accepted as stated in draft decision — No vote or consensus taken — No minutes kept — Attendance not recorded — Whether or not breach of rules of natural justice occurred — Labour Relations Act, R.S.O. 1980, c. 228, ss. 14, 102(9), (13), 106, 108, 114.

The Ontario Labour Relations Board ordinarily sits in panels of three when hearing applications under the *Labour Relations Act*. A three-member panel decided that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close a plant. In the course of deliberating over this decision, a meeting of the full Board was held to discuss a draft of the reasons. No express statutory authority exists for this practice.

The record did not indicate how many of the Board's 48 members attended the meeting in question and

Consolidated-Bathurst Packaging Ltd. *Appelante*

c.

Syndicat international des travailleurs du bois d'Amérique, section locale 2-69 *Intimé*

et

La Commission des relations de travail de l'Ontario *Intimée*

RÉPERTORIÉ: SITBA *c.* CONSOLIDATED-BATHURST PACKAGING LTD.

N° du greffe: 20114.

1989: 26 avril; 1990: 15 mars.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et McLachlin.

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

Droit administratif — Justice naturelle — Règle audi alteram partem — Droit de connaître la preuve invoquée contre soi — Audition d'une affaire et décision ultime par un banc de trois personnes — Affaire comportant des conséquences importantes et plus générales en matière de politique — Convocation d'une réunion plénière de la Commission pour discuter des conséquences en matière de politique d'un avant-projet de décision — Faits énoncés dans l'avant-projet de décision tenus pour avérés — Aucun vote ni aucune vérification du consensus — Aucune rédaction de procès-verbal des délibérations — Aucune prise des présences — Y a-t-il eu violation des règles de justice naturelle? — Loi sur les relations de travail, L.R.O. 1980, ch. 228, art. 14, 102(9), (13), 106, 108, 114.

La Commission des relations de travail de l'Ontario siège ordinairement en bancs de trois membres quand elle entend les demandes présentées en vertu de la *Loi sur les relations de travail*. Un banc de trois commissaires a statué que l'appelante avait refusé de négocier de bonne foi en ne divulguant pas, au cours des négociations visant la signature d'une convention collective, qu'elle projetait de fermer une usine. Pendant les délibérations relatives à cette décision, la Commission a tenu une réunion plénière pour débattre un avant-projet de motifs. Aucune disposition législative n'autorise expressément cette pratique.

Le dossier ne précise pas combien des 48 membres de la Commission ont assisté à la réunion en cause ni s'il y

whether labour and management were equally represented as contemplated by s. 102(9) of the Act. The members of the panel who heard the case, however, appear to have been present. The meeting was conducted in accordance with the Board's longstanding and usual practice. This practice required that discussion be limited to the policy implications of a draft decision, that the facts be accepted as contained in the decision, that no vote or consensus be taken, that no minutes be kept, and that no attendance be recorded.

Appellant applied for judicial review of the Board's decision on the ground that the rules of natural justice had been breached. The application was granted by the Divisional Court but was disallowed on appeal. At issue here was whether the two rules of natural justice had been breached: (a) that the adjudicator be independent and unbiased, that he who decides must hear, and (b) the *audi alteram partem* rule, the right to know the case to be met.

Held (Lamer and Sopinka JJ. dissenting): The appeal should be dismissed.

Per Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Full board meetings are a practical means of calling upon the accumulated experience of board members when making an important policy decision and obviate the possibility of different panels inadvertently deciding similar issues in a different way. The rules of natural justice should reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The members of a panel who actually participate in the decision must have heard both the evidence and the arguments presented by the parties. The presence of other Board members at the full board meeting does not, however, amount to "participation" in the final decision. Discussion with a person who has not heard the evidence does not necessarily vitiate the resulting decision because this discussion might "influence" the decision maker.

Decision makers cannot be forced or induced to adopt positions they do not agree with by means of some formalized consultation process. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and does not constitute an obstacle to this freedom. The ultimate decision, whatever discussion may take place, is that of the decision

avait représentation égale des employés et de l'employeur comme le prescrit le par. 102(9) de la Loi. Les membres du banc qui avaient entendu l'affaire semblent cependant avoir été présents. La réunion s'est déroulée conformément à la pratique habituelle que la Commission suit depuis longtemps. Cette pratique consiste à restreindre les débats aux conséquences en matière de politique d'un avant-projet de décision, à considérer les faits mentionnés dans la décision comme avérés, à ne pas prendre de vote ni vérifier s'il y a consensus, à ne pas rédiger de procès-verbal des délibérations et à ne pas prendre les présences.

L'appelante a demandé le contrôle judiciaire de la décision de la Commission pour le motif qu'il y avait eu violation des règles de justice naturelle. Cette demande a été accueillie par la Cour divisionnaire, mais rejetée en appel. Il s'agit en l'espèce de déterminer si les deux règles suivantes de justice naturelle ont été violées: a) celle portant que le décideur doit être indépendant et impartial, que celui qui tranche une affaire doit l'avoir entendue, et b) la règle *audi alteram partem*, le droit de connaître la preuve invoquée contre soi.

Arrêt (les juges Lamer et Sopinka sont dissidents): Le pourvoi est rejeté.

Les juges Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Les réunions plénières de la Commission sont un moyen pratique de faire appel à l'expérience acquise par les commissaires lorsqu'il s'agit de rendre une décision importante de politique et d'éviter que des bancs différents rendent des décisions divergentes sur des questions semblables. Les règles de justice naturelle devraient concilier les caractéristiques et les exigences du processus décisionnel des tribunaux spécialisés avec les droits des parties en matière de procédure.

Les membres du banc qui participent effectivement à une décision doivent avoir entendu la totalité de la preuve et des plaidoiries soumises par les parties. La présence d'autres commissaires à la réunion plénière de la Commission n'équivaut cependant pas à une «participation» à la décision finale. La discussion avec une personne qui n'a pas entendu la preuve n'entache pas forcément de nullité la décision qui s'ensuit parce que cette discussion est susceptible d'«influencer» le décideur.

On ne peut recourir à aucun mécanisme formel de consultation pour forcer ou inciter un décideur à adopter un point de vue qu'il ne partage pas. Une discussion n'empêche pas un décideur de juger selon sa propre conscience pas plus qu'elle ne constitue une entrave à sa liberté. Quelles que soient les discussions qui peuvent avoir lieu, la décision ultime appartient au décideur et il

maker and he or she must assume full responsibility for that decision. Board members are not empowered by the Act to impose one member's opinion on another and procedures which may in effect compel or induce a panel member to decide against his or her own conscience or opinion cannot be used to thwart this *de jure* situation.

The criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions. The full board meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. As practised by the Board, the holding of full board meetings does not impinge on the ability of panel members to decide according to their opinions so as to give rise to a reasonable apprehension of bias or lack of independence.

For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues.

Evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. It is, however, possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.

On factual matters the parties must be given a fair opportunity for correcting or contradicting any relevant

en assume la responsabilité entière. La Loi n'habilite pas les membres de la Commission à imposer leur avis à un autre commissaire et on ne saurait recourir à des procédures qui peuvent avoir pour effet de forcer ou d'inciter un membre d'un banc à statuer à l'encontre de ses propres conscience ou opinions pour contrecarrer cette situation de droit.

Le critère de l'indépendance est non pas l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions. La réunion plénière de la Commission a constitué un élément important du processus légitime de consultation, mais non une participation à la décision par des personnes qui n'avaient pas entendu les parties. La pratique de la Commission consistant à tenir des réunions plénières n'entrave pas la capacité des membres d'un banc de statuer selon leurs opinions, de manière à susciter une crainte raisonnable de partialité ou d'un manque d'indépendance.

Aux fins de l'application de la règle *audi alteram partem*, il faut distinguer les discussions portant sur des questions de fait et celles portant sur des questions de droit ou de politique.

Il n'est pas toujours impossible d'évaluer la preuve de façon définitive avant que le banc n'ait choisi le critère juridique approprié et avant que tous les membres du banc n'aient évalué la crédibilité de chaque témoin. Cependant, il est possible de débattre des questions de politique que soulève la preuve soumise au banc même si cette preuve peut entraîner une grande variété de conclusions sur les faits. Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. Les discussions sur les politiques n'ont pas pour objet de décider quelle partie aura finalement gain de cause, mais elles ont pour objet d'exposer les différents critères juridiques que la Commission peut adopter et de débattre leur valeur relative.

Il faut aborder les questions de politique de manière différente parce qu'elles ont, par définition, des conséquences qui vont au-delà du règlement du litige particulier entre les parties. Bien qu'elles découlent de faits précis, elles constituent l'expression d'un principe ou de normes apparentées au droit. Puisque ces questions font appel à l'analyse des lois, des décisions antérieures et des besoins sociaux qui sont perçus, les conséquences d'une décision de politique prise par la Commission ne dépendent pas, dans une certaine mesure, de l'intérêt immédiat des parties, même si elles peuvent avoir un effet sur l'issue de la plainte.

Relativement aux questions de fait, les parties doivent obtenir une possibilité raisonnable de corriger ou de

statement prejudicial to their view. The rule with respect to legal or policy arguments not raising issues of fact is, however, somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case.

The safeguards attached by the Board to this consultation process are sufficient to allay any fear of violations of the rules of natural justice provided the parties are advised of any new evidence or grounds and are given an opportunity to respond. The balance so achieved between the rights of the parties and the institutional pressures the Board faces are consistent with the nature and purpose of the rules of natural justice. In the instant case, the policy decided upon was the very subject of the hearing when the parties had full opportunity to deal with the matter and present diverging proposals which they did.

Per Lamer and Sopinka JJ. (dissenting): The introduction of policy considerations in the decision-making process by members of the Board who were not present at the hearing and their application by members who were present but who heard no submissions from the parties in that respect violates the rationale underlying the principles of natural justice.

The final decision was formally that of the three-member panel. The inference that the full Board meeting might have affected the outcome, however, exists and is fed by two difficulties. Firstly, uniformity can only be achieved if some decisions of the individual panels are brought into line with others by the uniform application of policy. Secondly, in matters affecting the integrity of the decision-making process, an appearance of injustice is sufficient to taint the decision.

The Board is required by statute to hold a hearing and to give the parties a full opportunity to present evidence and submissions. It is also entitled to apply policy. The role of policy in the decision-making function of boards must be reappraised in light of the evolution of the law relating to the classification of tribunals and the application of the rules of natural justice and fairness to those boards. The content of the rules of natural justice is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstances of the case, the governing statutory provisions and the nature of the matters to be determined. It is no longer appropriate to conclude that failure to disclose policy to

contredire tout énoncé pertinent qui nuit à leur point de vue. Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause et de répondre aux arguments qui leur sont défavorables. Ce droit n'inclut pas celui de reprendre les plaidoiries chaque fois que le banc se réunit pour débattre l'affaire.

Les garanties dont la Commission assortit ce processus de consultation sont suffisantes pour dissiper toute crainte de violation des règles de justice naturelle pourvu également que les parties soient informées de tout nouvel élément de preuve ou de tout nouveau moyen et qu'elles aient la possibilité d'y répondre. L'équilibre ainsi réalisé entre les droits des parties et les pressions institutionnelles qui s'exercent sur la Commission sont compatibles avec la nature et l'objet des règles de justice naturelle. En l'espèce, la politique visée par la décision était l'objet même de l'audition à laquelle les parties avaient l'entière possibilité de traiter de la question et de présenter des propositions divergentes, et c'est ce qu'elles ont fait.

Les juges Lamer et Sopinka (dissidents): L'introduction de considérations de politique dans le processus décisionnel par des commissaires qui n'ont pas assisté à l'audition et leur application par des commissaires qui étaient présents mais qui n'ont pas entendu de plaidoiries des parties au sujet de ces considérations, est contraire à la raison d'être des principes de justice naturelle.

La décision finale est bel et bien celle du banc de trois commissaires. La conclusion que la réunion plénière de la Commission peut avoir influé sur l'issue de l'affaire existe toutefois et découle de deux difficultés. Premièrement, l'uniformité ne peut se réaliser que si on fait concorder certaines décisions de bancs particuliers par l'application constante d'une politique. Deuxièmement, en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice pour vicier la décision.

La Loi oblige la Commission à tenir une audition et à donner aux parties toute possibilité de présenter des éléments de preuve et des arguments. Elle a aussi le pouvoir d'appliquer des politiques. Il y a lieu de réévaluer le rôle des politiques dans le processus décisionnel des commissions en fonction de l'évolution du droit relatif à la classification des tribunaux et à l'application des règles de justice naturelle et d'équité à leur endroit. Le contenu des règles de justice naturelle ne dépend plus de leur classification en règles judiciaires, quasi judiciaires ou administratives, mais il est déterminé par les circonstances de l'affaire, les dispositions législatives applicables et la nature des litiges à décider. Il ne

be applied by a tribunal is not a denial of natural justice without examining all the circumstances under which the tribunal operates.

The full board hearing deprived the appellant of a full opportunity to present evidence and submissions and accordingly constituted a denial of natural justice. It could not be determined with certainty from the record that a policy which was developed at the full Board hearing and was not disclosed to the parties was a factor in the decision. That this might very well have happened, however, was fatal to the Board's decision.

The goal of uniformity in the decisions of individual boards, while laudable, cannot be achieved at the expense of the rules of natural justice. The legislature, if it so chooses, can authorize the full board procedure.

The conclusion that no substantial wrong occurred could not be made. Prejudice arising because of a technical breach of the rules of natural justice must be established by the party making the allegation. The appellant, however, could hardly be expected to establish prejudice when it was not privy to the discussion before the full Board and when there is no evidence as to what in fact was discussed. The gravity of the breach of natural justice could not be assessed in the absence of such evidence.

The full board procedure was not saved by s. 102(13) of the *Labour Relations Act* which granted the Board the power to determine its own practice and procedure subject to the qualification that full opportunity be granted the parties to any proceedings to present their evidence and to make their submissions. The appellant was not given a full opportunity to present evidence and make submissions. The Board's practice must give way when at a variance with the rules of natural justice.

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By Gonthier J.

Considered: *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362; **referred to**: *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Mehr v.*

convient plus de conclure que l'omission de divulguer les politiques que le tribunal va appliquer ne constitue pas un déni de justice naturelle sans examiner toutes les circonstances dans lesquelles le tribunal fonctionne.

La réunion plénière de la Commission a privé l'appelante de la pleine possibilité de présenter des éléments de preuve et de faire valoir des arguments et a constitué un déni de justice naturelle. Le dossier ne permet pas de déterminer avec certitude si la formulation, lors de la réunion plénière, d'une politique qui n'a pas été divulguée aux parties a eu un effet sur la décision. Le fait que la chose ait très bien pu se produire est cependant fatal à la décision de la Commission.

Même si l'uniformisation des décisions de tribunaux particuliers est souhaitable, elle ne peut se faire aux dépens des règles de justice naturelle. Si le législateur veut permettre la poursuite de cet objectif, il est libre d'autoriser la procédure de réunion plénière de la Commission.

Il est impossible de conclure qu'il n'y a pas eu de préjudice grave. Le préjudice causé par une violation technique des règles de justice naturelle doit être prouvé par la partie qui l'invoque. On ne saurait cependant demander à l'appelante de prouver l'existence d'un préjudice alors qu'elle n'a pas eu connaissance de ce qui a été discuté à la réunion plénière de la Commission et qu'il n'y a pas de preuve quant à ce qui y a été réellement discuté. En l'absence de cette preuve, il est impossible de déterminer la gravité de la violation des règles de justice naturelle.

La procédure de réunion plénière de la Commission n'est pas sauvegardée par le par. 102(13) de la *Loi sur les relations de travail* qui confère à la Commission le pouvoir de régir sa propre pratique et procédure sous réserve d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. L'appelante n'a pas eu toute possibilité de présenter sa preuve et de soumettre ses arguments. Quand les règles de justice naturelle entrent en conflit avec une pratique de la Commission, cette dernière doit céder le pas.

Jurisprudence

Citée par le juge Gonthier

Arrêts examinés: *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577; *Doyle c. Commission sur les pratiques restrictives du commerce*, [1985] 1 C.F. 362; **arrêts mentionnés**: *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des*

Law Society of Upper Canada, [1955] S.C.R. 344; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385; *Re Ramm* (1957), 7 D.L.R. (2d) 378; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 484; *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673; *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Rex v. Sussex Justices*, [1924] 1 K.B. 256; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Board of Education v. Rice*, [1911] A.C. 179; *Local Government Board v. Arlidge*, [1915] A.C. 120.

By Sopinka J. (dissenting)

United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd., [1980] OLRB Rep. 577; *Re Ramm* (1957), 7 D.L.R. (2d) 378; *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344; *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943; *Szilard v. Szasz*, [1955] S.C.R. 3; *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395; *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Innisfil (Corporation of the Township) v. Corporation of Township of Vespra*, [1981] 2 S.C.R. 145; *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *R. v. Criminal Injuries Compensation Board*, [1973] 1 W.L.R. 1334; *Toshiba Corp. v. Anti-Dumping Tribunal* (1984), 8 Admin. L.R. 173; *Komo Construction Inc. v. Commission des Relations de Travail du Québec*, [1968] S.C.R. 172.

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APPEAL from a judgment of the Ontario Court of Appeal (1986), 56 O.R. (2d) 513, allowing an appeal from a judgment of the Divisional Court (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84, 85 CLLC 14,031, granting an application to quash a decision of the Ontario Labour Relations Board, [1983] OLRB Rep. December 1995, 5 CRBR (NS) 79, made on a reconsideration of its original decision, [1983] OLRB Rep. September 1411, 4 CLRBR (NS) 178. Appeal dismissed, Lamer and Sopinka JJ. dissenting.

William R. Herridge, Q.C., for the appellant.

Paul Cavalluzzo and *David Bloom*, for the respondent International Woodworkers of America, Local 2-69.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1986), 56 O.R. (2d) 513, qui a accueilli l'appel d'une décision de la Cour divisionnaire (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84, 85 CLLC 14,031, qui avait accueilli une demande d'annulation d'une décision de la Commission des relations de travail de l'Ontario, [1983] OLRB Rep. December 1995, 5 CRBR (NS) 79, rendue relativement à une demande de réexamen de sa décision initiale, [1983] OLRB Rep. September 1411, 4 CLRBR (NS) 178. Pourvoi rejeté, les juges Lamer et Sopinka sont dissidents.

William R. Herridge, c.r., pour l'appelante.

Paul Cavalluzzo et *David Bloom*, pour l'intimé le Syndicat international des travailleurs du bois d'Amérique, section locale 2-69.

Gordon F. Henderson, Q.C., and *R. Ross Wells*, for the respondent the Ontario Labour Relations Board.

The reasons of Lamer and Sopinka JJ. were delivered by

SOPINKA J. (dissenting)—The issue in this case is the propriety of a practice of the Ontario Labour Relations Board pursuant to which a full Board session is held to discuss a draft decision of a three-person panel.

Facts

The Ontario Labour Relations Board (hereinafter the "Board") derives its statutory authority under the *Labour Relations Act*, R.S.O. 1980, c. 228 (hereinafter the "Act"). The Board ordinarily sits in panels of three in hearing applications under the Act. This is authorized by s. 102(9) of the Act which provides:

102. ...

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

The original decision of a panel of three members of the Board ([1983] OLRB Rep. September 1411) from which this litigation arises was that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close its Hamilton plant. In the course of deliberating over this decision, a meeting was held of the full Board to discuss a draft of the reasons. No express statutory authority exists for this practice.

Although we are told that the full Board consists of 48 members, it does not appear from the record how many attended the meeting in question and whether labour and management were equally represented as contemplated by s. 102(9) of the Act. The affidavit of Mr. Michael Gordon, filed on behalf of the appellant, identifies thirteen of the

Gordon F. Henderson, c.r., et *R. Ross Wells*, pour l'intimée la Commission des relations de travail de l'Ontario.

Version française des motifs des juges Lamer et Sopinka rendus par

LE JUGE SOPINKA (dissident)—Le présent pourvoi soulève la question du bien-fondé d'une pratique suivie par la Commission des relations de travail de l'Ontario en vertu de laquelle celle-ci tient une réunion plénière pour débattre l'avant-projet de la décision que doit rendre un banc de trois commissaires.

Les faits

La Commission des relations de travail de l'Ontario (ci-après la «Commission») tient son existence de la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228 (ci-après la «Loi»). La Commission siège ordinairement en bancs de trois membres quand elle entend les demandes présentées en vertu de la Loi. Le paragraphe 102(9) de la Loi, qui permet cette façon de procéder, est ainsi conçu:

102 ...

(9) Le président ou un vice-président, un membre représentant les employeurs et un membre représentant les employés constituent le quorum et peuvent exercer les attributions de la Commission.

La décision initiale du banc de trois commissaires ([1983] OLRB Rep. September 1411) qui est à l'origine du présent litige portait que l'appelante avait refusé de négocier de bonne foi en ne divulguant pas, au cours des négociations visant la signature d'une convention collective, qu'elle projetait de fermer son usine de Hamilton. Pendant les délibérations relatives à cette décision, la Commission a tenu une réunion plénière pour débattre un avant-projet de motifs. Aucune disposition législative n'autorise expressément cette pratique.

Bien qu'on nous dise que la Commission au complet se compose de 48 membres, le dossier ne mentionne pas combien de membres ont assisté à la réunion en cause, ni s'il y avait représentation égale des employés et de l'employeur comme le prescrit le par. 102(9) de la Loi. L'affidavit de M. Michael Gordon, produit pour le compte de l'appe-

people present, among them an alternate chairman, several vice-chairmen, a number of Board members, solicitors and senior employees of the Board. Of those specifically identified, only Board member Wightman was a member of the panel which heard the case. Nevertheless it appears from the Board's reasons on reconsideration that the other members of the panel of three were also present.

While it is not contested that no evidence was introduced at this full board meeting, it is not clear from the record what was discussed. The meeting took several hours but no minutes were kept. The reasons of the Board on reconsideration describe the practice of the Board in relation to full board hearings but provide no details as to what was discussed. It may be assumed that the matters discussed were in accordance with the Board's practice in this regard. This practice is described in the decision of the Board on Consolidated-Bathurst's application to reconsider the original decision, [1983] OLRB Rep. December 1995, which reads, in part, at paragraph 8:

> 8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

There is no evidence that the procedure at the meeting in question departed from the Board's usual practice, whereby discussion is limited to the policy implications of a draft decision, the facts contained in the decision are taken as given, no vote or consensus is taken, no minutes are kept, and no attendance is recorded. The practice is not a recent innovation. It goes back at least as far as

lante, fournit les noms de treize des personnes présentes, dont un président suppléant, quelques vice-présidents, un certain nombre de commissaires, des avocats et des cadres de la Commission. Parmi les personnes expressément nommées, seul le commissaire Wightman faisait partie du banc qui avait entendu l'affaire. Néanmoins, il ressort des motifs rendus par la Commission au sujet de la demande de réexamen que les autres membres du banc de trois commissaires étaient eux aussi présents.

Bien qu'il ne soit pas contesté qu'aucun élément de preuve n'a été soumis pour la première fois à la réunion plénière de la Commission, le dossier n'indique pas clairement le sujet des délibérations. La réunion a duré plusieurs heures, mais personne n'a rédigé de procès-verbal. Les motifs rendus par la Commission sur la demande de réexamen décrivent la pratique de la Commission de tenir des réunions plénières, sans toutefois préciser ce sur quoi les débats ont porté. On peut supposer que les sujets discutés étaient conformes à la pratique de la Commission à cet égard. Cette pratique est décrite dans la décision rendue par la Commission au sujet de la demande de réexamen de la décision initiale, présentée par Consolidated-Bathurst, [1983] OLRB Rep. December 1995, dont le par. 8 est ainsi conçu:

> [TRADUCTION] 8. Après avoir délibéré sur un avant-projet de décision, un banc qui envisage de trancher une question importante de politique peut faire convoquer, par l'intermédiaire du président, une réunion plénière des membres et des vice-présidents pour leur faire part de la question soulevée et de la décision que le banc favorise. Ces réunions plénières ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province.

Il n'y a aucune preuve que la procédure suivie lors de la réunion en cause a été différente de la pratique habituelle de la Commission qui consiste à restreindre les débats aux conséquences en matière de politique d'un avant-projet de décision, à considérer les faits mentionnés dans la décision comme avérés, à ne pas prendre de vote ni vérifier s'il y a consensus, à ne pas rédiger de procès-verbal

1971 when it was referred to, disapprovingly, in Chief Justice McRuer's report in the *Royal Commission Inquiry into Civil Rights*, February 22, 1971, pp. 2004-6.

The appellant learned of the full board meeting by chance and requested a reconsideration by the Board of its decision. This request was denied. In the course of its reasons the Board, as mentioned above, described its practice in detail and defended it as promoting consistency in the Board's decisions and as an institutionalization of the informal practice of conferral among colleagues. The Board considered its practice not a breach of natural justice but rather a procedure well suited to the Board's size, composition, and statutory mandate. Subsequent to the Board's refusal to reconsider its decision, the appellant applied to the Divisional Court for judicial review.

Divisional Court (1985), 51 O.R. (2d) 481

The majority of the Divisional Court, with Osler J. dissenting, granted the application, quashed the Board's decision, and ordered the Board to reconsider the matter in light of the Court's reasons for judgment. The reasons of the majority of the Divisional Court, delivered by Rosenberg J., were to the effect that because the parties had no knowledge as to what had been said in the discussions and no opportunity to respond, there was a violation of the principle that he who hears must decide. It could not be said with certainty that the three-member panel was not influenced in its decision by the full Board, because of the lack of evidence as to what transpired at the meeting. Thus the Court quashed the Board's decision. Osler J., on the other hand, was of the view that the common law contained no prohibition of consultation among decision makers and their colleagues, so long as those who have not heard the evidence and submissions do not participate in the decision. While the parties must be given the

des délibérations et à ne pas prendre les présences. Cette pratique n'est pas récente. Elle remonte au moins aussi loin qu'en 1971, puisque le juge en chef McRuer la mentionne, pour la condamner, dans le rapport de la *Royal Commission Inquiry into Civil Rights*, le 22 février 1971, aux pp. 2004 à 2006.

L'appelante a appris par hasard la tenue de la réunion plénière de la Commission et elle a demandé à la Commission de réexaminer sa décision. Cette demande a été rejetée. Dans ses motifs, la Commission a, comme je l'ai déjà mentionné, décrit sa pratique en détail et l'a justifiée par la cohérence que cette pratique favorise dans les décisions de la Commission, affirmant qu'il s'agit de l'institutionnalisation de la coutume officieuse qu'ont les commissaires de se consulter entre eux. La Commission a estimé que cette pratique ne constituait pas un déni de justice naturelle, mais qu'elle constituait plutôt une procédure bien adaptée à la taille de la Commission, à sa composition et au mandat que lui confère la Loi. Suite au refus de la Commission de réexaminer sa décision, l'appelante a demandé à la Cour divisionnaire de procéder au contrôle judiciaire de la décision.

La Cour divisionnaire (1985), 51 O.R. (2d) 481

La Cour divisionnaire à la majorité, le juge Osler étant dissident, a fait droit à la demande, annulé la décision de la Commission et lui a ordonné de réexaminer l'affaire en fonction des motifs de jugement de la cour. Les motifs de la majorité des juges de la Cour divisionnaire, rédigés par le juge Rosenberg, portent que parce que les parties ne savaient pas ce qui s'était dit au cours des délibérations et n'ont pas eu la possibilité de répliquer, il y a eu violation du principe voulant qu'il appartient à celui qui entend une cause de la trancher. Il était impossible d'affirmer avec certitude que la réunion plénière de la Commission n'avait pas influencé la décision du banc de trois commissaires à cause de l'absence de preuve au sujet de ce qui s'était passé à la réunion. La cour a donc annulé la décision de la Commission. Le juge Osler, quant à lui, a estimé que la common law n'interdit nullement à celui qui doit rendre une décision de consulter des collègues pour autant que ceux qui n'ont pas entendu la preuve et les plaidoi-

opportunity to respond to new ideas or evidence, this case provided no evidence that the full board meeting had yielded any such ideas or evidence.

Court of Appeal (1986), 56 O.R. (2d) 513

The decision of the Divisional Court was reversed on appeal to the Court of Appeal. Cory J.A., as he then was, in the Court of Appeal, concluded that pursuant to s. 102(13) of the *Labour Relations Act* the Labour Relations Board had exclusive jurisdiction to determine its own practice and procedure subject only to the obligation to give a full opportunity to the parties to the proceedings to present evidence and make submissions. He further concluded that there was no denial of natural justice in this case and that the meeting was an exercise of common sense whereby the significance and effect of a decision was discussed with other experts in the field. He emphasized, however, that the full board procedure was limited in that the parties must be recalled if new evidence is considered in the full Board's discussion, and that while the panel can receive advice from the full Board there can be no participation by the other Board members in the decision.

Issues

The issue in this appeal is whether the following rules of natural justice have been violated:

(a) he who decides must hear;

(b) the right to know the case to be met.

The Effect of the Full Board Procedure

The first step in deciding whether the rules of natural justice have been breached is to assess what role, if any, the full board procedure played in the decision-making process. The appellant submits that the outcome of its case may have been influenced by a formalized meeting of the full Board. The respondent Union counters by submit-

ries ne prennent pas part à la décision. Quoique les parties doivent avoir la possibilité de répliquer aux énoncés ou aux éléments de preuve nouveaux, rien n'indique en l'espèce que la réunion plénière de la Commission a donné lieu à de tels énoncés ou éléments de preuve.

La Cour d'appel (1986), 56 O.R. (2d) 513

La Cour d'appel a infirmé la décision de la Cour divisionnaire. Le juge Cory (alors juge de la Cour d'appel) a conclu qu'en vertu du par. 102(13) de la *Loi sur les relations de travail*, la Commission des relations de travail avait compétence exclusive pour déterminer sa propre pratique et procédure sous réserve seulement de l'obligation d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. Il a conclu de plus qu'il n'y avait pas eu déni de justice naturelle en l'espèce et que la réunion était conforme au bon sens en ce qu'elle permettait à des experts d'un domaine de se consulter sur l'importance et la portée d'une décision. Il a cependant souligné que la procédure de réunion plénière de la Commission était limitée étant donné qu'il fallait réentendre les parties si les délibérations de la Commission au complet portaient sur de nouveaux éléments de preuve. Il a aussi souligné que si le banc pouvait obtenir l'avis de la Commission au complet, les autres membres de la Commission ne pouvaient participer à la décision.

Les questions en litige

Il s'agit de déterminer en l'espèce s'il y a eu violation des règles suivantes de justice naturelle:

a) celui qui tranche une affaire doit l'avoir entendue;

b) le droit de connaître la preuve invoquée contre soi.

Les conséquences de la procédure de réunion plénière de la Commission

Pour déterminer s'il y a eu violation des règles de justice naturelle, il faut commencer par évaluer le rôle qu'a pu jouer la procédure de réunion plénière de la Commission dans le processus décisionnel. L'appelante soutient que la réunion plénière officielle de la Commission a pu influer sur l'issue de son affaire. Le syndicat intimé réplique

ting that the appellant must establish a breach of the rules of natural justice but can point to no new evidence or arguments in the decision of the Board that were obtained as a result of the full board procedure. The purport of the Board's reasons on the application for reconsideration is that the ultimate decision was left to the panel and therefore presumably that the discussion of policy implications did not influence the final decision.

In the Board's reasons on reconsideration, it is stated at p. 2002 that the object of the full Board hearings is as follows:

> These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

The Board further states, at pp. 2002-3, that:

> 9. "Full Board" meetings are as important to fashioning informed and practical decisions which will withstand the scrutiny of subsequent panels as is the research and reflection undertaken by the vice-chairmen in preparing their draft decisions .... The "Full Board" meeting merely institutionalizes these discussions and better emphasizes the broad ranging policy implications of individual decisions.

The learned authors of Sack and Mitchell, *Ontario Labour Relations Board Law and Practice*, at p. 7, summarized the practice in the following terms:

> When such a matter is referred in this way, the full Board does not consider the evidence or the facts of the case, but individual members may express their views on questions of law or policy. No vote is taken. The panel which heard the case then confers in private session and reaches a decision. In this way, some uniformity in Board decisions on matters of policy and procedure has been achieved in spite of the fact that differently constituted panels sit every day.

que l'appelante doit faire la preuve d'une violation des règles de justice naturelle, mais qu'elle ne peut signaler, dans la décision de la Commission, la présence d'aucun nouvel élément de preuve ni d'aucun nouvel argument qui soit apparu en raison de la procédure de réunion plénière de la Commission. Les motifs rendus par la Commission au sujet de la demande de réexamen tendent à montrer que la décision ultime a été laissée au banc et qu'il faut donc présumer que le débat sur les conséquences de la politique n'a pas influé sur la décision finale.

Dans les motifs donnés par la Commission relativement à la demande de réexamen, on affirme, à la p. 2002, que les réunions plénières de la Commission visent les objets suivants:

> [TRADUCTION] Ces réunions plénières de la Commission ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province.

La Commission ajoute, aux pp. 2002 et 2003:

> [TRADUCTION] 9. Les réunions plénières de la Commission sont tout aussi importantes pour concevoir des décisions éclairées et pratiques qui résisteront à l'examen de bancs saisis ultérieurement que le sont les recherches et la réflexion des vice-présidents quand ceux-ci préparent leurs avant-projets de décision. [...] La réunion plénière de la Commission ne fait qu'institutionnaliser ces débats et souligne mieux la portée considérable des conséquences de décisions particulières en matière de politique.

Sack et Mitchell, les auteurs de l'ouvrage intitulé *Ontario Labour Relations Board Law and Practice*, décrivent brièvement cette pratique, à la p. 7:

> [TRADUCTION] Quand une question lui est ainsi soumise, la Commission au complet ne s'arrête pas aux faits de l'espèce ou à la preuve soumise, mais un commissaire peut exprimer son avis sur des questions de droit ou de politique. Il n'y a pas de vote. Le banc qui a entendu l'affaire délibère ensuite privément et arrête sa décision. De cette manière, il est possible d'arriver à une certaine uniformité dans les décisions de la Commission sur des questions de politique et de procédure même si la composition des bancs change tous les jours.

The issue before the Board was whether unsolicited disclosure of a proposed plant closing which was alleged to be at least under serious consideration was an aspect of the duty to bargain in good faith. In this regard the Board was being asked by the respondent Union to extend its decision in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, or at least to give it a broad interpretation. That case had decided that, as part of the employer's obligation to negotiate in good faith, an employer had a duty to disclose a *de facto* decision to close a plant. Resolution of this issue required the panel to choose between competing policies. The important role of policy is depicted in the following passages in the Board's original reasons at pp. 1430-31, 1436 and 1443:

In cases of this kind there are, of course, significant conflicting values at stake. There is the desirability of stability in collective bargaining relationships as evidenced by the statutory policy requiring a collective agreement for a minimum term of one year and the twin statutory requirements of "no strike and no lockout". All differences during the term of an agreement are to be funnelled through grievance arbitration. It is also widely understood that management must have the ability to take initiatives in responding to the new demands posed by changing circumstances. The market place seldom awaits labour and management consensus. On the other hand, unilateral management initiatives can adversely affect significant interests of employees and unions who, in the absence of change, may have built up certain expectations and attitudes concerning the status quo.

. . .

The Board must also be sensitive to the statutory purpose of the bargaining duty, the language describing that duty, and the industrial relations implications of one approach over another.

. . .

What policy justification then supports greater unsolicited disclosure and merits the Board's intervention in the face of these potential difficulties?

La Commission devait décider si l'obligation de négocier de bonne foi exigeait la divulgation spontanée d'un projet de fermer une usine qui, selon les allégations, était tout au moins sérieusement à l'étude. À cet égard, le syndicat intimé demandait à la Commission d'appliquer à l'espèce la décision qu'elle avait rendue dans l'affaire *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, ou, tout au moins, de lui donner une interprétation libérale. Dans cette affaire, la Commission avait statué qu'en vertu de l'obligation qui lui incombe de négocier de bonne foi, l'employeur est tenu de divulguer la décision *de facto* de fermer une usine. La solution de cette question exigeait du banc saisi qu'il choisisse entre deux politiques opposées. Les motifs de la décision initiale de la Commission font état de l'importance du rôle des politiques dans les passages suivants aux pp. 1430, 1431, 1436 et 1443:

[TRADUCTION] Les affaires de ce genre font intervenir des valeurs opposées importantes. Il y a, d'une part, l'avantage de la stabilité dans les relations de négociation collective que favorisent la règle de droit prescrivant que la convention collective ait une durée minimale d'une année et la double règle qui interdit le recours à la grève et au lock-out. Tous les différends qui surviennent pendant la durée d'une convention collective doivent être résolus par l'arbitrage des griefs. Il est aussi généralement reconnu que la direction doit avoir la possibilité de prendre les mesures que les changements du marché exigent. Les conditions économiques attendent rarement l'unanimité de la direction et des syndicats pour évoluer. D'autre part, les actions unilatérales de la direction peuvent nuire à des droits importants des travailleurs et des syndicats chez qui, faute de changement, il peut s'être développé certaines attentes et attitudes à l'égard du *statu quo*.

. . .

La Commission doit aussi tenir compte de l'objet de l'obligation de négocier, de la formulation de cette obligation et des conséquences du choix d'une orientation par rapport à une autre sur les relations industrielles.

. . .

Quelles sont les raisons de principe qui justifieraient une divulgation spontanée plus étendue et qui motiveraient l'intervention de la Commission face à la possibilité de telles difficultés?

In the result the Board chose to broaden the application of *Westinghouse* by extending the meaning of a *de facto* decision to the facts of this case. At paragraph 53, p. 1447 of its decision, it stated:

53. In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine established in *Westinghouse*.

The following passage, at p. 2004, from the Board's reasons on reconsideration summarizes the participation of the full Board in the application of policy:

Unsolicited disclosure in collective bargaining—the issue involved in the case—is an area of great significance to effective and harmonious collective bargaining in this Province and it is fair to say that many of the labour and management Board members in attendance at the meeting gave their reaction to the principles and their application as set out in the draft decision. No vote, however, was held and no other mechanism for measuring consensus was employed.

Given the number of Board members present and the fact that included were an alternate Chairman, Vice-chairmen and solicitors, the views expressed were potentially very influential.

In view of the above I adopt the following from the reasons of the majority of the Divisional Court, at pp. 491-92, as a correct statement as to the effect of the full board meeting:

En définitive, la Commission a choisi d'élargir la portée de la décision *Westinghouse* en appliquant le sens de l'expression «décision *de facto*» aux faits de l'espèce. Au paragraphe 53 de sa décision, la Commission dit, à la p. 1447:

[TRADUCTION] 53. De toute façon, nous concluons que la fermeture prochaine était si réelle et probable au début de janvier et que le conseil de direction l'a traitée de manière si superficielle (parce qu'il n'y a eu ni documentation, ni apparemment aucune étude des autres solutions possibles), que la société avait au moins l'obligation de dire qu'à défaut de réaliser une augmentation réelle du chiffre d'affaires ou de connaître un revirement spectaculaire dans l'exploitation de l'entreprise, la société recommanderait la fermeture dans les semaines suivantes. Compte tenu de la lettre envoyée aux employés à l'occasion de Noël, d'un bon deuxième semestre en 1982 et de l'état des pourparlers engagés entre le syndicat local et la direction sur l'avenir de l'usine, le silence de la société à la table des négociations équivalait à une déclaration mensongère au sens de la théorie de la décision *de facto* énoncée dans l'affaire *Westinghouse*.

L'extrait suivant des motifs rendus par la Commission relativement à la demande de réexamen résume la participation de la Commission au complet à l'application d'une politique (à la p. 2004):

[TRADUCTION] La divulgation spontanée à l'occasion de négociations collectives, l'objet du litige en l'espèce, a une grande importance pour ce qui est d'assurer l'efficacité et l'harmonie des négociations collectives dans la province. Aussi, il est juste de dire que de nombreux commissaires représentant les employés ou les employeurs présents à la réunion ont exprimé leur avis sur les principes énoncés dans l'avant-projet de décision et sur leur application. Cependant, il n'y a pas eu de vote, ni de recours à quelque autre moyen de vérifier s'il y avait consensus.

En raison du nombre de commissaires présents et parce que, parmi les personnes présentes, il y avait un président suppléant, des vice-présidents et des avocats, les avis qui y ont été exprimés étaient susceptibles d'avoir une très grande influence sur la décision.

Compte tenu de ce qui précède, j'estime que l'extrait suivant des motifs des juges formant la majorité de la Cour divisionnaire énonce correctement, aux pp. 491 et 492, les répercussions de la réunion plénière de la Commission:

Chairman Shaw [*sic*] states in his reasons that the final decision was made by the three members who heard evidence and argument. He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting. The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all of the members of the board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s. 15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond.

[TRADUCTION] Le président Shaw [*sic*] affirme dans ses motifs que la décision définitive a été arrêtée par les trois commissaires qui avaient entendu la preuve et les plaidoiries. Il ne peut valablement affirmer que lui-même et ses collègues membres du tribunal n'ont pas été influencés par le débat survenu lors de la réunion plénière de la Commission. La façon dont s'est déroulée la réunion plénière de la Commission laisse voir qu'il était important d'avoir l'avis des autres commissaires qui n'avaient entendu ni la preuve ni les plaidoiries avant de prendre une décision finale. La présentation de l'avant-projet de décision à tous les commissaires et à tout le personnel de soutien comportait un risque sérieux que d'autres personnes soumettent leur avis et fassent valoir des arguments. Il est probable que certaines des personnes présentes à la réunion ont exprimé leur avis. Il n'y avait convocation d'une réunion plénière de la Commission que s'il y avait des questions de politique importantes à débattre. La discussion a certainement porté sur les raisons de principe de donner à l'art. 15 une interprétation libérale ou une interprétation restreinte. Les commissaires ou le personnel de soutien ont pu faire part d'informations tirées de leur expérience pratique, ce qui pourrait équivaloir à présenter des éléments de preuve. Les parties au litige n'avaient aucun moyen de savoir ce qui se disait dans ce débat, ni aucune possibilité de répliquer.

I would conclude from the foregoing that the full board meeting might very well have affected the outcome. The Board in its reasons on reconsideration does not directly seek to refute this inference. It does affirm that the final decision was that of the panel. There are two difficulties which confront the Board in seeking to negate the inference. First, I find it difficult to understand how the full board practice can achieve its purpose of bringing about uniformity without affecting the decision of individual panels. Uniformity can only be achieved if some decisions are brought into line with others by the uniform application of policy. The second difficulty is that in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice. The tribunal will not be heard to deny what appears as a plausible objective conclusion. The principle was expressed by Mackay J. in *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.) Mackay J. wrote, at p. 382:

Je conclus de ce qui précède que la réunion plénière de la Commission a fort bien pu influer sur l'issue de l'affaire. Dans les motifs qu'elle a rendus au sujet de la demande de réexamen, la Commission ne tente pas directement de réfuter cette conclusion. Elle assure cependant que la décision finale est bel et bien celle du banc saisi. La Commission rencontre deux difficultés lorsqu'elle cherche à réfuter cette conclusion. Premièrement, il m'est difficile de comprendre comment la pratique de la Commission de tenir des réunions plénières peut permettre d'atteindre son objectif de réaliser l'uniformité sans influencer la décision des bancs particuliers. L'uniformité ne peut se réaliser que si on fait concorder certaines décisions par l'application constante d'une politique. La deuxième difficulté découle de ce qu'en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice. On ne peut accepter que le tribunal nie ce qui paraît être une conclusion objective plausible. Ce principe a été formulé par le juge Mackay dans l'arrêt *Re Ramm* (1957), 7 D.L.R. (2d) 378 (C.A. Ont.), où il dit, à la p. 382:

With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may very well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that "justice should not only be done but should manifestly and undoubtedly be seen to be done". In a word, it is not irrelevant to inquire whether two members of the Council who were not present at the earlier meeting took part in the proceeding in the Council's deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based. [Emphasis added.]

In *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p. 350, Cartwright J. cited with approval the following passage from the judgment of Lord Eldon L.C. in *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943, at pp. 72 and 944:

... but the arbitrator swears, it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.

This statement had been approved previously by this Court in *Szilard v. Szasz*, [1955] S.C.R. 3. Cartwright J. was also impressed by the statement of Romer J. in *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at p. 717:

Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of

[TRADUCTION] Quand à la différence dans la composition du Public Accountants Council lors des première et seconde auditions, il se peut fort bien que les deux membres du Public Accountants Council absents lors de la première audition se soient abstenus de débattre des questions à décider. Il appert cependant qu'ils ont voté puisque la décision de révoquer la licence de l'appelant Ramm était unanime. Il est reconnu qu'il est non seulement important, mais essentiel que «non seulement justice soit rendue, mais qu'il y ait aussi apparence manifeste que justice est rendue». En un mot, il ne s'agit pas de se demander si deux membres du Conseil absents lors de la première audition ont participé aux délibérations du Conseil lors de l'audition subséquente. Ce qui est critiquable, c'est leur présence pendant la période de consultation, situation qui ne leur permettait pas d'examiner, d'une manière judiciaire, la preuve présentée sous serment plusieurs jours auparavant, en leur absence, sur laquelle une décision devait être fondée. [Je souligne.]

Dans l'arrêt *Mehr v. Law Society of Upper Canada*, [1955] R.C.S. 344, à la p. 350, le juge Cartwright cite, en l'approuvant, le passage suivant des motifs du lord chancelier Eldon dans l'arrêt *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943, aux pp. 72 et 944 respectivement:

[TRADUCTION] ... mais l'arbitre jure que cela (le fait d'avoir entendu d'autres personnes) n'a pas influencé sa décision. Je le crois. C'est un homme très respectable. Je ne puis cependant, par déférence pour qui que ce soit, faire ce qui m'apparaît contraire aux principes généraux. Un juge ne peut prendre sur lui de dire si un élément de preuve irrégulièrement admis a influencé sa décision. La décision peut avoir rendu justice parfaitement, mais elle ne saurait être justifiée selon les principes généraux.

Notre Cour a déjà approuvé cette affirmation dans l'arrêt *Szilard v. Szasz*, [1955] R.C.S. 3. Le juge Cartwright a lui aussi été impressionné par l'énoncé du juge Romer dans l'arrêt *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, à la p. 717:

[TRADUCTION] De plus, j'aimerais simplement souligner ceci: à cette réunion du 16 mai, il y avait trois juges qui n'avaient pas entendu la preuve présentée sous serment le 25 avril. Il y a eu partage d'opinions. La résolution en faveur de confirmer a été adoptée à huit voix contre deux et il est à tout le moins possible que la majorité ait été amenée à se prononcer comme elle l'a fait en raison

those members who had not been present on April 25, to whom the facts were entirely unknown.

I turn next to consider whether a discussion of policy matters at the full board meeting which may have affected the outcome constituted a breach of the rules of natural justice.

The Principles of Natural Justice

Section 102(13) of the Act provides that the Board shall give full opportunity to the parties to present their evidence and make their submissions. The Board is empowered to determine its own practice and procedure but rules governing its practice and procedure are subject to the approval of the Lieutenant Governor in Council. While not every practice of the Board would necessarily be subject to the approval of the Lieutenant Governor, the full board practice is one which might require such approval. No such approval has been given and indeed the practice does not appear to have been adopted formally as a rule of the Board. In view of the fact, however, that this point was not argued I do not propose to deal with it further.

The full board hearing in this case is said to violate the principles of natural justice in two respects: first, that members of the Board who did not preside at the hearing participated in the decision; and second, that the case is decided at least in part on the basis of materials which were not disclosed at the hearing and in respect of which there was no opportunity to make submissions.

Although these are distinct principles of natural justice, they have evolved out of the same concern: a party to an administrative proceeding entitled to a hearing is entitled to a meaningful hearing in the sense that the party must be given an opportunity to deal with the material that will influence the tribunal in coming to its decision, and to deal with it in the presence of those who make the decision. As stated by Crane in his case comment on the *Consolidated-Bathurst* decision (1988), 1 *C.J.A.L.P.* 215, at p. 217: "The two rules have the

de l'éloquence des membres qui avaient été absents le 25 avril et qui ignoraient absolument tout des faits.

Je vais maintenant examiner si le débat qui a été tenu sur des questions de politique lors de la réunion plénière de la Commission et qui a pu influer sur l'issue de l'affaire a constitué une violation des règles de justice naturelle.

Les principes de justice naturelle

Le paragraphe 102(13) de la Loi prévoit que la Commission doit accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. La Commission a le pouvoir d'établir sa propre pratique et procédure, mais les règles qui régissent cette pratique et cette procédure sont soumises à l'approbation du lieutenant-gouverneur en conseil. Bien que ce ne soient pas toutes les pratiques de la Commission qui doivent être ainsi approuvées, la pratique des réunions plénières de la Commission en est une qui pourrait nécessiter cette approbation. Aucune approbation de cette nature n'a été donnée et la pratique ne paraît pas avoir été adoptée officiellement à titre de règle de la Commission. Mais puisque ce point n'a pas été débattu, je n'ai pas l'intention de m'y arrêter.

On a soutenu que la réunion plénière de la Commission en l'espèce viole les principes de justice naturelle de deux manières: premièrement, parce que des commissaires qui ne faisaient pas partie du banc qui a entendu l'affaire ont participé à la décision et, deuxièmement, parce que la décision a été, au moins en partie, prise en fonction d'éléments qui n'ont pas été divulgués à l'audition et à l'égard desquels il n'y a pas eu de possibilité de présenter des arguments.

Bien qu'il s'agisse de principes de justice naturelle distincts, ceux-ci découlent du même souci: faire en sorte qu'une partie à une procédure administrative qui a droit à une audition bénéficie d'une véritable audition, en ce sens qu'elle doit avoir la possibilité de répondre à tous les éléments qui influeront sur la décision du tribunal et d'y répondre en présence de ceux qui prennent cette décision. Crane le formule ainsi dans son commentaire sur la décision *Consolidated-Bathurst* (1988), 1 *C.J.A.L.P.* 215, à la p. 217: [TRADUCTION] «Les

same purpose: to preserve the integrity and fairness of the process." In the first case the party has had no opportunity to persuade some of the members at all, while in the second the party has not been afforded an opportunity to persuade the tribunal as to the impact of material obtained outside the hearing.

The concern for justice is aptly put by the pithy statement in the McRuer Report criticizing the full board procedure. At pages 2005-6, the former Chief Justice of the High Court of Ontario states:

> To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.
>
> . . .
>
> Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

Although I am satisfied that, at least formally, the decision here was made by the three-member panel, that does not determine the matter. The question, rather, is whether the introduction of policy considerations in the decision-making process by members of the Board who were not present at the hearing and their application by members who were present but who heard no submissions from the parties in respect thereto, violates the rationale underlying the above principles.

In answering this question, it is necessary to consider the role of policy in the decision-making processes of administrative tribunals. There is no question that the Labour Board is entitled to consider policy in arriving at its decisions. See Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36:

deux règles ont le même objet, celui de préserver l'intégrité et l'équité du processus». Dans le premier cas, la partie n'a pas du tout eu la possibilité de convaincre certains des commissaires alors que, dans le second cas, la partie n'a pas eu la possibilité de convaincre le tribunal quant à l'incidence des éléments obtenus en dehors de l'audition.

L'énoncé lapidaire du rapport McRuer qui critique la procédure de réunion plénière de la Commission formule bien ce souci de justice. Aux pages 2005 et 2006, l'ancien juge en chef de la Haute Cour de l'Ontario dit ceci:

> [TRADUCTION] Le fait de porter une affaire à la connaissance de toute la Commission pour en débattre et obtenir l'avis de personnes qui n'ont pas participé à l'audition sans que les parties touchées aient la possibilité d'exprimer leur avis constitue une violation du principe selon lequel celui qui tranche une affaire doit l'avoir entendue.
>
> . . .
>
> Malgré que la décision ultime soit prise par ceux qui ont assisté à l'audition, quand une section de la Commission juge nécessaire qu'une affaire soit débattue devant l'ensemble de la Commission ou une section plus grande, il faudrait en prévenir les parties et leur donner la possibilité d'être entendues.

Quoique je sois convaincu qu'officiellement, à tout le moins, c'est le banc de trois commissaires qui a pris la décision, cette conclusion ne clôt pas le débat. La question en litige est plutôt de savoir si l'introduction de considérations de politique dans le processus décisionnel par des commissaires qui n'ont pas assisté à l'audition et leur application par des commissaires qui étaient présents mais qui n'ont pas entendu de plaidoiries des parties au sujet de ces considérations est contraire à la raison d'être des principes susmentionnés.

Pour répondre à cette question, il faut examiner le rôle des politiques dans le processus décisionnel des tribunaux administratifs. Il n'y a pas de doute que la Commission des relations de travail peut tenir compte de politiques pour rendre ses décisions. Voir le juge Dickson (maintenant Juge en chef) dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, aux pp. 235 et 236:

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The Board, then, is obliged by statute to hold a hearing and to give the parties a full opportunity to present evidence and submissions. It is also entitled to apply policy. At a time when the content of the rules of natural justice was determined by classifying tribunals as quasi-judicial or administrative, the Board would have been classified as exercising hybrid functions. A tribunal exercising hybrid functions did so in two stages. As a quasi-judicial tribunal it was required to comply with the rules of natural justice. In making its decision, however, it assumed its administrative phase and could overrule the conclusion which was indicated at the hearing by the application of administrative policy. Examples of this type of tribunal and the jurisprudence relating to its functions can be found in cases such as *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, and *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439 (Ont. C.A.) In this state of the law there was no obligation on a tribunal during its administrative phase to comply with the rules of natural justice and hence to disclose policy which was being applied. Although tribunals exercising so-called administrative functions were subject to a general duty of fairness, disclosure of the policy to be applied by the tribunal was generally not a requirement. In the case of hybrid tribunals, therefore, such non-disclosure at the quasi-judicial stage would not have been considered a breach of the rules of natural justice. In this respect policy was treated on the same footing as the law. Both law and policy might be dealt with at the hearing but the tribunal was entitled to supplement it by its own researches without disclosure to the parties.

La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher des questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

La Loi oblige donc la Commission à tenir une audition et à donner aux parties toute possibilité de présenter des éléments de preuve et des arguments. Elle a aussi le pouvoir d'appliquer des politiques. À l'époque où la classification des tribunaux en tribunaux quasi judiciaires ou administratifs déterminait le contenu des règles de justice naturelle, la Commission aurait été classée dans la catégorie des tribunaux qui exerçaient des fonctions hybrides. Un tribunal qui exerçait des fonctions hybrides le faisait en deux étapes. À titre de tribunal quasi judiciaire, il était tenu de se conformer aux règles de justice naturelle. Au moment de rendre sa décision, il entrait dans la phase administrative de ses fonctions et pouvait, par l'application d'une politique administrative, écarter la conclusion indiquée à l'audience. On trouve des exemples de ce type de tribunal et de la jurisprudence qui traite de ses fonctions dans les arrêts *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, et *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439 (C.A. Ont.) Selon cet état du droit, un tribunal n'était pas tenu, dans la phase administrative de ses fonctions, d'observer les règles de justice naturelle et par conséquent de divulguer la politique qu'il appliquait. Bien que les tribunaux qui remplissaient ces fonctions dites administratives étaient assujettis à une obligation générale d'agir avec équité, ils n'étaient pas tenus, en règle générale, de divulguer la politique qu'ils allaient appliquer. Par conséquent, dans le cas des tribunaux hybrides, la non-divulgation de cette politique pendant la phase quasi judiciaire n'aurait pas été considérée contraire aux règles de justice naturelle. À cet égard, les politiques étaient placées sur le même pied que le droit. Il était possible de traiter les politiques et le droit à l'audition, mais le tribunal pouvait la compléter par ses propres recherches sans en informer les parties.

This view of the role of policy must be reappraised in light of the evolution of the law relating to the classification of tribunals and the application to them of the rules of natural justice and fairness. The content of these rules is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstances of the case, the governing statutory provisions and the nature of the matters to be determined. See *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879.

It is no longer appropriate, therefore, to conclude that failure to disclose policy to be applied by a tribunal is not a denial of natural justice without examining all the circumstances under which the tribunal operates.

The proceedings which are the subject of this appeal involve the exercise of extraordinary powers by the Board. In this case the Board was asked to order reopening of the Hamilton plant although it had operated at a loss. Although the Board declined to make that order, it apparently considered that it had jurisdiction to do so. In lieu thereof the employer was ordered to pay damages. These are civil consequences that affect the rights of employers to a greater degree than many civil actions in the courts in which a litigant enjoys the whole panoply of protection afforded by the rules of practice, procedure and the rules of evidence. The Act, here, provides for a full opportunity to the parties to present evidence and to make submissions. Is this opportunity denied when the tribunal considers and applies policy without giving the parties an opportunity to deal with it at the hearing? Is it a breach of the standard of fairness which underlies the rules of natural justice?

The answers to these questions lie in the nature of policy and whether it is correct to treat it on the

Il y a lieu de réévaluer cette conception du rôle des politiques en fonction de l'évolution du droit relatif à la classification des tribunaux et à l'application des règles de justice naturelle et d'équité à leur endroit. Le contenu de ces règles ne dépend plus de leur classification en règles judiciaires, quasi judiciaires ou administratives, mais il est déterminé par les circonstances de l'affaire, les dispositions législatives applicables et la nature des litiges à décider. Voir *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, et *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879.

Il ne convient donc plus de conclure que l'omission de divulguer les politiques que le tribunal va appliquer ne constitue pas un déni de justice naturelle sans examiner toutes les circonstances dans lesquelles le tribunal fonctionne.

Les procédures visées par le présent pourvoi portent sur l'exercice de pouvoirs exceptionnels de la part de la Commission. En l'espèce, on demandait à la Commission d'ordonner la réouverture de l'usine de Hamilton, même si son exploitation avait été déficitaire. Même si la Commission a refusé de rendre cette ordonnance, elle semble avoir estimé qu'elle avait compétence pour la rendre. L'employeur a plutôt été condamné à payer des dommages-intérêts. Ce sont là des conséquences civiles qui touchent plus les droits des employeurs que ne le font de nombreuses actions civiles devant des tribunaux où le justiciable bénéficie de toute la protection offerte par les diverses règles de pratique, de procédure et de preuve. En l'espèce, la Loi prescrit d'accorder toute possibilité aux parties de présenter leur preuve et de faire valoir leurs arguments. Cette possibilité est-elle refusée quand le tribunal examine et applique une politique sans donner aux parties la possibilité d'en traiter à l'audition? Est-ce là une violation de la norme d'équité qui sous-tend les règles de justice naturelle?

La réponse à ces questions dépend de la nature des politiques et de ce qu'il est ou non correct de

same footing as the law. In *Innisfil (Corporation of the Township) v. Corporation of Township of Vespra*, [1981] 2 S.C.R. 145, this Court was called upon to deal with the question whether a party to a proceeding before the Ontario Municipal Board was entitled to challenge policy by leading evidence and by cross-examination—the traditional methods for contesting fact. The Court of Appeal of Ontario had held that government policy introduced at the hearing was not binding but could be met by other evidence. Cross-examination was, however, denied. In this Court, the right to challenge policy by evidence was affirmed. In addition, the appellants were accorded the right to cross-examine and the Court of Appeal was reversed in this respect. Estey J., who delivered the judgment of the Court, stated, at p. 167:

> On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.

If a party has the right to attack policy in the same fashion as fact, it follows that to deprive the party of that right is a denial of a full opportunity to present evidence and is unfair. Policy in this respect is not like the law which cannot be the subject of evidence or cross-examination. Policy often has a factual component which the law does not. Furthermore, under our system of justice it is crucial that the law be correctly applied. The court or tribunal is not bound to rely solely on the law as presented by the parties. Accordingly, a tribunal can rely on its own research and if that differs from what has been presented at the hearing, it is bound to apply the law as found. Ordinarily there is no obligation to disclose to the parties the fruits of the tribunal's research as to the law, although it is a salutary practice to obtain their views in respect of an authority which has come to the tribunal's attention and which may have an important influence on the case. For an example of the application of this practice in this Court, see *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p.

les mettre sur le même pied que le droit. Dans l'arrêt *Innisfil (Municipalité du canton) c. Municipalité du canton de Vespra*, [1981] 2 R.C.S. 145, notre Cour devait décider si une partie à une procédure tenue devant la Commission municipale de l'Ontario avait le droit de contester une politique en présentant des éléments de preuve et en procédant à des contre-interrogatoires, qui sont les méthodes traditionnelles de contester les faits. La Cour d'appel de l'Ontario avait statué que la politique du gouvernement présentée à l'audition n'avait pas force obligatoire, mais qu'elle était susceptible de contestation sous forme de preuve contradictoire. On a cependant refusé le droit de contre-interroger. Notre Cour a confirmé le droit de contester une politique au moyen d'une preuve. De plus, l'appelante s'est vu accorder le droit de contre-interroger, ce qui infirmait la décision de la Cour d'appel à cet égard. Le juge Estey, qui a rendu l'arrêt de la Cour, dit ceci, à la p. 167:

> D'autre part, quand les droits d'une personne sont en jeu et que la loi lui accorde le droit à une audition complète, dont celle de la démonstration de ses droits, on s'attendrait à trouver dans la loi la négation catégorique du droit de cette personne de réfuter, par contre-interrogatoire, la preuve apportée contre elle.

Si une partie a le droit de contester une politique de la même manière qu'elle peut contester un fait, il s'ensuit que priver une partie de ce droit constitue un refus d'accorder à cette partie toute possibilité de présenter sa preuve et est injuste. Sous ce rapport, une politique diffère du droit qui ne peut faire l'objet d'une preuve ou d'un contre-interrogatoire. Une politique a souvent une composante factuelle que le droit n'a pas. De plus, selon notre système de justice, il est essentiel que le droit soit correctement appliqué. Un tribunal judiciaire ou administratif n'est pas astreint à s'en remettre aux seules règles de droit que les parties lui ont soumis. En conséquence, un tribunal administratif peut se fonder sur ses propres recherches et, en cas de divergence avec ce qui a été soumis à l'audition, il est tenu d'appliquer le droit déterminé par le résultat de ses recherches. Ordinairement, il n'y a pas d'obligation de révéler aux parties le fruit des recherches du tribunal quant au droit, bien qu'il soit recommandable d'obtenir leur avis quant à un précédent qui est porté à l'attention du tribunal et

36. We do not have the same attitude to policy. There is not necessarily one policy that is the right policy. Often there are competing policies, selection of the better policy being dependent on being subjected to the type of scrutiny which was ordered in *Innisfil*, *supra*.

Ample support can be found in the cases and writings for the proposition that generally policy is to be treated more like fact than law. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, Laskin C.J., in holding that the Commission was entitled to rely on policy, stated at p. 171:

> ... it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

In *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 223, the learned author states:

> ... an opportunity to be heard, both on the application and the merits of the policy, may be required in order to prevent a fettering of discretion.

In support, the learned author cites *R. v. Criminal Injuries Compensation Board*, [1973] 1 W.L.R. 1334, at p. 1345, *per* Megaw L.J.:

> As to the question of the board's minutes, I think that justice and paragraph 22 of the Scheme alike require that if the board in any particular case are minded to be guided by any principle laid down in any pre-existing minute of the board, the applicant must be informed of the existence and terms of that minute, so that he can, if he wishes, make his submissions with regard thereto: that is, submissions on the questions whether the principle is right or wrong in relation to the terms of the

qui peut avoir une influence considérable sur sa décision. Pour un exemple de l'application de cette pratique en notre Cour, on peut consulter l'arrêt *Ville de Kamloops c. Nielsen*, [1984] 2 R.C.S. 2, à la p. 36. Nous n'avons pas la même attitude envers les politiques. Il n'y a pas nécessairement une politique qui soit la bonne à suivre. Il arrive souvent que les politiques s'opposent et que le choix de la meilleure dépende d'un examen comme celui ordonné dans l'arrêt *Innisfil*, précité.

La jurisprudence et la doctrine appuient abondamment la proposition qu'en général il y a lieu de traiter une politique davantage comme un fait que comme du droit. Dans l'arrêt *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, le juge en chef Laskin, statuant que la Commission avait le droit de se fonder sur une politique, dit à la p. 171:

> ... il était tout à fait approprié d'énoncer des principes directeurs comme le Conseil l'a fait à l'égard de la télévision par câble. Les principes en cause ont été établis après de longues auditions auxquelles les parties intéressées étaient présentes et ont pu faire des observations. Sous le régime de réglementation établi par la *Loi sur la radiodiffusion*, il est dans l'intérêt des titulaires éventuels de licences et du public d'avoir une politique d'ensemble. Même si une telle politique peut ressortir d'une succession de demandes, il est plus judicieux de la faire connaître à l'avance.

Dans son ouvrage intitulé *de Smith's Judicial Review of Administrative Action* (4e éd. 1980), de Smith affirme, à la p. 223:

> [TRADUCTION] ... la possibilité d'être entendu tant sur l'application que sur le bien-fondé d'une politique peut être nécessaire afin d'éviter une diminution de pouvoir discrétionnaire.

Pour étayer son avis, l'auteur cite les motifs du lord juge Megaw dans l'arrêt *R. v. Criminal Injuries Compensation Board*, [1973] 1 W.L.R. 1334, à la p. 1345:

> [TRADUCTION] Quand aux procès-verbaux de la commission, je crois que la justice de même que le régime du paragraphe 22 exigent que si, dans un cas particulier, la commission veut s'inspirer de quelque principe formulé dans un procès-verbal préexistant, le requérant soit avisé de l'existence et des termes de ce procès-verbal, de sorte qu'il puisse, s'il le désire, présenter des arguments à son égard, c'est-à-dire des arguments relatifs aux questions de savoir si le principe est bon ou mauvais par rapport

Scheme and whether the principle, if right, is applicable or inapplicable to the facts of the particular case.

Another comment from de Smith is found in the section on the right to a hearing, at p. 182, note 92:

Whilst it would be going too far to assert that in all circumstances there is an implied right to be apprised of and to argue against policy proposals, there are some indications pointing in this direction: see for example, *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] A.C. 610, 625, 631 (desirable that notice be given to applicants for industrial grants of any rule or policy generally followed by the Department, and an opportunity for the applicants to make representations on the soundness or applicability of the policy or rule: this would make applications more effective and prevent the Department from fettering its statutory discretion) . . . .

In Professor Garant's *Droit administratif* (2nd ed. 1985), he states, at pp. 792-93:

[TRANSLATION] It seems to be well established that a policy or guidelines previously adopted by a tribunal do not give rise to a reasonable apprehension of bias, if the tribunal respects the *audi alteram partem* rule, even if the decision to intervene is in accordance with the policy or guidelines.

See also Dussault and Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), at p. 423, and Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 269.

In the discussion of "The Duty of Disclosure" Aronson and Franklin in *Review of Administrative Action* write, at p. 183:

The extent to which policy, expertise and independent inquiry are integral to the decision-making process will inevitably vary according to the subject matter for decision or investigation. But even in a trial-type hearing, the adjudicator is not bound exclusively by the parties' proofs and arguments, and will need to accommodate public and institutional interests. The more "polycentric", policy-oriented or technical a problem, the greater is the pressure on decision-makers to seek out solutions, to confer separately with interested persons, and to use their experience to find a settlement. The ability of administrators to inform themselves, and to apply their expertise and accumulated experience, and the expecta-

aux conditions du régime et si, à supposer qu'il soit bon, ce principe est applicable ou non aux faits de l'espèce.

On trouve cet autre commentaire de de Smith dans la section portant sur le droit à une audition, à la p. 182, note 92:

[TRADUCTION] Quoique ce serait aller trop loin que de soutenir qu'il existe, en toutes circonstances, un droit implicite d'être informé de toute proposition de politique et de la contester, il y a des indications en ce sens: voir, par exemple, *British Oxygen Co. Ltd.* v. *Board of Trade*, [1971] A.C. 610, aux pp. 625 et 631 (il est à souhaiter que les demandeurs de subventions industrielles soient informés de l'existence de toute règle ou politique généralement appliquée par le Ministère, et qu'ils aient la possibilité de présenter des arguments sur le bien-fondé ou l'applicabilité de la politique ou de la règle: cette pratique rendrait les demandes plus efficaces et empêcherait le Ministère de restreindre son pouvoir discrétionnaire) . . .

Dans son ouvrage intitulé *Droit administratif* (2e éd. 1985), le professeur Garant affirme, aux pp. 792 et 793:

La jurisprudence nous semble bien à l'effet qu'un énoncé de politique ou des directives prises préalablement par un tribunal ne donnent pas lieu à crainte raisonnable de préjugé, si le tribunal respecte la règle *audi alteram partem*, même si la décision à intervenir est conforme à l'énoncé de politique ou aux directives.

Voir également Dussault et Borgeat, *Traité de droit administratif* (2e éd. 1984), à la p. 423, et Pépin et Ouellette, *Principes de contentieux administratif* (2e éd. 1982), à la p. 269.

Au sujet de [TRADUCTION] «L'obligation de divulguer», Aronson et Franklin écrivent dans leur ouvrage intitulé *Review of Administrative Action*, à la p. 183:

[TRADUCTION] La mesure dans laquelle les politiques, l'expérience et la recherche personnelle font partie intégrante du processus décisionnel varie forcément selon le sujet de la décision ou de la recherche. Même dans une audition apparentée à un procès, le décideur n'est pas restreint à la preuve et aux arguments soumis par les parties, mais il doit tenir compte de l'intérêt du public et des institutions. Plus un problème est «polycentrique», technique ou axé sur une politique, plus le décideur sera poussé à chercher des solutions, à conférer séparément avec les personnes intéressées et à faire appel à leur expérience pour arriver à un règlement. La capacité des juges de tribunaux administratifs de se renseigner, de

tion that they will do so, makes the duty of disclosure sometimes difficult to define, and to observe. At the same time, however, it enhances the importance of the duty. Disclosure can act as an important safeguard against the use of inaccurate material or untested theories. It can also contribute to the efficiency of the hearing by directing argument and information to the relevant issues and materials. [Emphasis added.]

Wade, *Administrative Law* (4th ed. 1977) states, at p. 470:

Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly *vis-a-vis* any person who will be adversely affected. The decision will require the weighing of any such person's interests against the claims of policy; and this cannot fairly be done without giving that person an opportunity to be heard.

In my opinion, therefore, the full board hearing deprived the appellant of a full opportunity to present evidence and submissions and constituted a denial of natural justice. While it cannot be determined with certainty from the record that a policy developed at the full board hearing and not disclosed to the parties was a factor in the decision, it is fatal to the decision of the Board that this is what might very well have happened.

While achieving uniformity in the decisions of individual boards is a laudable purpose, it cannot be done at the expense of the rules of natural justice. If it is the desire of the legislature that this purpose be pursued it is free to authorize the full board procedure. It is worthy of note that Parliament has given first reading to Bill C-40, a revised *Broadcasting Act* which authorizes individual panels to consult with the Commission and officers of the Commission in order to achieve uniformity in the application of policy (s. 19(4)). Provision is made, however, for the timely issue of guidelines and statements with respect to matters within the jurisdiction of the Commission.

mettre à profit leurs compétences et expérience et les attentes qu'ils le feront, rend parfois difficile de définir et de respecter l'obligation de divulguer. Mais, en même temps, cette capacité accroît l'importance de cette obligation. La divulgation peut constituer une protection importante contre l'utilisation d'éléments inexacts ou de théories non éprouvées. Elle peut aussi favoriser l'efficacité de l'audition en concentrant les renseignements et l'argumentation sur les sujets et les éléments de preuve pertinents. [Je souligne.]

Wade affirme, à la p. 470 de son ouvrage intitulé *Administrative Law* (4e éd. 1977):

[TRADUCTION] Il va sans dire que les politiques constituent le fondement de la discrétion administrative dans de nombreuses affaires, mais ceci ne justifie pas de ne pas exercer ce pouvoir discrétionnaire avec équité envers toute personne qui sera défavorisée par une décision. La décision exige qu'on soupèse les intérêts de ces personnes en fonction de ce qu'exige une politique; on ne peut le faire sans donner à cette personne la possibilité d'être entendue.

À mon avis, la réunion plénière de la Commission a donc privé l'appelante de la pleine possibilité de présenter des éléments de preuve et de faire valoir des arguments et a constitué un déni de justice naturelle. Quoique le dossier ne permette pas de déterminer avec certitude si la formulation, lors de la réunion plénière, d'une politique qui n'a pas été divulguée aux parties a eu un effet sur la décision, le fait que la chose ait très bien pu se produire est fatal à la décision de la Commission.

Même si l'uniformisation des décisions de tribunaux particuliers est souhaitable, elle ne peut se faire aux dépens des règles de justice naturelle. Si le législateur veut permettre la poursuite de cet objectif, il est libre d'autoriser la procédure de réunion plénière de la Commission. Il convient de souligner que le Parlement a adopté en première lecture le projet de loi C-40, une refonte de la *Loi sur la radiodiffusion*, lequel permet à des bancs particuliers de consulter le Conseil et ses cadres afin de réaliser une application uniforme des politiques (par. 19(4)). On prévoit cependant la promulgation régulière de directives et d'énoncés de politique relativement aux matières relevant de la compétence du Conseil.

Section 114

The respondents do not contend that if a breach of natural justice has occurred, the privative clause in s. 108 of the Act would apply. They have, however, submitted that if there was a breach of natural justice, it was technical only and hence no remedy should be available. The respondents cite s. 114 of the Act as well as *Toshiba Corp. v. Anti-Dumping Tribunal* (1984), 8 Admin. L.R. 173 (F.C.A.) Section 114 reads:

114. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

Toshiba concerned a preliminary staff report prepared for the Anti-Dumping Tribunal which was not revealed to the parties and which the Court described as "a dangerous practice." Nonetheless, the Court of Appeal was satisfied that the report contained only matters of general knowledge or was based upon facts and sources which were brought out at the hearing in such a manner that the parties had the opportunity to test them. Thus any breach of natural justice was minor and inconsequential and the application for judicial review was dismissed.

The submission that there is no prejudice as a result of a technical breach of rules of natural justice requires that the party making the allegation establish this fact. To do so in this case it would be necessary for the respondents to satisfy the court that the matters discussed were all matters that had been brought out at the hearing. This has not occurred; unlike *Toshiba* there is no report or minutes of the full board meeting against which the hearing proceedings can be compared. The appellant can hardly be expected to establish prejudice when it was not privy to the discussion before the full Board and there is no evidence as to what in fact was discussed. In the absence of such evidence the gravity of the breach of natural jus-

L'article 114

Les intimés ne soutiennent pas que s'il y a eu violation des règles de justice naturelle, la clause privative de l'art. 108 de la Loi s'applique. Ils ont toutefois soutenu que s'il y a eu violation des règles de justice naturelle, elle a été purement formelle et qu'il n'y a pas lieu d'accorder quelque réparation que ce soit. Les intimés invoquent l'art. 114 de la Loi et l'arrêt *Toshiba Corp. c. Tribunal antidumping* (1984), 8 Admin. L.R. 173 (C.A.F.) L'article 114 est ainsi conçu:

114 Les instances introduites en application de la présente loi ne sont pas nulles en raison d'un vice de forme ou d'une irrégularité technique. Elles ne sont pas rejetées ni annulées, à moins qu'il n'en résulte un préjudice grave ou une erreur judiciaire fondamentale.

L'arrêt *Toshiba* porte sur un rapport préliminaire du personnel préparé pour le Tribunal antidumping qui n'avait pas été divulgué aux parties, ce que la cour a qualifié de «pratique dangereuse». Néanmoins, la Cour d'appel s'est dite convaincue que tout ce qui était contenu dans le rapport était de notoriété publique ou était fondé sur des faits et des sources soulevés à l'audience d'une manière telle que les parties avaient eu la possibilité de les examiner. Donc, s'il y avait eu violation des règles de justice naturelle, elle était mineure et sans importance de sorte que la demande de contrôle judiciaire a été rejetée.

L'argument selon lequel il n'y a pas eu de préjudice causé par une violation technique des règles de justice naturelle exige de la partie qui l'invoque qu'elle établisse cette absence. Pour faire cette preuve en l'espèce, il faudrait que les intimés convainquent la cour que les sujets discutés avaient tous été abordés à l'audition. Ce n'est pas ce qui s'est produit; à la différence de l'affaire *Toshiba*, il n'y a pas de compte rendu ou de procès-verbal de la réunion plénière de la Commission qui permettraient de faire la comparaison avec les procédures d'audition. On ne saurait demander à l'appelante de prouver l'existence d'un préjudice alors qu'elle n'a pas eu connaissance de ce qui a été discuté à la réunion plénière de la Commission et qu'il n'y a pas de preuve quant à ce qui y a été réellement discuté. En l'absence de cette preuve, il est impossible de déterminer la gravité de la violation des

tice cannot be assessed, and I cannot conclude that no substantial wrong has occurred.

Section 102(13)

Nor can I conclude that the full board procedure is saved by virtue of s. 102(13) of the *Labour Relations Act*. Section 102(13) reads:

102. ...

(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable. [Emphasis added.]

I recognize the importance of deference to a board's choice of procedures expressed by this Court in *Komo Construction Inc. v. Commission des Relations de Travail du Québec*, [1968] S.C.R. 172, at p. 176 [reported in English translation at (1967), 1 D.L.R. (3d) 125, at p. 127], *per* Pigeon J.:

While upholding the rule that the fundamental principles of justice must be respected, it is important to refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure.

However, in this case the appellant was not given a full opportunity to present evidence and make submissions, which is an explicit limit placed by statute on the Board's control of its procedure. Furthermore, when the rules of natural justice collide with a practice of the Board, the latter must give way.

Disposition

In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the order of the Divisional Court restored with costs to the appellant against the respondents both here and in the Court of Appeal.

règles de justice naturelle et je ne puis conclure qu'il n'y a pas eu de préjudice grave.

Le paragraphe 102(13)

Je ne puis non plus conclure que la procédure de réunion plénière de la Commission est sauvegardée en vertu du par. 102(13) de la *Loi sur les relations de travail*. Le paragraphe 102(13) est ainsi conçu:

102 ...

(13) La Commission régit sa propre pratique et procédure, sous réserve toutefois d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. La Commission peut, sous réserve de l'approbation du lieutenant-gouverneur en conseil, établir des règles de pratique et de procédure, réglementer l'exercice de ses attributions et prescrire les formules qu'elle estime opportunes. [Je souligne.]

Je reconnais l'importance de la déférence à l'égard du choix fait par une commission de sa procédure, dont parle le juge Pigeon de notre Cour dans l'arrêt *Komo Construction Inc. v. Commission des Relations de Travail du Québec*, [1968] R.C.S. 172, à la p. 176:

Tout en maintenant le principe que les règles fondamentales de justice doivent être respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure.

Cependant, en l'espèce, l'appelante n'a pas eu toute possibilité de présenter sa preuve et de faire valoir ses arguments, alors que cette possibilité constitue une limite expresse que la Loi impose au contrôle de la Commission sur sa procédure. De plus, quand les règles de justice naturelle entrent en conflit avec une pratique de la Commission, cette dernière doit céder le pas.

Dispositif

En conséquence, le pourvoi est accueilli, l'arrêt de la Cour d'appel est infirmé et l'ordonnance de la Cour divisionnaire est rétablie avec dépens en faveur de l'appelante contre les intimés en notre Cour et en Cour d'appel.

The judgment of Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

GONTHIER J.—I have had the opportunity to read the reasons of my colleague, Sopinka J., and I must respectfully disagree with his conclusions in this case. While I do not generally disagree with the summary of the facts, decisions and issues, I consider it useful to refer to them in somewhat more detail.

The appeal is from a decision of the Court of Appeal of Ontario dismissing an application for judicial review of two decisions of the Ontario Labour Relations Board (the "Board"). In the first decision, a tripartite panel composed of G. W. Adams, Q.C., Chairman of the Board, W. H. Wightman and B. F. Lee representing the management and labour sides respectively, decided, Mr. Wightman dissenting, that the appellant had failed to bargain in good faith with the respondent union because it did not disclose during the negotiations its impending decision to close the plant covered by the collective agreement. Counsel for the appellant then learned that a full board meeting had been called to discuss the policy implications of its decision when it was still in the draft stage. The parties were neither notified of nor invited to participate in this meeting. The appellant applied for a reconsideration of this decision under s. 106 of the *Labour Relations Act*, R.S.O. 1980, c. 228, on the ground that the full board meeting had vitiated the Board's decision and on the ground that the evidence adduced at the first hearing had been improperly considered. The same panel rejected both these arguments in the second decision (the "reconsideration decision").

The Board's decisions were challenged in the Divisional Court on the basis: (1) that the original decision was manifestly unreasonable in fact and in law, and (2) that the full board meeting called by the Board prior to the panel's decision constituted a violation of the rules of natural justice. The Divisional Court rejected the first ground and the appellant did not raise this argument in the

Version française du jugement des juges Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE GONTHIER—J'ai eu l'avantage de lire les motifs de mon collègue le juge Sopinka et, en toute déférence, je ne puis partager ses conclusions en l'espèce. Bien que, dans l'ensemble, je ne sois pas en désaccord avec le résumé des faits, des décisions et des questions en litige, je crois utile de les exposer un peu plus en détail.

Le pourvoi est formé contre un arrêt de la Cour d'appel de l'Ontario qui a rejeté une demande de contrôle judiciaire de deux décisions de la Commission des relations de travail de l'Ontario (la «Commission»). Dans la première décision, un banc tripartite composé du président de la Commission G. W. Adams, c.r., et de W. H. Wightman et B. F. Lee qui représentaient l'employeur et les employés respectivement, a statué, avec dissidence de la part de M. Wightman, que l'appelante n'avait pas négocié de bonne foi avec le syndicat intimé en ne divulguant pas, pendant les négociations, sa décision imminente de fermer l'usine visée par la convention collective. L'avocat de l'appelante a alors appris qu'une réunion plénière de la Commission avait été convoquée dans le but d'analyser les conséquences en matière de politique de sa décision alors que celle-ci était encore au stade d'avant-projet. Les parties n'ont été ni avisées de cette réunion, ni invitées à y participer. L'appelante a demandé le réexamen de cette décision en vertu de l'art. 106 de la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228, pour le motif que la réunion plénière de la Commission a entaché de nullité sa décision et que les éléments de preuve soumis à la première audition n'avaient pas été examinés correctement. Le même banc a rejeté ces deux arguments dans la seconde décision (la «décision relative à la demande de réexamen»).

Les décisions de la Commission ont été contestées devant la Cour divisionnaire pour les motifs suivants: (1) la décision initiale était manifestement déraisonnable en fait et en droit et (2) la réunion plénière convoquée par la Commission avant que le banc ne rende sa décision violait les règles de justice naturelle. La Cour divisionnaire a rejeté le premier motif invoqué et l'appelante ne l'a

Court of Appeal nor in this Court. Thus, the only issue before this Court is whether the impugned meeting vitiated the first decision rendered by the Board on the ground that the case was there discussed with panel members by persons who did not hear the evidence nor the arguments.

In order to determine whether the principles of natural justice have been breached in this case, it is necessary to examine in some detail the facts which led to the initial complaint made by the respondent union. It will also be necessary to examine the evidence as to the purpose and the context of the full board meeting so as to understand the policy matters in issue at that meeting.

I—The Facts

(a) *Plant Closure and Collective Agreement Negotiations*

The appellant operated a corrugated container plant in Hamilton (the "Hamilton plant") and decided to close it on April 26, 1983. This decision was approved by the Board of Directors on February 25, 1983 and announced on March 1, 1983. The respondent union was the bargaining agent for the employees of the Hamilton plant and negotiated a new collective agreement with the appellant from November 2, 1982 to January 13, 1983, the date at which a memorandum of settlement was concluded. The collective agreement was signed on April 22, 1983. It is obvious from the evidence heard by the Board that the decision to close the Hamilton plant and the labour negotiations concerning this plant took parallel courses. It is also obvious that the respondent union was never informed of the possibility of an impending plant closure. Although its demands did initially include a modification of art. 18.26 of the existing collective agreement concerning plant closure and severance pay, the respondent union unilaterally dropped this demand during the negotiations and art. 18.26 was simply renewed. At no other point during the negotiations did the subject of plant closure arise.

soulevé ni en cour d'appel, ni en notre Cour. La seule question en litige devant notre Cour est donc celle de savoir si la réunion contestée a entaché de nullité la première décision de la Commission pour le motif que les membres du banc qui ont entendu l'affaire en ont alors discuté avec d'autres personnes qui n'avaient pas entendu la preuve ni les plaidoiries.

Pour décider s'il y a eu manquement aux principes de justice naturelle en l'espèce, il est nécessaire d'analyser plus en détail les faits à l'origine de la première plainte du syndicat intimé. Il sera aussi nécessaire d'examiner la preuve relative à l'objet et aux circonstances de la réunion plénière de la Commission afin de comprendre les questions de politique qui étaient en cause lors de cette réunion.

I—Les faits

a) *La fermeture de l'usine et les négociations visant la signature d'une convention collective*

L'appelante exploitait une usine de fabrication de boîtes de carton ondulé à Hamilton («l'usine de Hamilton») qu'elle a décidé de fermer le 26 avril 1983. Cette décision, qui avait été approuvée par le conseil d'administration le 25 février 1983, a été annoncée le 1er mars 1983. Le syndicat intimé était l'agent négociateur des employés de l'usine de Hamilton et du 2 novembre 1982 au 13 janvier 1983 avait négocié une nouvelle convention collective avec l'appelante, date à laquelle un mémoire d'entente avait été signé. La convention collective a été signée le 22 avril 1983. Il ressort clairement de la preuve entendue par la Commission que les événements menant à la décision de fermer l'usine de Hamilton se sont déroulés parallèlement aux négociations collectives relatives à cette usine. Il est aussi évident que le syndicat intimé n'a jamais été avisé de la possibilité d'une fermeture imminente de l'usine. Quoique les demandes du syndicat aient compris au départ la modification de l'art. 18.26 de la convention collective existante qui traitait de la fermeture d'usine et des indemnités de départ, le syndicat intimé a abandonné cette demande de sa propre initiative pendant les négociations et l'art. 18.26 a été simplement reconduit. Le sujet de la fermeture de l'usine n'a plus jamais été soulevé au cours des négociations.

According to the testimonies of the representatives of the appellant, the Hamilton plant was so unprofitable that it would have been closed in 1982 if an industry-wide strike had not taken place from June to December of that year. The Hamilton plant remained open during that period and the appellant hoped that some goodwill would be generated through the new contracts entered into as a result of the industry-wide strike. As early as 1981, following the negotiation of the 1980-82 collective agreement, the appellant and the respondent union met to discuss concerns over the possibility of a plant closure given the severe losses anticipated for that year. The appellant had decided to turn the plant around and sought the respondent union's collaboration adding that there were no plans to close the Hamilton plant at that time. In October of 1981, the employees of the bargaining unit did commit themselves to the improvement of productivity at the plant. After registering a loss of $1.3 million for the year 1981, the appellant continued to invest in the Hamilton plant but warned that it would not continue to "throw 'good money after bad'" and that the plant would have to become profitable in the short term. In May of 1982, immediately before the industry-wide strike, 25 employees had to be laid off and the plant was operating only two shifts a day on a four-day work week.

In this context, the industry-wide strike was a godsend for the Hamilton plant. New clients had to award contracts to the Hamilton plant for the duration of this strike and the plant was operating at capacity, three shifts a day, seven days a week. Unfortunately, the anticipated goodwill from new customers did not materialize and Mr. Ted Haiplik, Vice-President and General Manager of the Container Division, reported to his superiors that in his opinion the Hamilton plant should be closed. Mr. Souccar, to whom Mr. Haiplik reports, testified that this recommendation was made to him in the "first or second week of February during one of their regular meetings". The matter was brought to the attention of the Board of Directors during their meeting of February 25, 1983 and they decided that the plant would close on April

D'après les dépositions des représentants de l'appelante, l'usine de Hamilton entraînait des pertes si considérables qu'elle aurait fermé ses portes en 1982 s'il n'y avait pas eu une grève à l'échelle de cette industrie de juin à décembre de la même année. L'usine de Hamilton est restée ouverte pendant cette période et l'appelante espérait qu'une certaine clientèle serait générée grâce aux nouveaux contrats signés par suite de la grève à l'échelle de l'industrie. Dès 1981, après la négociation de la convention collective visant les années 1980 à 1982, l'appelante et le syndicat intimé avaient discuté de la crainte que l'usine ferme ses portes à cause des pertes considérables prévues au cours de cette année. L'appelante avait décidé de rentabiliser l'usine et elle a demandé la collaboration du syndicat intimé, ajoutant qu'elle n'avait pas l'intention de fermer l'usine de Hamilton à ce moment-là. En octobre 1981, les employés de l'unité de négociation se sont engagés à améliorer la productivité à cette usine. Après avoir essuyé des pertes de 1,3 million de dollars en 1981, l'appelante a continué d'investir de l'argent dans l'usine de Hamilton, tout en prévenant qu'elle ne continuerait pas de [TRADUCTION] «jeter de l'argent par les fenêtres» et que l'usine devrait devenir rentable à court terme. En mai 1982, immédiatement avant la grève à l'échelle de l'industrie, 25 employés avaient dû être mis à pied et l'usine ne fonctionnait plus qu'à deux quarts par jour, quatre jours par semaine.

Dans ces circonstances, la grève à l'échelle de l'industrie fut un don du ciel pour l'usine de Hamilton. De nouveaux clients durent attribuer des contrats à l'usine de Hamilton pour la durée de la grève et l'usine fonctionnait à plein rendement, à trois quarts par jour, sept jours par semaine. Malheureusement, il n'y eut pas autant de nouveaux clients que prévu et M. Ted Haiplik, vice-président et directeur général de la division des emballages a fait rapport à ses supérieurs qu'à son avis il fallait fermer l'usine de Hamilton. Monsieur Souccar, le supérieur immédiat de M. Haiplik, a témoigné avoir reçu cette recommandation pendant [TRADUCTION] «la première ou la deuxième semaine de février, à l'occasion d'une de leurs réunions régulières». La question a été portée à l'attention du conseil d'administration lors de sa

26, 1983. Mr. Souccar insisted that it took four to five weeks following the end of the industry-wide strike to determine the amount of market share retained by the appellant and assess its viability under normal circumstances. Thus, according to Mr. Souccar, no decision concerning the closure of the Hamilton plant could be made before February of 1983.

Throughout this period, no mention was made of the possibility of plant closure during the negotiations except to point out that customers were monitoring these negotiations closely to see whether there was any possibility of a strike after the deadline set for January 8, 1983 by the respondent union. Moreover, Mr. Gruber, labour negotiator for the appellant, testified that he was not aware of any plans to close the plant during the negotiations. It is in this context that the Board was asked to determine whether the appellant had breached its obligation to bargain in good faith and, more particularly, whether it had the obligation to disclose its plans to close the Hamilton plant.

The obligation to disclose, without being asked, information relevant to any particular labour negotiation was held by the Board to be part and parcel of the obligation to bargain in good faith in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, (*Westinghouse*), where this information relates to plans "which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees" (at p. 598). In order to understand the policy issues which were the subject of discussion at the full board meeting held by the Board, it is necessary to analyse the *Westinghouse* decision and its implications in this case.

(b) *The Westinghouse Decision and the Arguments Raised by the Parties before the Board*

In *Westinghouse*, management had decided to relocate its Switchgear and Control Division from Hamilton to several other locations two months

réunion du 25 février 1983; le conseil a alors décidé que l'usine fermerait ses portes le 26 avril 1983. Monsieur Souccar a souligné qu'il fallait de quatre à cinq semaines, après une grève à l'échelle de l'industrie, pour connaître la part de marché retenue par l'appelante et vérifier sa viabilité dans des circonstances normales. Donc, d'après M. Souccar, aucune décision de fermer l'usine de Hamilton ne pouvait être prise avant février 1983.

Pendant toute cette période, personne n'a jamais parlé de la possibilité de fermer l'usine au cours des négociations, sauf qu'on a mentionné que les clients suivaient ces négociations de près pour vérifier s'il y aurait possibilité de grève après la date cible du 8 janvier 1983 fixée par le syndicat intimé. De plus, M. Gruber, qui agissait à titre de négociateur pour l'appelante a témoigné qu'il n'avait été au courant d'aucun projet de fermer l'usine pendant les négociations. C'est dans ce contexte qu'on a demandé à la Commission de décider si l'appelante avait manqué à l'obligation qu'elle avait de négocier de bonne foi et, plus précisément, si elle avait l'obligation de divulguer son projet de fermer l'usine de Hamilton.

La Commission a statué, dans la décision *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577 (la décision *Westinghouse*), que l'obligation de divulguer spontanément tout renseignement utile aux fins des négociations collectives fait partie intégrante de l'obligation de négocier de bonne foi si ces renseignements ont trait à des projets [TRADUCTION] «qui, s'ils sont mis à exécution pendant la durée de la convention collective, auront des conséquences importantes sur la situation économique des employés de l'unité de négociation» (à la p. 598). Pour comprendre les questions de politique qui ont été débattues lors de la réunion plénière de la Commission, il faut analyser la décision *Westinghouse* et ses répercussions sur l'espèce.

b) *La décision Westinghouse et les arguments invoqués par les parties devant la Commission*

Dans l'affaire *Westinghouse*, la direction avait décidé de déménager de Hamilton à divers autres endroits la division des appareils de commutation

after the conclusion of negotiations for a collective agreement. In this decision, the Board ruled that the obligation to bargain in good faith set out in s. 14 of the *Labour Relations Act*, now s. 15, comprised the obligation to reveal during the course of negotiations decisions which may seriously affect members of the bargaining unit. However, the Board found it difficult to define the point at which a planned decision becomes sufficiently certain to warrant disclosure during the negotiations without creating unnecessarily threatening perceptions in the bargaining process. The Board described as follows the perils of forced disclosure of plans which may be discarded in the future and held that an employer does not have the obligation to disclose plans until they have become at least *de facto* decisions, at pp. 598-99:

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a

et de contrôle deux mois après la fin des négociations visant la signature d'une convention collective. Dans cette décision, la Commission a statué que l'obligation de négocier de bonne foi, énoncée à l'art. 14 de la *Loi sur les relations de travail*, devenu depuis l'art. 15, comportait l'obligation de divulguer, pendant les négociations, les décisions susceptibles de toucher sérieusement les membres de l'unité de négociation. Cependant, la Commission a trouvé difficile de déterminer à quel moment une décision projetée devient suffisamment certaine pour justifier sa divulgation pendant les négociations sans qu'il en résulte inutilement des perceptions de menaces au cours du processus de négociation. La Commission a défini de la manière suivante les dangers de la divulgation forcée de projets qui seront peut-être délaissés plus tard et elle a statué que l'employeur n'est pas tenu de divulguer des projets avant qu'ils n'aient atteint au moins le stade de décisions *de facto*, aux pp. 598 et 599:

[TRADUCTION] 41. La nature concurrentielle de notre économie et l'obligation, pour une administration compétente, de s'adapter aux forces du marché exigent des administrateurs qu'ils envisagent constamment de nouvelles mesures susceptibles d'avoir des répercussions sur l'unité de négociation. Mais plus souvent qu'autrement, il n'en résulte pas de décision concrète. Pour une raison ou une autre, les projets sont souvent rejetés à l'étape de leur conception ou abandonnés plus tard en raison de changements des circonstances externes. L'amorce par la société de discussions libres portant sur des sujets aussi vagues à la table de négociation pourrait avoir de graves conséquences sur les relations de travail. L'employeur devrait décider à chaque fois qu'il y a négociation à quel moment, dans l'évolution de son projet, il doit en faire part au syndicat pour se conformer à l'art. 14. Parce que cette annonce viendrait de l'employeur et que les projets n'ont souvent aucune suite, il y aurait possibilité que le syndicat perçoive l'annonce faite par l'employeur comme une menace (et qu'elle entraîne des contestations). Si l'annonce n'était pas perçue comme une menace, il y aurait quand même possibilité de réaction exagérée des employés à l'annonce de la société. Une mesure annoncée par la société, par opposition à une réponse de la société à une demande syndicale de renseignements, peut donner prise à un sentiment de certitude qui n'est pas justifié dans les faits. Les négociations collectives lancent les parties dans des pourparlers délicats et souvent périlleux. Compte tenu de l'obligation déjà imposée à la société de répondre

significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his onw [*sic*] initiative plans which have not become at least de facto decisions. [Emphasis added.]

The Board then decided that management " ... had not made a hard decision to relocate during the course of bargaining as would have required it to reveal its decision to the trade union" (at p. 599). [Emphasis added.]

The facts in this case are substantially similar to those in the *Westinghouse* case in that a decision which would substantially affect the bargaining unit was taken by management either during or immediately after collective agreement negotiations thereby raising the issue of whether plans to close the Hamilton plant had gone sufficiently far through management's decision-making process to justify their disclosure to union representatives during the course of the negotiations. Before the Board, the appellant and the respondent union both argued, *inter alia*, that the test established in the *Westinghouse* decision ought to be modified. In his reasons, [1983] OLRB Rep. September 1411, Chairman Adams stated the respondent union's position as follows, at p. 1428:

26. The complainant's second major alternative argument requested this Board to reconsider its holding in *Westinghouse* that an employer does not have to reveal on his own initiative plans which have not become at least *de facto* decisions. The complainant asserted that the test ought to be disclosure where an employer is "seriously considering an action which if carried out will have a serious impact on employees".

Chairman Adams later summarized the appellant's arguments as follows, at p. 1429:

29. On behalf of the respondent company it was submitted that the extent of its bargaining duty was to disclose any decisions the company had made about the closing

franchement, à la table des négociations, aux demandes de renseignements du syndicat au sujet des projets de l'employeur susceptibles d'avoir des conséquences importantes sur l'unité de négociation, exiger de l'employeur qu'il engage le débat sur des sujets qui n'ont pas encore fait l'objet d'une décision de sa part comporterait peu d'avantages pour le syndicat et risquerait de fausser le processus de négociation et d'engendrer plus de litiges entre les parties: L'obligation définie à l'art. 14 n'impose pas à l'employeur le devoir de divulguer, de sa propre initiative, les projets qui n'ont pas encore atteint au moins le stade de décisions *de facto*. [Je souligne.]

La Commission a donc statué que la direction [TRADUCTION] « ... n'avait pas pris de décision ferme de déménager, pendant les négociations collectives, qui l'aurait obligée à divulguer sa décision au syndicat» (à la p. 599). [Je souligne.]

Les faits de l'espèce ressemblent beaucoup à ceux de l'affaire *Westinghouse* puisque la direction avait pris, pendant ou immédiatement après la négociation de la convention collective, une décision susceptible d'influencer profondément l'unité de négociation et qu'il fallait alors décider si le projet de fermer l'usine de Hamilton était rendu suffisamment loin dans le processus décisionnel de la direction pour justifier sa divulgation aux représentants du syndicat au cours des négociations. Devant la Commission, la société appelante et le syndicat intimé ont soutenu notamment qu'il fallait modifier le critère établi dans la décision *Westinghouse*. Dans ses motifs, [1983] OLRB Rep. September 1411, le président Adams formule ainsi la position du syndicat intimé, à la p. 1428:

[TRADUCTION] 26. Dans son deuxième argument important soulevé à titre subsidiaire, le plaignant demande à la Commission de réexaminer la décision qu'elle a rendue dans l'affaire *Westinghouse* et en vertu de laquelle un employeur n'est pas tenu de divulguer, de sa propre initiative, des projets qui n'ont pas encore atteint au moins le stade de décisions *de facto*. Le plaignant soutient que la norme devrait imposer la divulgation quand un employeur «envisage sérieusement de prendre une mesure dont la réalisation aura des conséquences profondes sur les employés».

Le président Adams a résumé plus loin l'argumentation de l'appelante en ces termes, à la p. 1429:

[TRADUCTION] 29. On a soutenu, au nom de la société intimée, qu'elle était tenue de divulguer lors des négociations collectives toute décision de fermer l'usine qu'elle

of the plant during the course of negotiations. Counsel submitted that on the evidence before the board one could only conclude that a definitive decision had not been made and that the respondent was not obligated to engage in speculation about a possible plant closing during bargaining.

Thus, although other legal and factual arguments were put forward by the parties, the main issue before the Board was whether the *Westinghouse* decision had to be reconsidered and the test it adopted replaced by either one of the tests proposed by the parties. This issue was a policy issue which had important implications from the point of view of labour law principles as well as of the effectiveness of collective bargaining in Ontario. The Board's desire to discuss it in a full board meeting was therefore understandable.

The Board panel decided in this case, Mr. Wightman dissenting on this issue, that the test set out in the *Westinghouse* case should be confirmed and that in this case, the appellant had made a *de facto* decision to close the Hamilton plant during the course of the negotiations. Thus, the appellant had the obligation to disclose this decision to the respondent union even if no questions were asked on this subject. The Board also found in the alternative that the decision to close the plant was so highly probable that the appellant should have informed the respondent union that if the Hamilton plant's financial situation did not improve in the short term, a recommendation to close the plant would shortly be made to the Board of Directors.

(c) *The Full Board Meeting*

On September 23, 1983, Mr. Michael Gordon, counsel for the appellant, became aware that a full board meeting concerning the Hamilton plant closure was taking place at the Board's offices. Mr. Gordon was aware that full board meetings have been part of the Board's practice for some time but had never been aware that any of the cases in which he had been involved was the subject of such a meeting. The appellant then filed an application for a reconsideration of the initial decision on the

avait prise au cours des négociations. L'avocat de l'intimée soutient que d'après la preuve soumise à la Commission, on ne peut que conclure qu'aucune décision définitive n'avait été arrêtée et que l'intimée n'était pas tenue de spéculer, pendant les négociations, sur la possibilité de fermer l'usine.

Donc, même si les parties ont invoqué d'autres arguments de droit et de fait, la principale question en litige devant la Commission était de savoir s'il y avait lieu de réexaminer la décision *Westinghouse* et de remplacer le critère adopté dans cette décision par l'un de ceux proposés par les parties. La question en était une de politique qui avait des conséquences importantes du point de vue des principes du droit du travail et de l'efficacité des négociations collectives en Ontario. La volonté de la Commission de débattre cette question en réunion plénière était donc compréhensible.

Le banc de la Commission chargé de l'audition a décidé en l'espèce, avec dissidence de la part de M. Wightman sur ce point, qu'il y avait lieu de confirmer le critère établi dans la décision *Westinghouse* et que, dans la présente affaire, l'appelante avait pris la décision *de facto* de fermer l'usine de Hamilton pendant le déroulement des négociations. Ainsi, l'appelante avait l'obligation de divulguer sa décision au syndicat intimé même si on ne lui avait pas posé de question à ce propos. La Commission a conclu, à titre subsidiaire, que la décision de fermer l'usine était si probable que l'appelante aurait dû informer le syndicat intimé que si la situation financière de l'usine de Hamilton ne s'améliorait pas rapidement, la recommandation de fermer l'usine serait soumise au conseil d'administration.

c) *La réunion plénière de la Commission*

Le 23 septembre 1983, Me Michael Gordon, l'avocat de l'appelante, a appris qu'une réunion plénière se déroulait aux bureaux de la Commission à propos de la fermeture de l'usine de Hamilton. Me Gordon savait que la Commission avait depuis un certain temps l'habitude de tenir des réunions plénières, mais il n'avait jamais eu connaissance que l'un des dossiers auxquels il avait participé faisait l'objet d'une telle réunion. L'appelante a présenté une demande de réexamen de la

basis, *inter alia*, that the practice of holding full board meetings is illegal.

In this reconsideration decision, Chairman Adams described in detail the purpose of these meetings and the way in which they are held. Not surprisingly, Chairman Adams emphasized the necessity to foster coherence and maintain a high level of quality in the decisions of the Board, at p. 2001:

6. In considering this question, it is to be noted that the Act confers many areas of broad discretion on the Board in determining how the statute should be interpreted or applied to an infinite variety of factual situations. Within these areas of discretion, decision-making has to turn on policy considerations. At this level of "administrative law", law and policy are to a large degree inseparable. In effect, law and policy come to be promulgated through the form of case by case decisions rendered by panels. It is in this context that the Board is sometimes criticized for not creating enough certainty in "Board law" to facilitate the planning of the parties regulated by the statute. This criticism, however, ignores the fact that there is a huge corpus of Board law much of which is almost as old as the legislation itself and as settled and stable as law can be. Board decision-making has recognized the need for uniformity and stability in the application of the statute and the discretions contained therein. Indeed, it is because there is so much settled law and policy that upwards to 80% of unfair labour practice charges are withdrawn, dismissed, settled or adjusted without the issuance of a decision and that a high percentage of other matters are either settled or withdrawn without the need for a hearing .... Thus, there is great incentive for the Board to articulate its policies clearly and, once articulated, to maintain and apply them. Nevertheless, there remains, even in applying an established policy, an inevitable area of discretion in applying the statute to each fact situation. Moreover, the Board reserves the right to change its policies as required and new amendments to the Act create additional requirements for ongoing policy analysis. To perform its job effectively, the Board needs all the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the capacity to ascertain by research and investigation just what impact its decisions have on labour relations and the economy generally. In this context therefore, and accepting that no one panel of the Board can bind another panel by any decision rendered, what institutional procedures has the Board developed to foster greater insightfulness in the exercise

décision initiale pour le motif notamment que la pratique de tenir des réunions plénières de la Commission est illégale.

Dans la décision relative à la demande de réexamen, le président Adams décrit en détail l'objet de ces réunions et la façon dont elles sont tenues. Naturellement, le président Adams insiste sur la nécessité de promouvoir la cohérence des décisions de la Commission et d'y maintenir un niveau élevé de qualité, à la p. 2001:

[TRADUCTION] 6. En examinant cette question, il faut souligner que la Loi confère à la Commission des pouvoirs discrétionnaires étendus sur plusieurs sujets quant à la façon d'interpréter et d'appliquer la Loi à toutes sortes de situations concrètes. À l'intérieur de ces pouvoirs discrétionnaires, la prise des décisions doit s'appuyer sur des considérations de politique. À ce niveau de «droit administratif», le droit et les politiques sont dans une large mesure inséparables. En effet, le droit et les politiques en viennent à être établis sous la forme de décisions rendues par différents bancs dans des affaires particulières. C'est dans ce contexte que l'on blâme parfois la Commission de ne pas créer suffisamment de certitude dans sa jurisprudence de manière à faciliter la planification par les parties régies par la Loi. Cette critique ne tient cependant pas compte du fait qu'il existe une jurisprudence abondante de la Commission depuis presque aussi longtemps que la Loi elle-même existe et qu'elle est aussi stable et incontestable que le droit peut l'être. La Commission a reconnu dans ses décisions qu'il est nécessaire d'avoir une uniformité et une stabilité dans l'application de la Loi et des pouvoirs discrétionnaires que celle-ci comporte. En réalité, c'est parce qu'il y a tant de droit et de politiques bien établis que jusqu'à 80 pour 100 des plaintes de pratiques déloyales en matière de travail sont retirées, rejetées, réglées ou arrangées sans délivrance d'une décision et qu'une grande proportion des autres affaires sont soit réglées soit retirées sans qu'il soit nécessaire de tenir une audience. [...] Donc, il y a de grands avantages pour la Commission à ce que celle-ci établisse clairement ses politiques et qu'après les avoir établies, elle les maintienne et les applique. Néanmoins, même quand la Commission applique une politique établie, il reste une marge inévitable de pouvoir discrétionnaire dans l'application de la Loi à chaque situation concrète. De plus, la Commission conserve le droit de changer ses politiques au besoin et les nouvelles modifications apportées à la Loi créent d'autres obligations de procéder à une analyse permanente des politiques. Pour s'acquitter efficacement de ses tâches, la Commission a besoin de toutes

of the Board's powers by particular panels? What internal mechanisms has the Board developed to establish a level of thoughtfulness in the creation of policies which will meet the labour relations community's needs and stand the test of time? What internal procedures has the Board developed to ensure the greatest possible understanding of these policies by all Board members in order to facilitate a more or less uniform application of such policies? The meeting impugned by the respondent must be seen as only part of the internal administrative arrangements of the Board which have evolved to achieve a maximum regulatory effectiveness in a labour relations setting. [Emphasis added.]

It will be noted that Chairman Adams does not claim that the purpose of full board meetings is to achieve absolute uniformity in decisions made by different panels in factually similar situations. Chairman Adams accepts that "no one panel of the Board can bind another panel by any decision rendered" (at p. 2001). The methods used at those meetings to discuss policy issues reflect the need to maintain an atmosphere wherein each attending Board member retains the freedom to make up his mind on any given issue and to preserve the panel members' ultimate responsibility for the outcome of the final decision. Thus, Chairman Adams states that discussions at full board meetings are limited to policy issues, that the facts of each case must be taken as presented and that no votes are taken nor any attendance recorded, at p. 2002:

8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to

les lumières qu'elle peut rassembler dans le but d'évaluer les conséquences pratiques de ses décisions, parce qu'elle n'a pas les moyens de vérifier par des recherches et des enquêtes quelles seront au juste les conséquences de ses décisions sur les relations de travail et sur l'ensemble de l'économie. Dans ces circonstances, et si on accepte qu'aucun banc de la Commission ne peut en lier un autre par sa décision, quelles procédures institutionnelles la Commission a-t-elle mises au point pour conférer plus de perspicacité dans l'exercice par les bancs particuliers des pouvoirs conférés à la Commission? Quels mécanismes internes la Commission a-t-elle établis pour fixer un niveau de réflexion dans la formulation de politiques qui répondent aux besoins de la collectivité en matière de relations de travail et qui de plus résisteront à l'épreuve du temps? Quelles procédures internes la Commission a-t-elle établies pour assurer la meilleure compréhension possible de ces politiques par tous les commissaires de manière à faciliter une application plus ou moins uniforme de ces politiques? La réunion contestée par l'intimé doit être perçue seulement comme une partie des arrangements administratifs internes que la Commission a pris pour réaliser le maximum d'efficacité de la réglementation dans un contexte de relations de travail. [Je souligne.]

On remarquera que le président Adams ne soutient pas que l'objet des réunions plénières de la Commission est de réaliser l'uniformité absolue des décisions prises par les différents bancs dans des situations de fait semblables. Le président Adams reconnaît qu' [TRADUCTION] «aucun banc de la Commission ne peut en lier un autre par sa décision» (à la p. 2001). Les méthodes utilisées à ces réunions pour débattre des questions de politique traduisent la nécessité de préserver une ambiance où chaque commissaire présent garde la liberté de se former une opinion sur une question précise et de sauvegarder la responsabilité ultime des membres de chaque banc à l'égard de la décision finale. Ainsi, le président Adams affirme, à la p. 2002, qu'aux réunions plénières de la Commission les discussions se limitent aux questions de politique, que les faits de chaque cas sont tenus pour avérés et qu'on ne prend pas de vote, ni de présence:

[TRADUCTION] 8. Après avoir délibéré sur un avant-projet de décision, un banc qui envisage de trancher une question importante de politique peut faire convoquer, par l'intermédiaire du président, une réunion plénière des membres et des vice-présidents pour leur faire part

make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion at a "Full Board" meeting is limited to the policy implications of a draft decision. The draft decision of a panel is placed before those attending the meeting by the panel and is explained by the panel members. The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus. The meetings invariably conclude with the Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel's final decision whatever it might be. No minutes are kept of such meetings nor is actual attendance recorded. [Emphasis added.]

At page 2004 of his reasons, Chairman Adams confirmed that the impugned meeting was held in accordance with the above-mentioned rules.

Finally, Chairman Adams rejected the idea that full board meetings could have an overbearing effect on the panel members' capacity to decide the issues at hand in accordance with their opinion, at p. 2003:

10. The respondent's submission is really attempting to probe the mental processes of the panel which rendered the decision in question and in so doing ignores the inherent nature of judicial decision-making and administrative law making .... In general, the deliberations of this panel were not unlike those engaged in by a judge sitting in court. The "Full Board" meeting, to the extent there is no judicial analogy, distinguishes an administrative agency from somewhat more individual common law judging. But, as an extra-record event, "Full Board" meetings are in substance no different than the post-hearing consultation of a judge with his law clerks or the informal discussions that inevitably occur between brother judges. Such meetings, we also suggest, have no greater or lesser effect than a judge's post-hearing read-

de la question soulevée et de la décision que le banc favorise. Ces réunions plénières ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province. Cependant, cet objet institutionnel est assujetti au principe accepté de tous qu'il appartient au banc qui entend l'affaire de prendre la décision ultime et que les débats à la réunion plénière de la Commission se limitent aux conséquences en matière de politique d'un avant-projet de décision. L'avant-projet de décision d'un banc est soumis à la réunion par le banc lui-même et expliqué par les commissaires qui le composent. Les faits mentionnés dans l'avant-projet de décision sont tenus pour avérés et ne font pas l'objet de discussions. Aucun vote n'est pris lors de ces réunions et aucune autre procédure n'est utilisée pour vérifier s'il y a consensus. Le président clôt toujours ces réunions en remerciant les commissaires composant le banc d'avoir exposé leur problème à toute la Commission et en disant que tous les commissaires attendront avec impatience la décision du banc quelle qu'elle puisse être. Il n'y a pas de procès-verbal de ces réunions ni de prise de présences. [Je souligne.]

À la page 2004 de ses motifs, le président Adams confirme que la réunion contestée a été tenue selon les règles ci-dessus mentionnées.

Enfin, le président Adams rejette l'idée que les réunions plénières de la Commission puissent avoir une influence impérieuse sur la capacité des membres du banc de trancher selon leur opinion les questions soulevées. Il dit, à la p. 2003:

[TRADUCTION] 10. L'argument de l'intimé cherche réellement à déterminer le cheminement mental du banc qui a rendu la décision visée et, ce faisant, il ne tient pas compte de la nature propre du processus décisionnel judiciaire et des décisions de droit administratif. [...] De manière générale, les délibérations de ce banc n'ont pas différé de celles d'un juge appelé à rendre une décision judiciaire. La réunion plénière de la Commission, dans la mesure où il n'y a pas d'équivalent en matière judiciaire, différencie un organisme administratif du processus quelque peu plus individualiste de jugement en common law. Cependant, à titre d'événement officieux, les réunions plénières de la Commission ne diffèrent pas substantiellement des consultations que mène un juge après l'audience, avec ses recherchistes ou des discussions informelles qui surviennent inévitablement entre collègues juges. Ces réunions, à notre avis, n'ont ni plus, ni moins d'influence que la consultation

ing of reports and periodicals which may not have been cited or relied on by the advocates.

It follows that the full board meetings held by the Board are designed to promote discussion on important policy issues and to provide an opportunity for members to share their personal experiences in the regulation of labour relations. There is no evidence that the particular meeting impugned in this case was used to impose any given opinion upon the members of the panel or that the spirit of discussion and exchange sought through those meetings was not present during those deliberations. Moreover, three sets of reasons were issued by the members of the panel, one member dissenting in part while another dissented on the principal substantive issue at stake in this case. If this meeting had been held for the purpose of imposing policy directives on the members of the panel, it certainly did not meet its objective.

Incidentally, the record does not disclose the identity of all the persons who attended the impugned meeting. In his affidavit, Mr. Gordon, counsel for the appellant before the Board, describes the events which led him to conclude that a full board meeting was taking place; he also lists the persons whom he saw entering or leaving the room where the meeting took place. This affidavit does disclose that Mr. Wightman was seen leaving the room in which the meeting was held but there is no evidence that the other members of the panel did attend the meeting. However, the Board's decision on the motion for reconsideration indicates that all members of the panel attended the meeting.

II—Decisions of the Courts Below

Of the two decisions rendered by the Board in this case, only the reconsideration decision is relevant since it alone deals with the issue of the legality of the practice of holding full board meetings on important policy issues. The Board decided that the practice of holding full board meetings on policy issues does not breach principles of natural justice because of its tripartite nature, the manner in which they are conducted and because of the institutional requirements which they serve.

que le juge fait après l'audition de jurisprudence ou de doctrine que les avocats n'ont ni invoquée, ni citée.

Il s'ensuit que les réunions plénières que tient la Commission sont conçues pour favoriser la discussion d'importantes questions de politique et donner aux commissaires l'occasion de mettre en commun leur expérience en matière de relations de travail. Il n'y a rien qui indique que la réunion visée en l'espèce ait servi à imposer une opinion quelconque aux membres du banc ou que l'esprit de discussion et d'échange que ces réunions cherchent à favoriser n'ait pas prévalu au cours de ces délibérations. De plus, chacun des trois commissaires qui composaient le banc a rédigé des motifs, l'un d'eux étant dissident en partie alors qu'un autre était dissident sur la principale question de fond à trancher en l'espèce. Si cette réunion avait été tenue pour imposer aux membres du banc des directives en matière de politique, elle n'a certes pas atteint son objectif.

Soit dit en passant, le dossier n'identifie pas tous ceux qui ont assisté à la réunion contestée. Dans son affidavit, Me Gordon, l'avocat de l'appelante à l'audience devant la Commission, relate les événements qui l'ont amené à conclure qu'une réunion plénière avait lieu; il fournit aussi les noms des personnes qu'il a vu entrer et sortir de la pièce où se déroulait la réunion. Cet affidavit mentionne qu'on a vu M. Wightman sortir de la pièce où la réunion se déroulait, mais il n'y a aucune preuve que les autres membres du banc ont assisté à la réunion. Cependant, la décision de la Commission sur la demande de réexamen indique que tous les membres du banc ont assisté à la réunion.

II—Les décisions des tribunaux d'instance inférieure

Des deux décisions rendues par la Commission en l'espèce, seule la décision relative à la demande de réexamen est pertinente puisqu'elle seule porte sur la légalité de la pratique de la Commission de tenir des réunions plénières sur des questions de politique importantes. La Commission a statué que sa pratique de tenir des réunions plénières sur des questions de politique ne viole pas les principes de justice naturelle à cause de sa nature tripartite, de la manière dont les réunions sont tenues et à cause

According to Chairman Adams, with whom Messrs. Lee and Wightman concurred, ss. 102 and 103 of the *Labour Relations Act* create a procedural framework based on panels composed of three members and the high number of cases handled by the Board creates the necessity to have a large number of full-time and part-time members and, therefore, a wide variety of panels. Such institutional constraints create the necessity to provide a mechanism which would promote a maximum amount of coherence in Board decisions. In essence, the Board decided that full board meetings are a necessary component of decision making within the procedural framework of the *Labour Relations Act* and that they do not breach the principles of natural justice.

In the Divisional Court (1985), 51 O.R. (2d) 481, Rosenberg J., with whom J. Holland J. concurred, allowed the appellant's application for judicial review on the basis that the impugned full board meeting allowed persons who did not hear the evidence to "participate" in the decision even though they did not vote. Rosenberg J. adopted the recommendations of the McRuer Report entitled *Royal Commission Inquiry into Civil Rights*, vol. 5, Report No. 3, 1971, which dealt specifically with the Board and recommended that the parties be notified and given an opportunity to be heard whenever important policy issues must be dealt with by the entire Board, at pp. 2205-06:

> In Report Number 1 we pointed out that no person should participate in a decision of a judicial tribunal who was not present at the hearing and heard and considered the evidence and that all persons who had heard and considered the evidence should participate in the decision.
>
> The practice we have outlined violates that principle. To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.

. . .

des exigences institutionnelles auxquelles elles répondent. Selon le président Adams, aux motifs duquel les commissaires Lee et Wightman ont souscrit, les art. 102 et 103 de la *Loi sur les relations de travail* établissent un système de procédure fondé sur des bancs de trois commissaires et le grand nombre d'affaires traitées par la Commission est à l'origine de la nécessité d'avoir un grand nombre de commissaires à temps plein et à temps partiel et, en conséquence, d'avoir un grand nombre de bancs. Ces contraintes institutionnelles sont à l'origine de la nécessité de fournir un mécanisme qui favorise la plus grande cohérence possible des décisions de la Commission. Essentiellement, la Commission a jugé que ses réunions plénières sont une composante nécessaire de son processus décisionnel à l'intérieur du système de procédure établi par la *Loi sur les relations de travail* et qu'elles ne violent pas les principes de justice naturelle.

En Cour divisionnaire (1985), 51 O.R. (2d) 481, le juge Rosenberg, aux motifs duquel le juge J. Holland a souscrit, a accueilli la demande de contrôle judiciaire de l'appelante pour le motif que la réunion plénière contestée de la Commission a permis à des personnes qui n'avaient pas entendu la preuve de «participer» à la décision même s'ils n'avaient pas voté. Le juge Rosenberg a suivi les recommandations du rapport McRuer de la *Royal Commission Inquiry into Civil Rights*, vol. 5, rapport n° 3, 1971, qui visait précisément la Commission et qui portait qu'il y a lieu d'aviser les parties et de leur donner la possibilité d'être entendues chaque fois que la Commission au complet doit débattre d'importantes questions de politique, aux pp. 2205 et 2206:

> [TRADUCTION] Dans le rapport numéro 1, nous avons souligné que nul ne devrait participer à la décision d'un tribunal judiciaire s'il n'a pas été présent à l'audition et s'il n'a pas entendu et examiné la preuve et que toutes les personnes qui ont entendu et examiné la preuve devraient participer à la décision.
>
> La pratique que nous avons exposée viole ce principe. Le fait de porter une affaire à la connaissance de toute la Commission pour en débattre et obtenir l'avis de personnes qui n'ont pas participé à l'audition sans que les parties touchées aient la possibilité d'exprimer leur avis constitue une violation du principe selon lequel celui qui tranche une affaire doit l'avoir entendue.

. . .

Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

Malgré que la décision ultime soit prise par ceux qui ont assisté à l'audition, quand une section de la Commission juge nécessaire qu'une affaire soit débattue devant l'ensemble de la Commission ou une section plus grande, il faudrait en prévenir les parties et leur donner la possibilité d'être entendues.

The majority stated, at pp. 491-92, that the practice of holding full board meetings creates situations where members who did not hear the evidence can have an influence over the result as well as situations where arguments are proposed by persons attending the meeting without giving the parties the opportunity to respond:

La majorité a affirmé, aux pp. 491 et 492, que la pratique de la Commission de tenir des réunions plénières crée des situations où des commissaires qui n'ont pas entendu la preuve peuvent influencer la décision, de même que des situations où des personnes présentes à la réunion soumettent des arguments sans que les parties aient la possibilité d'y répondre:

Chairman Shaw [*sic*] states in his reasons that the final decision was made by the three members who heard evidence and argument. He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting. The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all of the members of the board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s. 15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond. [Emphasis added.]

[TRADUCTION] Le président Shaw [*sic*] affirme dans ses motifs que la décision définitive a été arrêtée par les trois commissaires qui avaient entendu la preuve et les plaidoiries. Il ne peut valablement affirmer que lui-même et ses collègues membres du tribunal n'ont pas été influencés par le débat survenu lors de la réunion plénière de la Commission. La façon dont s'est déroulée la réunion plénière de la Commission laisse voir qu'il était important d'avoir l'avis des autres commissaires qui n'avaient entendu ni la preuve ni les plaidoiries avant de prendre une décision finale. La présentation de l'avant-projet de décision à tous les commissaires et à tout le personnel de soutien comportait un risque sérieux que d'autres personnes soumettent leur avis et fassent valoir des arguments. Il est probable que certaines des personnes présentes à la réunion ont exprimé leur avis. Il n'y avait convocation d'une réunion plénière de la Commission que s'il y avait des questions de politique importantes à débattre. La discussion a certainement porté sur les raisons de principe de donner à l'art. 15 une interprétation libérale ou une interprétation restreinte. Les commissaires ou le personnel de soutien ont pu faire part d'informations tirées de leur expérience pratique, ce qui pourrait équivaloir à présenter des éléments de preuve. Les parties au litige n'avaient aucun moyen de savoir ce qui se disait dans ce débat, ni aucune possibilité de répliquer. [Je souligne.]

Rosenberg J. then added at p. 492 that factual issues are necessarily built into policy issues since it is impossible, in his opinion, to decide factual issues without a prior determination of the legal standards applicable to them.

Le juge Rosenberg a alors ajouté, à la p. 492, que les questions de fait sont nécessairement imbriquées dans les questions de politique puisqu'il est impossible, à son avis, de statuer sur des questions de fait sans d'abord déterminer les normes juridiques qui leur sont applicables.

Osler J. dissented on the basis that there is no authority prohibiting decision makers acting in a judicial capacity to engage in either formal or informal discussions with their colleagues concerning policy issues at stake in a case standing for judgment. Full board meetings are merely a formalized method of seeking the opinion of colleagues on policy issues. In fact, this practice is desirable given the importance of achieving a high degree of coherence in Board decisions. Osler J. also noted that the tripartite procedural framework imposed by the *Labour Relations Act* made it necessary to resort to full board meetings as a means of achieving such coherence. Finally, Osler J. held that the record in this case does not indicate that either new evidence was heard during the impugned meeting or that new ideas requiring a reply from the parties were discussed during this meeting. The policy alternatives had all been proposed by the parties during argument and Chairman Adams' decision as well as Mr. Wightman's dissent simply adopted one of the alternatives.

Le juge Osler a exprimé une dissidence en faisant valoir qu'il n'y a aucun précédent qui interdise aux décideurs qui agissent à titre judiciaire de mener des discussions officielles ou officieuses avec leurs collègues au sujet des questions de politique soulevées par une affaire en instance. Les réunions plénières de la Commission constituent simplement un moyen formel de demander l'avis de collègues sur des questions de politique. En réalité, cette pratique est souhaitable à cause de l'importance d'avoir des décisions de la Commission très cohérentes. Le juge Osler a aussi fait remarquer que le système de procédure tripartite qu'impose la *Loi sur les relations de travail* rend nécessaire le recours aux réunions plénières de la Commission comme moyen de réaliser cette cohérence. Enfin, le juge Osler a statué que le dossier en l'espèce n'indique pas que, pendant la réunion contestée, on a présenté de nouveaux éléments de preuve ou fait valoir de nouvelles idées exigeant une réplique des parties. Les choix de politique possibles avaient tous été proposés par les parties pendant leurs plaidoiries et le président Adams dans sa décision et le commissaire Wightman dans sa dissidence n'avaient fait qu'adopter un de ces choix.

The Court of Appeal (1986), 56 O.R. (2d) 513, unanimously allowed the appeal for the reasons set out in Osler J.'s dissent. Cory J.A. (as he then was) added that the following limitations on the practice of holding full board meetings on policy issues must be observed by the Board, at p. 517:

> It must be stressed, however, and indeed it was conceded by the appellants, that if new evidence was considered by the entire Board during its discussion, then both parties would have to be recalled, advised of the new evidence and given full opportunity to respond to it in whatever manner they deemed appropriate. In the absence of the introduction of fresh material, the evidence must be taken as found in the draft reasons for the purposes of the full Board discussions.
>
> As in any judicial or *quasi*-judicial proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice there can be no participation by other members of the Board in the final decision.

La Cour d'appel (1986), 56 O.R. (2d) 513, a accueilli à l'unanimité l'appel pour les motifs énoncés par le juge Osler dans sa dissidence. Le juge Cory (alors juge de la Cour d'appel) a ajouté que la Commission devrait respecter les conditions suivantes quand elle tient des réunions plénières au sujet de questions de politique, à la p. 517:

> [TRADUCTION] Il faut souligner cependant, ce que les appelants ont reconnu, que si, pendant sa réunion plénière, la Commission examine de nouveaux éléments de preuve, il faut rappeler les deux parties, leur faire part des nouveaux éléments de preuve et leur donner entière possibilité de répliquer de la manière qu'elles jugent appropriée. En l'absence de tout nouvel élément de preuve, la preuve exposée dans l'avant-projet de décision doit être tenue pour avérée pour les fins de discussion à la réunion plénière de la Commission.
>
> Comme dans toute procédure judiciaire ou quasi judiciaire, le banc ne doit pas fonder sa décision sur un moyen non soulevé à l'audience sans donner aux parties la possibilité de présenter leurs arguments. Il existe également une règle stricte selon laquelle, bien que le banc puisse recevoir des avis, aucun autre membre de la Commission ne peut participer à la décision finale.

It was therefore the view of the Court of Appeal that, while some precautions are necessary in the use of any formalized consultation process, the full board meeting procedure described by Chairman Adams does not violate any principle of natural justice.

III—Analysis

(a) *Introduction*

It is useful to begin with a summary of the arguments submitted by the parties. The appellant argues that the practice of holding full board meetings on policy issues constitutes a breach of a rule of natural justice appropriately referred to as "he who decides must hear". According to the appellant's version of this rule, a decision maker must not be placed in a situation where he can be "influenced" by persons who have not heard the evidence or the arguments. Thus, the appellant's position is that panel members must be totally shielded from any discussion which may cause them to change their minds even if this change of opinion is honest, because the possibility of undue pressure by other Board members is too ominous to be compatible with principles of natural justice. The appellant also claims that full board meetings do not provide the parties with an adequate opportunity to answer arguments which may be voiced by Board members who have not heard the case.

It is important to note at the outset that the appellant's arguments raise issues with respect to two important and distinct rules of natural justice. It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)": Evans, *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 156; see also Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at pp. 148-49. While the appellant does not claim that the panel was biased, it does claim that full board meetings may prevent a panel member from deciding the topic of discussion freely and independently

La Cour d'appel a donc été d'avis que, bien que certaines précautions s'imposent lorsqu'on a recours à un processus formel de consultation, la procédure de réunion plénière de la Commission décrite par le président Adams ne porte atteinte à aucun principe de justice naturelle.

III—Analyse

a) *Introduction*

Il convient de commencer par résumer les arguments des parties. L'appelante soutient que la pratique de la Commission de tenir des réunions plénières sur des questions de politique viole la règle de justice naturelle dite «celui qui tranche une affaire doit l'avoir entendue». D'après l'interprétation que l'appelante donne à cette règle, un décideur ne doit pas se trouver dans une situation où il peut être «influencé» par des personnes qui n'ont pas entendu la preuve ni les plaidoiries. Donc, l'appelante soutient que les commissaires qui composent un banc doivent être totalement à l'abri de toute discussion qui pourrait les amener à changer d'avis, même si ce changement d'avis est sincère, parce que le risque de pression indue de la part des autres commissaires est trop grand pour être compatible avec les principes de justice naturelle. L'appelante soutient encore que les réunions plénières de la Commission ne fournissent pas aux parties une possibilité suffisante de répondre aux arguments que des commissaires qui n'ont pas entendu la preuve peuvent y faire valoir.

Il importe de souligner dès le début que les arguments de l'appelante soulèvent des questions relativement à deux règles importantes, mais distinctes, de justice naturelle. On a souvent dit que ces règles peuvent se répartir en deux catégories, savoir [TRADUCTION] «que le décideur doit être désintéressé et impartial (*nemo judex in causa sua*) et que les parties doivent recevoir un préavis suffisant et avoir la possibilité d'être entendues (*audi alteram partem*)»: Evans, *de Smith's Judicial Review of Administrative Action* (4e éd. 1980), à la p. 156; voir également Pépin et Ouellette, *Principes de contentieux administratif* (2e éd. 1982), aux pp. 148 et 149. Bien que l'appelante ne soutienne pas que le banc a été partial, elle soutient que les réunions plénières de la Commis-

from the opinions voiced at the meeting. Independence is an essential ingredient of the capacity to act fairly and judicially and any procedure or practice which unduly reduces this capacity must surely be contrary to the rules of natural justice.

The respondent union argues that the practice of holding full board meetings on important policy issues is one which is justified for the reasons set forth by Chairman Adams in the reconsideration decision quoted previously.

Before embarking on an analysis of these arguments, one should keep in mind the difference between a full board meeting and a full board hearing: a full board hearing is simply a normal hearing where representations are made by both parties in front of an enlarged panel comprised of all the members of the Board in the manner prescribed by s. 102 of the *Labour Relations Act*; on the other hand, a full board meeting does not entail representations by the parties since they are not invited to or even notified of the meeting. The procedure recommended by the McRuer Report is somewhat different in that it entails the presence of the parties at an informal meeting where they would have the right to answer the arguments raised by members of the Board. In this case, the parties have not made any arguments on the relative virtues of these procedures and have restricted their arguments to the legality of the full board meeting procedure in relation to the rules of natural justice.

I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do

sion peuvent empêcher un membre du banc de se prononcer sur le sujet des discussions de façon libre et indépendante des opinions exprimées lors de la réunion. L'indépendance est un élément essentiel de la capacité d'agir avec équité et de façon judiciaire et toute procédure ou pratique qui mine indûment cette capacité doit certainement être contraire aux règles de justice naturelle.

Le syndicat intimé soutient que la pratique de la Commission de tenir des réunions plénières sur des questions de politique importantes est justifiée pour les motifs énoncés par le président Adams dans la décision relative à la demande de réexamen déjà citée.

Avant d'entreprendre l'analyse de ces arguments, il faut se rappeler la différence qui existe entre une réunion plénière de la Commission et une audience plénière de la Commission: une audience plénière de la Commission est tout simplement une audience normale au cours de laquelle les deux parties plaident devant un banc élargi composé de tous les membres de la Commission, de la manière prescrite par l'art. 102 de la *Loi sur les relations de travail*; par contre, une réunion plénière ne comporte pas de plaidoiries par les parties puisque celles-ci ne sont pas invitées à participer à la réunion, ni même avisées de sa tenue. La procédure que recommande le rapport McRuer est quelque peu différente parce qu'elle comporte la présence des parties à une réunion officieuse à laquelle celles-ci auraient le droit de répondre aux arguments soulevés par les commissaires. En l'espèce, les parties n'ont pas abordé le mérite relatif de ces procédures et ont limité leurs plaidoiries à la légalité de la procédure de réunions plénières de la Commission eu égard aux règles de justice naturelle.

Je suis d'accord avec le syndicat intimé que les règles de justice naturelle doivent tenir compte des contraintes institutionnelles auxquelles les tribunaux administratifs sont soumis. Ces tribunaux sont constitués pour favoriser l'efficacité de l'administration de la justice et doivent souvent s'occuper d'un grand nombre d'affaires. Il est irréaliste de s'attendre à ce qu'un tribunal administratif comme la Commission observe strictement toutes les règles applicables aux tribunaux judiciaires. De

not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument. [Emphasis added.]

The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full board hearing, is the only acceptable alternative. The advantages of the practice of holding full board meetings must be weighed against the disadvantages involved in holding discussions in the absence of the parties.

(b) *The Consequences of the Institutional Constraints Faced by the Board*

The *Labour Relations Act* has entrusted the Board with the responsibility of fostering harmonious labour relations through collective bargaining, as appears clearly in the preamble of the Act:

> WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

fait, il est admis depuis longtemps que les règles de justice naturelle n'ont pas un contenu fixe sans égard à la nature du tribunal et aux contraintes institutionnelles auxquelles il est soumis. Le juge Dickson (maintenant Juge en chef) a réitéré ce principe dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

> 2. En tant qu'élément constitutif de l'autonomie dont il jouit, le tribunal doit respecter la justice naturelle qui, comme l'a dit le lord juge Harman [dans] *Ridge v. Baldwin*, à la p. 850, équivaut simplement [TRADUCTION] «à jouer franc jeu». Dans chaque cas, les exigences de la justice naturelle varient selon [TRADUCTION] «les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.»: le lord juge Tucker dans *Russell v. Duke of Norfolk*, à la p. 118. Les règles de justice naturelle ne peuvent être abrogées que par un texte de loi exprès ou nettement implicite en ce sens. [Je souligne.]

La question principale est de savoir si, vu l'importance de la question de politique en cause en l'espèce et la nécessité de maintenir un niveau élevé de qualité et de cohérence dans les décisions de la Commission, les règles de justice naturelle permettent la tenue d'une réunion plénière de la Commission sous réserve des conditions exposées par la Cour d'appel et, dans la négative, si une procédure qui permet aux parties d'être présentes, telle une audience plénière de la Commission, est la seule autre solution acceptable. Il faut soupeser les avantages de la pratique de la Commission de tenir des réunions plénières en regard des inconvénients que comporte la tenue de débats en l'absence des parties.

b) *Les conséquences des contraintes institutionnelles auxquelles la Commission est soumise*

La *Loi sur les relations de travail* confie à la Commission la responsabilité de faciliter les bonnes relations de travail par la négociation collective, comme le stipule expressément le préambule de la Loi:

> ATTENDU qu'il est dans l'intérêt public de la province de l'Ontario de faciliter les bonnes relations entre employeurs et employés en favorisant le recours à la négociation collective entre les employeurs et les syndicats à titre de représentants librement choisis des employés.

The Board has been granted the powers thought necessary to achieve this task, not the least of which is the power to decide in a final and conclusive manner all matters which fall within its jurisdiction: s. 106(1) of the *Labour Relations Act*. As was stated by Chairman Adams in his reconsideration decision, the Board has also been given very broad discretionary powers as is the case with the power to determine what constitutes "bargaining in good faith" (s. 15).

The immensity of the task entrusted to the Board should not be underestimated. As Chairman Adams wrote in the reconsideration decision, the Board had a caseload of 3189 cases to handle in 1982-83 and employed 12 full-time chairman and vice-chairmen, 4 part-time vice-chairmen, 10 full-time Board members representing labour and management as well as another 22 part-time Board members to hear and decide those cases. The Board's full-time chairman and vice-chairmen have an average caseload of 266 cases per year. Moreover, the tripartite nature of the Board makes it necessary to have an equal representation from management and labour unions on each panel as appears clearly from s. 102 of the *Labour Relations Act*:

102.—(1) The Ontario Labour Relations Board is continued.

(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council.

. . .

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

. . .

(11) The decision of the majority of the members of the Board present and constituting a quorum is the

La Commission a reçu, en vertu du par. 106(1) de la *Loi sur les relations de travail*, les pouvoirs jugés nécessaires pour accomplir cette tâche dont celui, qui n'est pas le moindre, de rendre, au sujet de toute question qui relève de sa compétence, des décisions finales et définitives. Comme l'affirme le président Adams dans sa décision sur la demande de réexamen, la Commission a aussi reçu des pouvoirs discrétionnaires très étendus, notamment celui de déterminer ce que comporte une «négociation de bonne foi» (art. 15).

Il ne faut pas sous-estimer l'ampleur de la tâche assignée à la Commission. Comme le président Adams l'a écrit dans la décision relative à la demande de réexamen, la Commission a eu 3 189 affaires à traiter durant l'exercice 1982-1983 et elle comptait, outre le président, 11 vice-présidents à plein temps, 4 vice-présidents à temps partiel, 10 commissaires permanents représentant les employés et les employeurs ainsi que 22 autres commissaires à temps partiel pour entendre et trancher ces affaires. Le président et les vice-présidents à plein temps ont en moyenne 266 affaires par année à entendre. De plus, la nature tripartite de la Commission fait en sorte qu'elle doit compter un nombre égal de représentants des employeurs et des syndicats sur chaque banc, comme le stipule clairement l'art. 102 de la *Loi sur les relations de travail*:

102 (1) La Commission des relations de travail de l'Ontario demeure en fonction.

(2) La Commission se compose d'un président, d'un ou plusieurs vice-présidents et des autres membres répartis en un nombre égal de représentants des employeurs et de représentants des employés que le lieutenant-gouverneur en conseil juge nécessaires. Ces personnes sont nommées par le lieutenant-gouverneur en conseil.

. . .

(9) Le président ou un vice-président, un membre représentant les employeurs et un membre représentant les employés constituent le quorum et peuvent exercer les attributions de la Commission.

. . .

(11) La décision de la majorité des membres de la Commission présents qui constitue le quorum est la

decision of the Board, but, if there is no majority, the decision of the chairman or vice-chairman governs.

The rules governing the quorum of any panel of the Board are especially suited for panels of three although they do not appear to prevent the formation of a larger panel. However, even if the *Labour Relations Act* allows full board hearings, such a procedure would not necessarily be practical every time an important policy issue is at stake.

Indeed, it is apparent from the size of the Board's caseload and from the number of persons which would sit on such an enlarged panel that holding full board hearings is a highly impractical way of solving important policy issues. Furthermore, the difficulties involved in setting up a panel comprised of an equal number of management and labour representatives and in scheduling such a meeting are also obvious when one takes into consideration the large number of Board members who would have to be present. In fact, one wonders whether it is really possible to call a full board hearing every time an important policy issue arises. The solution proposed in the McRuer Report, i.e., allowing the parties to be present and to answer the arguments made at the meeting, would entail similar difficulties since their presence would necessitate some formal procedure and involve organizational difficulties as well.

The first rationale behind the need to hold full board meetings on important policy issues is the importance of benefiting from the acquired experience of all the members, chairman and vice-chairmen of the Board. Moreover, the tripartite nature of the Board makes it even more imperative to promote exchanges of opinions between management and union representatives. As was pointed out clearly by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, the primary purpose of the creation of

décision de la Commission. Si aucune majorité ne se dégage, le président ou le vice-président a voix prépondérante.

Les règles régissant le quorum d'un banc de la Commission conviennent particulièrement bien à des bancs de trois personnes même si elles ne paraissent pas interdire la constitution de bancs composés d'un plus grand nombre de commissaires. Cependant, même si la *Loi sur les relations de travail* autorise les audiences plénières de la Commission, une telle procédure ne serait pas forcément pratique dans tous les cas où il se présente une question de politique importante.

En réalité, il ressort manifestement du nombre d'affaires soumises à la Commission et du nombre de personnes qui participeraient à ces bancs élargis que la tenue d'audiences plénières de la Commission constitue une façon très peu pratique de résoudre des questions de politique importantes. De plus, les difficultés que présenteraient la constitution d'un banc composé d'un nombre égal de représentants des employeurs et des employés et la fixation de la date de cette réunion ressortent clairement si on considère le grand nombre de commissaires qui devraient être présents. En fait, on se demande même s'il est vraiment possible de convoquer une audience plénière de la Commission chaque fois qu'il y a une importante question de politique à débattre. La solution préconisée dans le rapport McRuer, c'est-à-dire celle d'autoriser les parties à assister à la réunion et à répliquer aux arguments qui y sont avancés, comporterait des difficultés semblables puisque la présence des parties exigerait une procédure formelle quelconque et susciterait aussi des difficultés d'organisation.

La première raison pour laquelle il est nécessaire de tenir des réunions plénières de la Commission au sujet des questions de politique majeures tient à l'importance de bénéficier de l'expérience acquise de tous les commissaires, y compris le président et les vice-présidents de la Commission. De plus, la nature tripartite de la Commission rend encore plus impérieux de favoriser les échanges d'avis entre les représentants des employeurs et ceux des syndicats. Comme le souligne clairement le juge Dickson (maintenant Juge en chef) dans l'arrêt *Syndicat canadien de la Fonction publique,*

administrative bodies such as the Ontario Labour Relations Board is to confer a wide jurisdiction to solve labour disputes on those who are best able, in light of their experience, to provide satisfactory solutions to these disputes, at pp. 235-36:

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The second rationale for the practice of holding full board meetings is the fact that the large number of persons who participate in Board decisions creates the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse* (1986), 16 *R.D.U.S.* 591, at p.

section locale 963 c. Société des alcools du Nouveau-Brunswick, [1979] 2 R.C.S. 227, aux pp. 235 et 236, le but premier de la constitution des organismes administratifs comme la Commission des relations de travail de l'Ontario est d'attribuer une compétence générale pour régler les différends du travail à ceux qui sont le plus en mesure, à cause de leur expérience, de trouver des solutions satisfaisantes à ces différends:

L'article 101 révèle clairement la volonté du législateur que les différends du travail dans le secteur public soient réglés promptement et en dernier ressort par la Commission. Des clauses privatives de ce genre sont typiques dans les lois sur les relations de travail. On veut protéger les décisions d'une commission des relations de travail, lorsqu'elles relèvent de sa compétence, pour des raisons simples et impérieuses. La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher des questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

Les règles de justice naturelle ne devraient pas dissuader les organismes administratifs de tirer profit de l'expérience acquise par leurs membres. Au contraire, les règles de justice naturelle devraient, par leur application, concilier les caractéristiques et les exigences du processus décisionnel des tribunaux spécialisés avec les droits des parties en matière de procédure.

La seconde raison d'être de la pratique de tenir des réunions plénières de la Commission tient au fait que le grand nombre de personnes qui participent aux décisions de la Commission crée un risque que des bancs différents rendent des décisions divergentes sur des questions semblables. Il est évident qu'il faut favoriser la cohérence des décisions rendues en matière administrative. L'issue des litiges ne devrait pas dépendre de l'identité des personnes qui composent le banc puisque ce résultat serait «difficile à concilier avec la notion d'égalité devant la loi, l'un des principaux corollaires de la primauté du droit, et peut-être aussi le plus intelligible»: Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et syn-*

632. Given the large number of decisions rendered in the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. The fact that the Board's decisions are protected by a privative clause (s. 108) makes it even more imperative to take measures such as full board meetings in order to avoid such conflicting results. At the same time, the decision of one panel cannot bind another panel and the measures taken by the Board to foster coherence in its decision making must not compromise any panel member's capacity to decide in accordance with his conscience and opinions.

A full board meeting is a forum for discussion which, in Cory J.A.'s words (as he then was) is "no more than an amplification of the research of the hearing panel carried out before they delivered their decision" (at p. 517). Like many other judicial practices, however, full board meetings entail some imperfections, especially with respect to the opportunity to be heard and the judicial independence of the decision maker, as is correctly pointed out by Professors Blache and Comtois in "La décision institutionnelle" (1986), 16 *R.D.U.S.* 645, at pp. 707-8:

[TRANSLATION] There are advantages and disadvantages to institutionalizing the decision-making process. The main advantages with which it is credited are increasing the efficiency of the organization as well as the quality and consistency of decisions. It is felt that institutional decisions tend to promote the equal treatment of individuals in similar circumstances, increase the likelihood of better quality decisions and lead to a better allocation of resources. Against this it is feared that institutionalization creates a danger of the introduction, without the parties' knowledge, of evidence and ideas obtained extraneously and reduces the decision maker's personal responsibility for the decision to be made.

The question before this Court is whether the disadvantages involved in this practice are sufficiently important to warrant a holding that it

thèse (1986), 16 *R.D.U.S.* 591, à la p. 632. Vu le grand nombre de décisions rendues en matière de droit du travail, la Commission est justifiée de prendre les mesures nécessaires pour éviter d'arriver, par inadvertance, à des solutions différentes dans des affaires semblables. Puisque les décisions de la Commission sont protégées par une clause privative (l'art. 108), il est encore plus impérieux de recourir à des mesures comme les réunions plénières de la Commission pour éviter ces solutions incompatibles. En même temps, la décision d'un banc ne saurait lier un autre banc et les mesures prises par la Commission pour favoriser la cohérence de ses décisions ne doivent pas entraver la capacité de chacun des membres d'un banc de décider selon sa conscience et ses opinions.

Une réunion plénière de la Commission est un lieu de discussion qui, selon l'expression du juge Cory (alors juge de la Cour d'appel,) ne constitue [TRADUCTION] «rien de plus qu'un approfondissement de la recherche à laquelle procède le banc qui entend une affaire avant de rendre sa décision» (à la p. 517). Cependant, comme bien d'autres pratiques judiciaires, les réunions plénières de la Commission comportent certaines imperfections, notamment en ce qui concerne la possibilité pour les parties d'être entendues et l'indépendance du décideur, comme le soulignent avec justesse les professeurs Blache et Comtois dans «La décision institutionnelle» (1986), 16 *R.D.U.S.* 645, aux pp. 707 et 708:

L'institutionnalisation du processus décisionnel présente des avantages et des inconvénients. Les principaux avantages qui lui sont imputés sont d'accroître l'efficacité de l'organisme ainsi que la cohérence et la qualité des décisions. La décision institutionnelle est, croit-on, susceptible de favoriser l'égalité de traitement d'individus se trouvant dans des situation similaires, de maximiser la possibilité de rendre des décisions d'une qualité supérieure, et de favoriser une meilleure affectation des ressources. On craint par contre que l'institutionnalisation ne risque d'encourager l'introduction, à l'insu des parties, de preuve et d'idées obtenues hors instance et d'entraîner la diminution de la responsabilité personnelle du décideur face à la décision à rendre.

La question dont est saisie notre Cour est de savoir si les inconvénients que cette pratique comporte sont assez importants pour conclure qu'elle consti-

constitutes a breach of the rules of natural justice or whether full board meetings are consistent with these rules provided that certain safeguards be observed.

(c) *The Judicial Independence of Panel Members in the Context of a Full Board Meeting*

The appellant argues that persons who did not hear the evidence or the submissions of the parties should not be in a position to "influence" those who will ultimately participate in the decision, i.e., vote for one side or the other. The appellant cites the following authorities in support of its argument: *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p. 351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at pp. 715 and 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (Ont. H.C.), at pp. 161-64; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (Ont. H.C.), at pp. 394-95; *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.), at pp. 382-83; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (N.S.S.C.), at pp. 53-55; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, at p. 594; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 484 (P.E.I.S.C.), at p. 499; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (C.A.), at p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, Report No. 3, c. 124, at pp. 2004-5. In all those decisions with the exception of *Re Rogers*, some of the members of the panel which rendered the impugned decision had not heard all the evidence or all the representations of the parties; their vote was cast even though some of the members of these panels did not have the benefit of assessing the credibility of the witnesses or the validity of the factual and legal arguments. I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties and in this respect I adopt Pratte J.'s words in *Doyle v. Restrictive Trade Practices Commission*, *supra*, at pp. 368-69:

tue une violation des règles de justice naturelle ou si les réunions plénières de la Commission sont conformes à ces règles pourvu que certaines garanties soient respectées.

c) *L'indépendance judiciaire des membres d'un banc dans le contexte d'une réunion plénière de la Commission*

L'appelante soutient que les personnes qui n'ont pas entendu la preuve ou les plaidoiries des parties ne doivent pas être en mesure d'«influencer» celles qui, en fin de compte, participeront à la décision, c'est-à-dire de se prononcer en faveur d'un côté ou de l'autre. L'appelante cite les décisions suivantes pour étayer son argumentation: *Mehr v. Law Society of Upper Canada*, [1955] R.C.S. 344, à la p. 351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, aux pp. 715 et 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (H.C. Ont.), aux pp. 161 à 164; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (H.C. Ont.), aux pp. 394 et 395; *Re Ramm* (1957), 7 D.L.R. (2d) 378 (C.A. Ont.), aux pp. 382 et 383; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (C.S.N.-É.), aux pp. 53 à 55; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, à la p. 594; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 489 (C.S.Î.-P.-É.) à la p. 499; *Doyle c. Commission sur les pratiques restrictives du commerce*, [1985] 1 C.F. 362 (C.A.), à la p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, rapport n° 3, ch. 124, aux pp. 2004 et 2005. Dans toutes ces décisions, sauf *Re Rogers*, certains des membres du banc qui avait rendu la décision contestée n'avaient pas entendu la totalité de la preuve ou des plaidoiries des parties; ils avaient participé au vote même s'ils n'avaient pas été en mesure d'évaluer la crédibilité des témoins ou les arguments factuels et juridiques. Je reconnais qu'en règle générale les membres d'un banc qui participent effectivement à une décision doivent avoir entendu la totalité de la preuve et des plaidoiries soumises par les parties et, à cet égard, je fais miens les propos tenus par le juge Pratte dans l'arrêt *Doyle c. Commission sur les pratiques restrictives du commerce*, précité, aux pp. 368 et 369:

The important issue is whether the maxim "he who decides must hear" invoked by the applicant should be applied here.

This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case .... This having been said, it must be realized that the rule "he who decides must hear", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard.

In that case, one of the issues was whether it was sufficient for the members of the panel who had not heard the evidence to read the transcripts and this question was answered in the negative in light of the relevant statutory provisions. In this case, however, the members of the panel who participated in the impugned decision, i.e., Chairman Adams and Messrs. Wightman and Lee, heard all the evidence and all the arguments. It follows that the cases cited by the appellant cannot support its argument, nor can the presence of other Board members at the full board meeting amount to "participation" in the final decision even though their contribution to the discussions which took place at that meeting can be seen as a "participation" in the decision-making process in the widest sense of that expression.

However, the appellant claims that the following extract from the reasons of Romer J. in *The King v. Huntingdon Confirming Authority*, *supra*, constitutes the basis of a rule whereby decision makers who have heard all the evidence and representations should not be influenced by persons who have not, at p. 717:

Ce qui importe, c'est de savoir s'il y a lieu d'appliquer ici la maxime «*he who decides must hear*» qu'invoque le requérant.

Cette maxime exprime une règle bien connue suivant laquelle, lorsque la loi charge un tribunal d'entendre et décider une affaire, seuls les membres du tribunal qui ont entendu l'affaire peuvent participer à la décision. On a parfois dit que cette règle exprimait une conséquence de la règle *audi alteram partem*. Cela est vrai dans la mesure où un justiciable n'est vraiment «entendu» que s'il est entendu par celui qui décidera sa cause. [...] Ceci dit, il faut voir que la règle «*he who decides must hear*», si importante qu'elle soit, est fondée sur la volonté présumée du législateur. Elle ne s'applique donc pas lorsque le législateur en a expressément écarté l'application; elle ne s'applique pas non plus lorsque l'étude de l'ensemble des dispositions régissant l'activité d'un tribunal conduit à croire que le législateur n'a pas dû vouloir qu'elle s'y applique. Enfin, lorsque la règle s'applique à un tribunal, elle exige que tous les membres de ce tribunal qui participent à une décision aient entendu la preuve et les représentations des parties de la façon que la loi veut qu'elles soient entendues.

Dans cette affaire, l'une des questions à trancher était de savoir s'il suffisait que les membres du banc qui n'avaient pas entendu la preuve lisent la transcription sténographique des audiences, ce à quoi on a répondu par la négative en raison des dispositions législatives applicables. En l'espèce cependant, les membres du banc qui ont participé à la décision contestée, c'est-à-dire le président Adams et les commissaires Wightman et Lee, ont entendu toute la preuve et toutes les plaidoiries. Il s'ensuit que les décisions citées par l'appelante ne peuvent étayer son argumentation et la présence d'autres commissaires à la réunion plénière de la Commission ne peut pas non plus équivaloir à une «participation» à la décision finale, même si l'on peut considérer leur apport aux discussions qui s'y sont déroulées comme une «participation» au processus décisionnel au sens le plus large du terme.

Cependant, l'appelante soutient que le passage suivant des motifs du juge Romer dans l'arrêt *The King v. Huntingdon Confirming Authority*, précité, à la p. 717, constitue le fondement de la règle en vertu de laquelle le décideur qui a entendu la totalité de la preuve et des plaidoiries ne doit pas être influencé par des personnes qui ne l'ont pas fait:

Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown. [Emphasis added.]

Thus, Romer J. was of the opinion that the influence of those who did not hear the evidence could go beyond their vote and that this influence constituted a denial of natural justice. Following that reasoning, it was held in *Re Rogers* that the presence of a person who heard neither the evidence nor the representations at one of the meetings where a quorum of the Prince Edward Island Land Use Commission was deliberating invalidated the decision of the Commission even though that person did not vote on the matter. The opposite result was reached in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (Ont. C.A.), where it was held that the presence of Board members who neither heard the evidence nor voted on the matter did not invalidate the Board's decision, at p. 675.

I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might "influence" the decision maker. In this respect, I adopt Meredith C.J.C.P.'s words in *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656 (C.A.), at p. 659:

The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they—that is, those members of the Board who heard the evidence and made the award—allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them .... [B]ut it is only fair to add that if every Judge's judgment were vitiated because

[TRADUCTION] De plus, j'aimerais simplement souligner ceci: à cette réunion du 16 mai, il y avait trois juges qui n'avaient pas entendu la preuve présentée sous serment le 25 avril. Il y a eu partage d'opinions. La résolution en faveur de confirmer a été adoptée à huit voix contre deux et il est à tout le moins possible que la majorité ait été amenée à se prononcer comme elle l'a fait en raison de l'éloquence des membres qui avaient été absents le 25 avril et qui ignoraient absolument tout des faits. [Je souligne.]

Le juge Romer a donc été d'avis que l'influence de ceux qui n'avaient pas entendu la preuve pouvait aller au-delà de leur vote et que cette influence a constitué un déni de justice naturelle. On a jugé, en suivant ce raisonnement dans l'arrêt *Re Rogers*, que la présence d'une personne qui n'a entendu ni la preuve ni les plaidoiries à l'une des réunions de délibérations de la Land Use Commission de l'Île-du-Prince-Édouard où il y avait quorum avait pour effet d'invalider la décision de la Commission même si cette personne n'avait pas voté sur la question. On est arrivé au résultat contraire dans l'arrêt *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (C.A. Ont.), où on statue, à la p. 675, que la présence de commissaires qui n'ont ni entendu la preuve ni voté sur la question n'a pas pour effet d'invalider la décision de la Commission.

Je ne puis souscrire à l'affirmation portant que toute discussion avec une personne qui n'a pas entendu la preuve entache forcément de nullité la décision qui s'ensuit parce que la discussion est susceptible d'«influencer» le décideur. À cet égard, je fais miens les propos du juge en chef Meredith dans l'arrêt *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656 (C.A.), à la p. 659:

[TRADUCTION] La Commission se compose de personnes qui occupent des postes qui ressemblent à un poste de juge plutôt qu'à un poste de simple arbitre; personne ne prétend qu'ils ont entendu quelque élément de preuve à l'insu de l'une ou l'autre des parties; tout ce qu'on peut dire c'est qu'ils, à savoir les commissaires qui ont entendu la preuve et rendu la décision, ont permis à un autre commissaire qui n'avait pas entendu la preuve ni participé à l'enquête auparavant, d'en lire la transcription et de leur exprimer certaines de ses vues sur la cause [...] [M]ais, il convient d'ajouter que si toutes les

he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed. [Emphasis added.]

The appellant's main argument against the practice of holding full board meetings is that these meetings can be used to fetter the independence of the panel members. Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. It is useful to define this concept before discussing the effect of full board meetings on panel members. In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, Dickson C.J. described the "accepted core of the principle of judicial independence" as a complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons, including judges, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87, and Benyekhlef, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, at p. 48.

It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do

décisions d'un juge étaient entachées de nullité parce qu'il a discuté de l'affaire avec un autre juge, il faudrait invalider un grand nombre de jugements considérés comme valides et inattaquables, et que si ces discussions étaient prohibées, encore plus de jugements pourraient être infirmés en Cour d'appel à cause du vice qu'il faudrait constater si le sujet avait été ainsi discuté. [Je souligne.]

Dans son principal argument à l'encontre de la pratique de la Commission de tenir des réunions plénières, l'appelante soutient que ces réunions peuvent servir à diminuer l'indépendance des membres du banc. L'indépendance des juges est un principe reconnu depuis longtemps dans notre droit constitutionnel; elle fait également partie des règles de justice naturelle même en l'absence de protection constitutionnelle. Il est utile de définir cette notion avant d'aborder l'effet des réunions plénières de la Commission sur les membres d'un banc. Dans l'arrêt *Beauregard c. Canada*, [1986] 2 R.C.S. 56, le juge en chef Dickson définit «ce qui a ... été accepté comme l'essentiel du principe de l'indépendance judiciaire», comme la liberté complète de juger une affaire donnée selon sa conscience et ses opinions, sans l'intervention d'autres personnes, y compris de juges, à la p. 69:

> Historiquement, ce qui a généralement été accepté comme l'essentiel du principe de l'indépendance judiciaire a été la liberté complète des juges pris individuellement d'instruire et de juger les affaires qui leur sont soumises: personne de l'extérieur—que ce soit un gouvernement, un groupe de pression, un particulier ou même un autre juge—ne doit intervenir en fait, ou tenter d'intervenir, dans la façon dont un juge mène l'affaire et rend sa décision. Cet élément essentiel continue d'être au centre du principe de l'indépendance judiciaire.

Voir également *Valente c. La Reine*, [1985] 2 R.C.S. 673, aux pp. 686 et 687, et Benyekhlef, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, à la p. 48.

Il est évident qu'aucune ingérence extérieure ne peut être pratiquée pour forcer ou contraindre un décideur à participer à des discussions au sujet de questions de politique soulevées par une affaire sur laquelle il doit statuer. Il va de soi aussi qu'on ne peut recourir à aucun mécanisme formel de consultation pour forcer ou inciter un décideur à

not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate decision will be that of the decision maker for which he assumes full responsibility.

The essential difference between full board meetings and informal discussions with colleagues is the possibility that moral suasion may be felt by the members of the panel if their opinions are not shared by other Board members, the chairman or vice-chairmen. However, decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any *stare decisis* rule.

It follows that the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions. There is nothing in the *Labour Relations Act* which gives either the chairman, the vice-chairmen or other Board members the power to impose his opinion on any other Board member. However, this *de jure* situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions.

It is pointed out that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": see *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259. This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reason-

adopter un point de vue qu'il ne partage pas. Cependant, les discussions avec des collègues ne constituent pas en soi une atteinte à la capacité des membres d'un banc de trancher les questions en litige de manière indépendante. Une discussion n'empêche pas un décideur de juger selon ses propres conscience et opinions, pas plus qu'elle ne constitue une entrave à sa liberté. Quelles que soient les discussions qui peuvent avoir lieu, la décision ultime appartient au décideur et il en assume la responsabilité entière.

La différence fondamentale entre les réunions plénières de la Commission et les discussions informelles entre collègues tient à la pression morale que les membres du banc peuvent ressentir si les autres commissaires, le président ou les vice-présidents ne partagent pas leur avis. Cependant, les décideurs ont le droit de changer d'avis, peu importe que ce soit à la suite de discussions avec des collègues ou de leur propre réflexion sur le sujet. L'opinion de la majorité de ses collègues peut également amener un décideur à changer d'avis par souci de cohérence de la jurisprudence puisqu'il s'agit d'un critère légitime qui doit être pris en considération, même si le décideur n'est lié par aucune règle de *stare decisis*.

Il s'ensuit que la question qu'il faut se poser en l'espèce est non pas de savoir si la pratique des réunions plénières de la Commission peut amener les membres d'un banc à changer d'avis, mais plutôt de savoir si cette pratique entrave la capacité des membres de ce banc de statuer selon leurs opinions. Il n'y a rien dans la *Loi sur les relations de travail* qui autorise le président, les vice-présidents ou les autres commissaires à imposer leur avis à quelque autre commissaire. Cependant, cette situation de droit ne doit pas être contrecarrée par des procédures qui peuvent avoir pour effet de forcer ou d'inciter des membres d'un banc à statuer à l'encontre de leurs propres conscience et opinions.

On souligne qu'il est essentiel [TRADUCTION] «que non seulement justice soit rendue, mais que justice paraisse manifestement et indubitablement être rendue»: voir *Rex v. Sussex Justices*, [1924] 1 K.B. 256, à la p. 259. Cette maxime s'applique chaque fois que les circonstances créent un risque

able apprehension of bias, even if the decision maker has completely disregarded these circumstances. However, in my opinion and for the reasons which follow, the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a reasonable apprehension of bias or lack of independence within the meaning of the test stated by this Court in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, reaffirmed and applied as the criteria for judicial independence in *Valente v. The Queen*, *supra*, at p. 684:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—concluded . . . ."

See also p. 689.

A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. It cannot be said that this practice is meant to convey to panel members the message that the opinion of the majority of the Board members present has to be followed. On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. However, the criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions. In fact, the record shows that each panel member held to his own opinion since Mr. Wightman dissented and Mr. Lee only concurred in part with Chairman Adams. It is my opinion, in agreement with the Court of Appeal, that the full board

d'injustice, par exemple, quand il existe une crainte raisonnable de partialité, même si le décideur n'a pas du tout tenu compte de ces circonstances. Cependant, pour les motifs ci-après, je suis d'avis que le risque que les réunions plénières de la Commission diminuent l'indépendance judiciaire des membres du banc n'est pas suffisant pour susciter une crainte raisonnable de partialité ou d'un manque d'indépendance au sens du critère formulé par notre Cour dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394, lequel a été confirmé et appliqué à titre de critère d'indépendance judiciaire dans l'arrêt *Valente c. La Reine*, précité, à la p. 684:

> . . . la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique . . .»

Voir aussi à la p. 689.

La réunion plénière de la Commission tenue conformément à la procédure décrite par le président Adams n'est pas imposée, elle est convoquée à la demande du banc qui a entendu l'affaire ou par l'un de ses membres. Elle est soigneusement organisée pour favoriser la discussion sans qu'il y ait tentative de vérifier s'il y a consensus; il n'est pas dressé de procès-verbal, le vote n'y est pas pris, la présence à la réunion est facultative et les présences n'y sont pas prises. La décision revient entièrement au banc qui a entendu l'affaire. On ne saurait dire que cette pratique vise à signaler aux membres du banc qu'il faut se conformer à l'avis de la majorité des commissaires présents. Par ailleurs, il est vrai qu'il est possible de vérifier s'il y a consensus sans recourir à un vote et que cette institutionnalisation du processus de consultation comporte un risque d'influence plus prononcée sur les membres du banc. Cependant, le critère de l'indépendance est non pas l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions. En fait, le dossier démontre que chacun des membres du banc s'en est tenu à son opinion puisque M. Wightman a été dissident et que M. Lee n'a souscrit qu'en partie à l'avis du

meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. The Board's practice of holding full board meetings or the full board meeting held on September 23, 1983 would not be perceived by an informed person viewing the matter realistically and practically—and having thought the matter through—as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.

(d) *Full Board Meetings and the Audi Alteram Partem Rule*

Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence.

For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. In this case, for example, the Board had to determine which events led to the decision to close the Hamilton plant and, in turn, decide whether the appellant had failed to bargain in good faith by not informing of an impending plant closing either on the basis that a "*de facto* decision" had been taken or on some other basis. The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their

président Adams. J'estime, à l'instar de la Cour d'appel, que la réunion plénière de la Commission a constitué un élément important du processus légitime de consultation, mais non une participation à la décision par des personnes qui n'avaient pas entendu les parties. Une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique, ne percevrait pas la pratique de la Commission de tenir des réunions plénières ou la réunion plénière de la Commission tenue le 23 septembre 1983 comme une atteinte à son droit d'obtenir une décision d'un tribunal indépendant et ainsi comme une violation de ce principe de justice naturelle.

d) *Les réunions plénières de la Commission et la règle audi alteram partem*

Les réunions plénières de la Commission tenues *ex parte* comportent certains inconvénients sur le plan de la règle *audi alteram partem* parce que les parties ne savent pas ce qui a été dit à ces réunions et n'ont pas la possibilité de répliquer aux nouveaux arguments soumis par les personnes qui y ont assisté. De plus, il y a toujours le risque que les personnes présentes à la réunion discutent de la preuve.

Aux fins de l'application de la règle *audi alteram partem*, il faut distinguer les discussions portant sur des questions de fait et celles portant sur des questions de droit ou de politique. Dans toute décision, les membres du banc doivent établir les faits, les normes juridiques à appliquer à ces faits et, enfin, il doivent évaluer la preuve conformément à ces normes juridiques. En l'espèce, par exemple, la Commission devait déterminer quels événements avaient donné lieu à la décision de fermer l'usine de Hamilton, pour ensuite décider si l'appelante avait omis de négocier de bonne foi en n'informant pas de la fermeture prochaine de l'usine, pour le motif qu'«une décision *de facto*» avait été prise en ce sens ou pour un autre motif. La détermination et l'évaluation des faits sont des tâches délicates qui dépendent de la crédibilité des témoins et de l'évaluation globale de la pertinence de tous les renseignements présentés en preuve. En général, les personnes qui n'ont pas entendu toute la preuve ne sont pas à même de bien remplir cette tâche et les règles de justice naturelle ne permet-

participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

It is already recognized that no new evidence may be presented to panel members in the absence of the parties: *Kane v. Board of Governors of the University of British Columbia*, *supra*, at pp. 1113-14. The appellant does not claim that new evidence was adduced at the meeting and the record does not disclose any such breach of the *audi alteram partem* rule. The defined practice of the Board at full board meetings is to discuss policy issues on the basis of the facts as they were determined by the panel. The benefits to be derived from the proper use of this consultation process must not be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. In this case, the record contains no evidence that factual issues were discussed by the Board at the September 23, 1983 meeting.

In his reasons for judgment, Rosenberg J. has raised the issue of whether discussions on policy issues can be completely divorced from the factual findings, at p. 492:

> In this case there was a minority report. Although the chairman states that the facts in the draft decision were taken as given there is no evidence before us to indicate whether the facts referred to those in the majority report or the minority report or both. Also, without in any way doubting the sincerity and integrity of the chairman in making such a statement, it is not practical to have all of the facts decided except against a background of determination of the principles of law involved. For example, a finding that Consolidated-Bathurst was seriously considering closing the Hamilton plant is of no significance if the requirement is that the failure to bargain in good faith must be a *de facto* decision to close. Accordingly,

tent pas à ces personnes de voter sur l'issue du litige. Leur participation aux discussions portant sur ces questions de fait pose moins de problèmes quand elles ne participent pas à la décision finale. Cependant, j'estime que ces discussions violent généralement les règles de justice naturelle parce qu'elles permettent à des personnes qui ne sont pas parties au litige de faire des observations sur des questions de fait alors qu'elles n'ont pas entendu la preuve.

Il est déjà admis que les membres d'un banc ne peuvent être saisis de nouveaux éléments de preuve en l'absence des parties: *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, précité, aux pp. 1113 et 1114. L'appelante ne soutient pas que de nouveaux éléments de preuve ont été soumis à la réunion et le dossier ne révèle aucune violation de la règle *audi alteram partem* pour ce motif. La pratique définie par la Commission lors de ces réunions plénières consiste précisément à discuter des questions de politique en tenant pour avérés les faits établis par le banc. Il ne faut pas refuser les avantages que l'utilisation valable de ce processus de consultation peut procurer, uniquement à cause de la simple crainte que cette pratique établie ne soit pas respectée, en l'absence de toute preuve que la chose s'est produite. En l'espèce, le dossier ne contient aucune preuve que des questions de fait ont été discutées par la Commission lors de la réunion du 23 septembre 1983.

Dans ses motifs de jugement, le juge Rosenberg soulève la question de savoir si les discussions de questions de politique peuvent être totalement séparées des constatations de fait, à la p. 492:

> [TRADUCTION] En l'espèce, il y a eu des motifs minoritaires. Bien que le président affirme que les faits mentionnés dans l'avant-projet de décision ont été tenus pour avérés, rien dans la preuve qui nous est soumise n'indique si les faits se rapportaient à ceux des motifs de la majorité, de la minorité ou des deux à la fois. De plus, même si je ne doute nullement de la bonne foi et de l'intégrité du président au moment où il affirme cela, il n'est pas pratique de déterminer tous les faits si ce n'est en fonction de la détermination des principes de droit applicables. Par exemple, la constatation que Consolidated-Bathurst envisageait sérieusement de fermer l'usine de Hamilton n'a pas d'importance s'il est nécessaire que

until the board decides what the test is the findings of fact cannot be finalized.

With respect, I must disagree with Rosenberg J. if he suggests that it is not practical to discuss policy issues against the factual background provided by the panel.

It is true that the evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. However, it is possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. In this case, Mr. Wightman seemed to disagree with Chairman Adams with respect to the credibility of the testimonies of some of the appellant's witnesses. While this might be relevant to Mr. Wightman's conclusions, it was nevertheless possible to outline the policy issues at stake in this case from the summary of the facts prepared by Chairman Adams. In turn, it was possible to outline the various tests which could be adopted by the panel and to discuss their appropriateness from a policy point of view. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests

l'omission de négocier de bonne foi découle d'une décision *de facto* de fermer l'usine. En conséquence, la constatation des faits ne peut être parachevée avant que la Commission ne décide du critère applicable.

En toute déférence, je ne puis souscrire à l'avis du juge Rosenberg s'il veut dire qu'il n'est pas pratique de discuter des questions de politique en fonction de la base factuelle fournie par le banc.

Il est vrai qu'il n'est pas toujours possible d'évaluer la preuve de façon définitive avant que le banc n'ait choisi le critère juridique approprié et avant que tous les membres du banc n'aient évalué la crédibilité de chaque témoin. Cependant, il est possible de débattre des questions de politique que soulève la preuve soumise au banc même si cette preuve peut entraîner une grande variété de conclusions sur les faits. En l'espèce, M. Wightman semble avoir différé d'opinion avec le président Adams sur la crédibilité des dépositions de certains témoins de l'appelante. Bien que cela puisse être pertinent relativement aux conclusions de M. Wightman, il était néanmoins possible d'énoncer les questions de politique en cause dans cette affaire à partir du résumé des faits préparé par le président Adams. Puis, il était possible d'exposer les différents critères que le banc pouvait adopter et de discuter de leur pertinence sur le plan des politiques. Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. Les discussions sur les politiques n'ont pas pour objet de décider quelle partie aura finalement gain de cause, mais elles ont pour objet d'exposer les différents critères juridiques que la Commission peut adopter et de débattre leur valeur relative.

Il faut aborder les questions de politique de manière différente parce qu'elles ont, par définition, des conséquences qui vont au-delà du règlement du litige particulier entre les parties. Bien qu'elles découlent de faits précis, elles constituent l'expression d'un principe ou de normes apparentées au droit. Puisque ces questions font appel à l'analyse des lois, des décisions antérieures et des besoins sociaux qui sont perçus, les conséquences d'une décision de politique prise par la Commis-

of the parties even though it has an effect on the outcome of the complaint.

I have already outlined the reasons which justify discussions between panel members and other members of the Board. It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the *audi alteram partem* rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.

I agree with Cory J.A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate. The decision to call such a hearing is left to the Board as master of its own procedure: s. 102(13) of the *Labour Relations Act*. However, this is not a case where a new policy undisclosed or unknown to the parties was introduced or applied. The extent of the obligation of an employer engaged in collective bargaining to disclose information regarding the possibility of a plant closing was at the very heart of the debate from the outset and had been the subject of a policy decision previously in the *Westinghouse* case. The parties had every opportunity to deal with the matter at the hearing and indeed presented diverging proposals for modifying the policy. There is no evidence that any new grounds were put forward at the meeting and each of the reasons rendered by Chairman Adams and Messrs. Wightman and Lee simply adopts one of the arguments presented by the parties and summarized at pp. 1427-30 of Chairman Adams' decision. Though the reasons are expressed in great detail, the appellant does not identify any of them as being new nor does it contend that it did not have an opportunity to be heard or to deal with them.

sion ne dépendent pas, dans une certaine mesure, de l'intérêt immédiat des parties, même si elles peuvent avoir un effet sur l'issue de la plainte.

J'ai déjà exposé les motifs qui justifient les membres d'un banc d'avoir des discussions avec les autres commissaires. Il faut maintenant examiner les conditions dans lesquelles les réunions plénières de la Commission doivent être tenues afin de respecter la règle *audi alteram partem*. À cet égard, la seule violation possible de la règle a lieu quand on propose une nouvelle politique ou un nouvel argument à une réunion plénière de la Commission et qu'une décision fondée sur cette politique ou cet argument est rendue sans qu'on accorde aux parties la possibilité de répliquer.

Je souscris à l'avis du juge Cory (alors juge de la Cour d'appel) qu'il faut aviser les parties de tout nouveau moyen à propos duquel elles n'ont pas soumis de plaidoiries. Dans un tel cas, il faut accorder aux parties une possibilité raisonnable de répliquer et la convocation d'une audience supplémentaire peut se révéler appropriée. La décision de convoquer une telle audience revient à la Commission en tant que maîtresse de sa propre procédure: par. 102(3) de la *Loi sur les relations de travail*. Cependant, en l'espèce, il n'y a eu ni présentation ni application d'une nouvelle politique qui n'avait pas été divulguée aux parties ou que celles-ci ne connaissaient pas. La portée de l'obligation d'un employeur qui négocie collectivement de divulguer les renseignements relatifs à la fermeture possible d'une usine était au cœur même du débat depuis le début et avait déjà fait l'objet d'une décision de politique dans l'affaire *Westinghouse*. Les parties avaient eu toutes les chances possibles de traiter ce sujet à l'audience et avaient même soumis des propositions contradictoires de modification de la politique. Il n'y a aucune preuve que de nouveaux moyens ont été présentés lors de la réunion et les motifs de chacun des trois commissaires, le président Adams et MM. Wightman et Lee, ne font qu'adopter l'un des arguments soumis par les parties que le président Adams résume aux pp. 1427 à 1430 de sa décision. Bien que les motifs soient très élaborés, l'appelante n'en désigne aucune partie comme nouvelle, ni ne soutient qu'elle n'a pas eu la possibilité de se faire entendre ou d'en traiter.

Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, *de Smith's Judicial Review of Administrative Action, supra,* at p. 158. It is true that on factual matters the parties must be given a "fair opportunity . . . for correcting or contradicting any relevant statement prejudicial to their view": *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia*, *supra*, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very existence is the specialized knowledge and expertise which they are expected to apply.

I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. In this case, an important policy issue, namely the validity of the test adopted in the *Westinghouse* case, was at stake and the Board was entitled to call a full board meeting to discuss it. There is no evidence that any other issues were discussed or indeed that any other arguments were raised at that meeting and it follows that the appellant has failed to prove that it has been the

Depuis sa première formulation, la règle *audi alteram partem* vise essentiellement à donner aux parties une [TRADUCTION] «possibilité raisonnable de répliquer à la preuve présentée contre [elles]»: Evans, *de Smith's Judicial Review of Administrative Action*, précité, à la p. 158. Il est vrai que relativement aux questions de fait, les parties doivent obtenir une [TRADUCTION] «possibilité raisonnable [. . .] de corriger ou de contredire tout énoncé pertinent qui nuit à leur point de vue»: *Board of Education v. Rice*, [1911] A.C. 179, à la p. 182; voir également *Local Government Board v. Arlidge*, [1915] A.C. 120, aux pp. 133 et 141, et *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, précité, à la p. 1113. Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause adéquatement et de répondre aux arguments qui leur sont défavorables. Ce droit n'inclut pas celui de reprendre les plaidoiries chaque fois que le banc se réunit pour débattre l'affaire. Pour des raisons pratiques manifestes, les cours supérieures, et en particulier les cours d'appel, ne sont pas tenues de convoquer de nouveau les parties chaque fois qu'un membre du banc infirme un argument et il serait anormal d'être plus exigeant envers les tribunaux administratifs en raison des règles de justice naturelle. En réalité, une de leurs raisons d'être est justement leurs connaissances et compétences spécialisées qu'on souhaite les voir appliquer.

Je conclus donc que le processus de consultation décrit par le président Adams dans sa décision relative à la demande de réexamen ne viole pas la règle *audi alteram partem* pourvu que les questions de fait ne soient pas discutées à la réunion plénière de la Commission et que les parties aient une possibilité raisonnable de répliquer à tout nouveau moyen soulevé à cette réunion. En l'espèce, une importante question de politique était en jeu, savoir la validité du critère adopté dans la décision *Westinghouse* et la Commission avait le droit de convoquer une réunion plénière pour en débattre. Il n'y a aucune preuve qu'on ait discuté d'autres sujets ou même qu'on ait soulevé quelque autre argument lors de cette réunion. Il s'ensuit que

victim of any violation of the *audi alteram partem* rule. Indeed, the decision itself indicates that it rests on considerations known to the parties upon which they had full opportunity to be heard.

IV—Conclusion

The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalized consultation process will not necessarily lead Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion on the issues at hand.

The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. In this respect, I adopt the words of Professors Blache and Comtois in "La décision institutionnelle", *supra*, at p. 708:

[TRANSLATION] The institutionalizing of decisions exists in our law and appears to be there to stay. The problem is thus not whether institutional decisions should be sanctioned, but to organize the process in such a way as to limit its dangers. There is nothing revolutionary in this approach: it falls naturally into the tradition of English and Canadian jurisprudence that the rules of natural justice should be flexibly interpreted.

l'appelante n'a pas prouvé qu'elle ait été victime d'une violation quelconque de la règle *audi alteram partem*. En réalité, la décision elle-même montre qu'elle repose sur des considérations connues des parties et au sujet desquelles elles avaient eu tout le loisir de se faire entendre.

IV—Conclusion

L'institutionnalisation du processus de consultation adopté par la Commission fournit un cadre qui permet au président, aux vice-présidents et aux commissaires de mettre leur expérience en commun et d'améliorer la qualité globale de leurs décisions. Quoique le respect de l'indépendance judiciaire des commissaires empêche d'obtenir la cohérence parfaite des décisions de la Commission, celle-ci cherche, par ce processus de consultation à éviter les décisions contradictoires rendues par inadvertance et à atteindre le niveau de cohérence le plus élevé possible dans les circonstances. Un processus institutionnalisé de consultation ne permet pas nécessairement aux commissaires de parvenir à un consensus, mais il fournit une tribune où il est possible de parvenir librement à ce consensus suite à une discussion réfléchie des questions soulevées.

Les avantages d'un processus institutionnalisé de consultation sont manifestes et je ne puis souscrire à la proposition que cette pratique contrevient forcément aux règles de justice naturelle. Les règles de justice naturelle doivent avoir la souplesse nécessaire pour tenir compte à la fois des pressions institutionnelles qui s'exercent sur les tribunaux administratifs modernes et des risques inhérents à cette pratique. À cet égard, je fais miens les propos tenus par les professeurs Blache et Comtois dans «La décision institutionnelle» précité, à la p. 708:

Le phénomène d'institutionnalisation de la décision existe dans notre droit et il semble qu'il y soit pour rester. Le problème qui se pose n'est donc pas de savoir si la décision institutionnelle devrait ou non être autorisée, mais d'articuler des modalités de mise en œuvre qui permettent d'en limiter les risques. Il s'agit là d'une approche qui n'a rien de révolutionnaire et s'inscrit dans la tradition jurisprudentielle anglaise et canadienne selon laquelle il faut interpréter avec flexibilité les règles de justice naturelle.

The consultation process adopted by the Board formally recognizes the disadvantages inherent in full board meetings, namely that the judicial independence of the panel members may be fettered by such a practice and that the parties do not have the opportunity to respond to all the arguments raised at the meeting. The safeguards attached to this consultation process are, in my opinion, sufficient to allay any fear of violations of the rules of natural justice provided as well that the parties be advised of any new evidence or grounds and given an opportunity to respond. The balance so achieved between the rights of the parties and the institutional pressures the Board faces are consistent with the nature and purpose of the rules of natural justice.

Le processus de consultation adopté par la Commission reconnaît formellement les inconvénients inhérents aux réunions plénières de la Commission, savoir que l'indépendance judiciaire des membres d'un banc peut être diminuée par une telle pratique et que les parties n'ont pas la possibilité de répliquer à tous les arguments soulevés au cours de ces réunions. Les garanties dont est assorti ce processus de consultation sont, à mon avis, suffisantes pour dissiper toute crainte de violation des règles de justice naturelle pourvu également que les parties soient informées de tout nouvel élément de preuve ou de tout nouveau moyen et qu'elles aient la possibilité d'y répondre. L'équilibre ainsi réalisé entre les droits des parties et les pressions institutionnelles qui s'exercent sur la Commission sont compatibles avec la nature et l'objet des règles de justice naturelle.

For these reasons, I would dismiss the appeal with costs.

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs, LAMER *and* SOPINKA JJ. *dissenting.*

Pourvoi rejeté avec dépens, les juges LAMER *et* SOPINKA *sont dissidents.*

Solicitors for the appellant: Beard, Winter, Toronto.

Procureurs de l'appelante: Beard, Winter, Toronto.

Solicitors for the respondent the International Woodworkers of America, Local 2-69: Cavalluzzo, Hayes & Lennon, Toronto.

Procureurs de l'intimé le Syndicat international des travailleurs du bois d'Amérique, section locale 2-69: Cavalluzzo, Hayes & Lennon, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Gowling & Henderson, Ottawa.

Procureurs de l'intimée la Commission des relations de travail de l'Ontario: Gowling & Henderson, Ottawa.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Henthorne v. British Columbia Ferry Services Inc.,* 2011 BCCA 476

Date: 20111124
Docket: CA038984

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; and the *Workers Compensation Act*, R.S.B.C. 1996, c. 492; and Decisions of the Workers' Compensation Appeal Tribunal rendered on March 11, 2010 (Decision No. WCAT-2010-00733), and June 10, 2010 (Decision No. WCAT-2010-01612)

Between:

Colin Henthorne

Appellant
(Petitioner)

And

British Columbia Ferry Services Inc. and Workers' Compensation Appeal Tribunal

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson

On appeal from the Supreme Court of British Columbia, April 1, 2011 (*Henthorne v. British Columbia Ferry Services Inc.,* 2011 BCSC 409, Vancouver Registry, Docket Number S103290)

Counsel for Appellant:	R.D.W. Dalziel D.M. Getz
Counsel for Respondent British Columbia Ferry Services Inc.:	P. Fairweather
Counsel for Respondent Workers' Compensation Appeal Tribunal	V.A. Pylypchuk

Place and Date of Hearing:	Vancouver, British Columbia September 6, 2011
Place and Date of Judgment:	Vancouver, British Columbia November 24, 2011

Written Reasons by:
The Honourable Madam Justice Newbury

Written Reasons Concurring in the Result by:
The Honourable Mr. Justice Groberman (Page 32, para. 60.)

Concurred in by:
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice Newbury:

Factual Background

[1] On the evening of March 21, 2006, the ferry "Queen of the North", en route from Prince Rupert to Port Hardy, went aground and sank off Gil Island in Wright Sound, necessitating an emergency evacuation and resulting in the presumed death of two passengers. The appellant Mr. Henthorne was the captain (or "master") of the ferry. At the time of the incident, he had retired for the night, as he was entitled to do, leaving the second officer and a quartermaster on navigational watch.

[2] An internal inquiry into the incident was held by Mr. Henthorne's employer, the respondent British Columbia Ferry Services Inc. (the "Corporation"). The second officer and quartermaster who had been on duty in the bridge when the ferry went aground refused to provide information as to what had occurred. Mr. Henthorne said he was unable to explain why the vessel had failed to change course when required. Mr. Henthorne was questioned about the matter of the general safety and seaworthiness of the ferry. He recounted some safety concerns he had reported to his employer in past years, some of which had been rectified and some of which had not. The inquiry panel asked to hear of serious safety problems that might have caused the vessel to go aground, or caused pollution. Mr. Henthorne referred to two minor items – a module on the autopilot that had been resolved after several years, and a rescue boat davit, which had been launched weekly in exercises without causing injuries.

[3] After further discussion, and in light of time constraints, Mr. Henthorne was asked to prepare a list of safety concerns he had had to which the Corporation had not responded. He prepared an 11-page list describing 52 issues he had noted over the years, some of which had not been resolved by the time of the sinking. In response to questioning when the inquiry resumed, he conceded that none of the items on the list had caused or contributed to the events of March 21, 2006.

[4] We were not provided with the report of the panel that held the inquiry, but their findings were described as follows in the reasons of the Workers' Compensation Appeal Tribunal ("WCAT" or the "Tribunal") in the present proceeding:

> The DI [Divisional Inquiry] report concluded that the navigational watch – the fourth officer (4/O) and the quartermaster (QM1) – of the ship at the time of the grounding, failed to maintain a proper lookout, failed to make the required or any course changes at Sainty Point, and that therefore for over 14 minutes the ship proceeded straight on an incorrect course for four nautical miles until striking Gil Island. The DI report also observed that a casual watchkeeping behaviour was practiced at times when operating the ship, based on evidence at the DI proceedings and further demonstrated by music playing on the bridge as overheard on radio calls. The DI report made 31 recommendations regarding equipment, bridge team procedures, and evacuation.

[5] The reference to "casual watchkeeping" came from the evidence of the other captain of the Queen of the North, Captain "F". (He and Captain Henthorne worked on an alternating two-week rotation.) Captain F testified as to a "relaxed wheelhouse and failure to follow standing bridge orders" and described two previous breakdowns in proper navigational practices on the ferry. He mentioned that Captain Henthorne had permitted music to be played in the wheelhouse – an aspect of casual watchkeeping that occurred the night of the accident. Captain Henthorne, in contrast, did not refer in his evidence to any poor navigational or watchkeeping practices.

[6] A full investigation into the sinking was also done by the Transportation Safety Board (see TSB Marine Report 2006-MO6W0052, available on the TSB website (www.tsb.gc.ca).) Its report listed the following "Findings as to Causes and Contributing Factors":

> 1. The fourth officer (4/O) did not order the required course change at the Sainty Point waypoint.
> 2. Various distractions likely contributed to the 4/O's failure to order the course change. Furthermore, believing that the course change had been made, the next course change was not expected for approximately 27 minutes.

> 3. For the 14 minutes after the missed course change, the 4/O did not adhere to sound watchkeeping practices and failed to detect the vessel's improper course.
> 4. When the 4/O became aware that the vessel was off course, the action taken was too little too late to prevent the vessel from striking Gil Island.
> 5. The navigation equipment was not set up to take full advantage of the available safety features and was therefore ineffective in providing a warning of the developing dangerous situation.
> 6. The composition of the bridge watch lacked an appropriately certified third person. This reduced the defences and made it more likely that the missed course change would go undetected.
> 7. The working environment on the bridge of the ship was less than formal, and the accepted principles of navigation safety were not consistently or rigorously applied. Unsafe navigation practices persisted which, in this occurrence, contributed to the loss of situational awareness by the bridge team.
> 8. No accurate head count of passengers and crew was taken before abandoning the vessel, thus precluding a focused search for missing persons at that time.

[7] In January 2007, the Corporation told Mr. Henthorne that following a review of operational and staff requirements, it had concluded it would no longer require his services. Later, the employer acknowledged that the need to reduce staff was not the reason for the termination. However, the Corporation did not allege cause for the dismissal and proposed to keep Mr. Henthorne on full payroll and benefits until April 15, 2008 and to provide him with a reference letter if requested.

Workers' Compensation Board Complaint

[8] In January 2008, Mr. Henthorne filed a complaint with the Workers' Compensation Board under s. 151 of the *Workers Compensation Act,* R.S.B.C. 1996, c. 492. Sections 150-52, colloquially referred to as 'whistle-blower' provisions, state in material part:

> 150(1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.
>
> (2) Without restricting subsection (1), discriminatory action includes

> (a) suspension, lay-off or dismissal,
>
> (b) demotion or loss of opportunity for promotion,
>
> (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
>
> (d) coercion or intimidation,
>
> (e) imposition of any discipline, reprimand or other penalty, and
>
> (f) the discontinuation or elimination of the job of the worker.
>
> 151 An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> (i) an employer or person acting on behalf of an employer,
>
> ...
>
> 152(1) A worker who considers that
>
> (a) an employer or union, or a person acting on behalf of an employer or union, has taken, or threatened to take, discriminatory action against the worker contrary to section 151, or
>
> ...
>
> may have the matter dealt with through the grievance procedure under a collective agreement, if any, or by complaint in accordance with this Division.
>
> ...
>
> (3) In dealing with a matter referred to in subsection (1), whether under a collective agreement or by complaint to the Board, the burden of proving that there has been no such contravention is on the employer or the union, as applicable. [Emphasis added.]

Section 153(2) of the Act provides that where the Board finds that discriminatory action has occurred, it may *inter alia* order the complainant's reinstatement on the same terms and conditions as those on which he or she was previously employed.

[9] We were not provided with a copy of Mr. Henthorne's complaint, but it is clear he alleged his employment had been terminated because he had voiced safety concerns to the panel which heard the internal inquiry. Mr. Henthorne sought an order returning him to active duty in his previous position as an "exempt master" (i.e., a captain who is not a member of the union that represents non-management employees of the employer). The Corporation defended the complaint (again we do not have a copy of its response), denying it had terminated Mr. Henthorne's employment for the reason alleged, and advancing various other reasons why it had "lost confidence in the Complainant's ability to command".

[10] The complaint was heard by a case officer in the Compliance Section, Investigations Division, of the Board. She noted at the outset that establishing a *prima facie* case of discriminatory action is not an onerous matter: generally, she said, a "bare outline of a complaint" will prevail, and the employee's evidence is accepted as accurate at this initial stage. Applying this standard, the case officer found that Mr. Henthorne had demonstrated a *prima facie* case and that the Corporation had failed to discharge its burden under s. 152(3) to show that no contravention of s. 151 had taken place. The case officer summarized her findings in the following passage:

> To sum up, even if I were able to accept that the employer honestly lost confidence in the worker [Captain Henthorne] because of his actions or inactions in relation to the events of March 21 and 22, 2006, I cannot ignore the employer's position that the worker's failure to appreciate his role as part of the management team "significantly contributed" to the decision to fire him. As the worker's representative stated: "In B.C. Ferries' view, [the worker] showed a bad attitude in raising what it considered to be a long and tedious list of unaddressed long-standing safety complaints, an attitude that it considered to be somewhat inconsistent with being a member of the management team." I agree. I find that at least part of the motivation for deciding to terminate the worker relates to the employer being displeased with the worker's attitude towards safety issues as a member of management. Thus, the motivation for firing the worker is tainted. The employer has not provided sufficient persuasive evidence to rebut the *prima facie* case.

[11] The case officer left the matter of remedy for a later day, but after mediation proved unsuccessful, a second hearing was held in February 2009. By this time, the

Corporation had decided that it would reinstate Mr. Henthorne – although not to the position of exempt master on the Northern route. He, on the other hand, had decided he would prefer not to return to his position, given what he alleged was the absence of a "healthy environment for a reinstatement." Nevertheless, the case officer ordered the Corporation to reinstate Mr. Henthorne to his former position as an "exempt Master, Northern Route ... no later than May 25, 2009".

Appeal to Workers' Compensation Appeal Tribunal

[12] The Corporation appealed the case officer's orders to the Tribunal, which receives the record of the previous hearing and under s. 246.1 of the Act may also receive such other information it considers relevant. The Tribunal held an oral hearing lasting ten days, at which both parties were represented by counsel. Mr. Henthorne did not give further evidence before WCAT. Two witnesses appeared on behalf of the employer, Captain Taylor and Captain Capacci (referred to in WCAT's reasons by initials only). At the time of the accident, they had been the Vice President of Fleet Operations and the Executive Vice-President of Operations, respectively. Captain Capacci (who had persuaded Mr. Henthorne to take the position of exempt master only shortly before the sinking) had, like Captain F, offered to resign upon hearing that the Queen of the North had gone aground. He was persuaded by the President, Mr. Hahn, to stay on because his leadership was needed to "move the employer forward as a company." However, he was no longer employed by the Corporation at the time of the hearing before the Tribunal.

[13] The long and detailed reasons of the Tribunal are indexed as WCAT-2010-00733, and dated March 11, 2010. In its description of the background facts of the case, WCAT observed that the proffering of the resignations of Captain F and Captain Capacci following the sinking was in keeping with the maritime culture that "the 'buck' does indeed 'stop' with the Master of a ship." The Tribunal continued:

> We further find that when a ship sinks, the career of the on-duty exempt Master of that ship is on the line, that is, his or her future employment as a Master is at serious risk. Such a situation may seem unfair where there was no misconduct sufficient to support a just cause termination. Nevertheless the evidence satisfies us that this is a well-known consequence, even an

> expectation, in the maritime culture where responsibility is absolute regardless of fault. Captain C testified about his experience in his career knowing Masters who had lost their ships. He referred to some of his U.S. Coast Guard classmates who had grounded vessels and are no longer working at sea, as well as a Master who ran a ship aground in Alaska whose employment was subsequently terminated as a result. Captain C noted that the Captain of the *Exxon Valdez* is no longer working at sea. Captain C testified that it is a maritime tradition that having lost a vessel, the Master of such a vessel would be "looking to move on" to another place of employment in the maritime world. He indicated that it would be his expectation if he were in that situation. Captain C said that if he had captained a ship that sunk he would expect to be relieved of his command and he "would move inland with an oar over my shoulder." [At para. 75.]

[14] With respect to the employer's decision to terminate Captain Henshaw's employment, the Tribunal made the following findings:

> Captain C's testimony was that he made the decision that it was necessary to terminate the worker's employment and that he discussed his opinion with Captain T who agreed with him. Subsequently Captain C made this recommendation to the employer's Executive Management Committee, composed of the employer's senior vice-presidents and the president. They all adopted Captain C's recommendation that the employer should terminate the worker's employment. There were no e-mails or other documentation involved in that process. [At para. 66.]

[15] The Tribunal stated the onus on an employer under s. 152 as follows:

> If a worker has provided sufficient evidence to establish a *prima facie* case against the respondent, then the respondent bears the burden of showing that their actions were not motivated in any part by unlawful reasons as alleged by the worker and specified in section 151 of the Act. This is because section 152(3) provides that the burden of proving that there has been a violation of section 151 is on the employer or the union, as applicable. Section 153 gives the Board's procedure for dealing with a complaint.
>
> **...**
>
> Like the former Appeal Division, WCAT has applied the "taint" principle in appeals involving section 151 complaints. As we earlier indicated, a complainant will establish a case of illegal discrimination even if anti-safety attitude provides only a partial motivation for the employer or union action. The "taint" principle requires that in order to discharge the burden of proof under section 152(3) of the Act, a respondent must prove that in no part were its actions tainted by anti-safety motivation prohibited under section 151. The determination of motive or motives for taking negative action against a worker is critical in these types of appeals, and it can be a difficult task. [At paras. 58-60; emphasis added.]

[16] WCAT rejected Mr. Henthorne's argument that the Corporation could not discharge its onus under s. 152(3) without calling all members of the Corporation's "executive team" who had participated in making the decision to terminate his employment. In the words of the Tribunal:

> ... We do not consider that an employer is required to lead evidence from every possible participant in a termination decision that is alleged to contravene section 151 of the Act. That is particularly so where, as in this case, the employer is a large corporation and the evidence indicates that it delegates some of the substance of its decision-making to other appropriate levels within the corporate hierarchy. In our view, it is enough for an employer to lead evidence from the primary or key players involved with the decision in question.
>
> In this case, Captain T testified about the procedure adopted by the employer in deciding to terminate the worker's employment. Captain T said that the termination was technically decided at the executive level; however, as a practical matter this decision was made on the basis of Captain C's recommendation and with additional input from Captain T at the executive level.
>
> We note that the worker ultimately reported to Captain C who was the vice-president in charge of the employer's fleet operations. In addition, Captain C had been instrumental in hiring the worker as an exempt Master and knew the worker's qualities as a mariner from personal observation and experience. Captain C also had the opportunity to observe the worker during the DI.
>
> It follows that Captain C was both sufficiently senior and sufficiently knowledgeable to reasonably have been tasked with the responsibility of evaluating the worker's employment status after the sinking. We are therefore satisfied that Captain C's recommendation would have been central to the employer's decision to terminate the worker's employment.
>
> In addition, we note that Captain T, as an executive vice-president, added his endorsement of Captain C's recommendation at the executive level where the decision was made. Captain T's input at the executive level was the result of him having participated in the DI, of being an experienced mariner, and of having known the worker for many years. Captain T's contribution at the executive level would therefore have been particularly persuasive.
>
> Accordingly, we are satisfied that the combined effect of Captain C's termination recommendation together with Captain T's similarly persuasive input at the executive level provides sufficient insight into and explanation for the employer's motivation at the time it decided to terminate the worker's employment.
>
> Consequently, we do not agree with the worker's argument that the employer has failed to lead sufficient evidence to properly describe its intention and state of mind at the time of the worker's dismissal and thereby rebut the *prima facie* case of discrimination established by the worker. [At paras. 211-17; emphasis added.]

[17] WCAT ultimately found that Mr. Henthorne's raising of safety concerns before the internal inquiry had not been the reason for his termination. Rather, the Tribunal said, it was Mr. Henthorne's "failure to address himself to the focus of the DI and, as requested by the DI panel, turn his mind to providing them with helpful information about the sinking of the ship." (Para. 192.) The Tribunal continued:

> The purpose of section 151(c)(i) of the Act is to prevent employers from disciplining or taking other discriminatory action against workers because they have raised occupational health or safety issues. The statutory provision is intended to protect workers who raise such issues from reprisal. It is not, however, intended to be used as a shield by workers against employer actions that are not directed at discouraging workers from raising occupational health and safety issues. In other words, simply because a worker raised safety concerns before experiencing adverse employment consequences does not necessarily lead to a successful section 151 complaint (although it may raise a *prima facie* case and the section 152(3) presumption for an employer to rebut). See *WCAT-2007-03653* (November 26, 2007). If this were not the case then any worker could protect himself or herself from disciplinary action simply by making sure to raise a safety issue at a critical time, for example, when knowing that they are the subject of a personnel or human resources investigation. As noted in *WCAT-2009-03326* (December 24, 2009):
>
> > The worker relies on the contextual link that his employment termination has with his raising of safety issues with the employer. I find that in this case, that contextual link is merely a coincidence. Indeed, because the worker's role as a CSO involved a requirement that he report safety issues on a daily basis to the employer, whatever reason the employer gave for terminating his employment would necessarily be embedded in the context of the worker raising safety issues. This does not mean, however, that an employer in such a situation can never rebut the section 152(3) presumption that will likely arise when an employer's action against a worker takes place within an occupational health and safety environment. The task [is] to decide whether the evidence establishes the good faith (the *bona fides*) of an employer's stated motivation for taking action against a worker.
>
> Similarly, in this case, the focus of the DI was to investigate safety concerns and the worker was expected, indeed he was asked, to address his mind to safety issues and speak about them to the DI panel. The employer's perception was that the worker was not helpful to the DI and that at the DI hearing he did not behave as the employer expected and wanted a management team member to behave. Occupational safety issues were the context for the DI inquiry and thus the employer's reasons for terminating the worker's employment are of necessity embedded in that overall context which again of necessity includes the worker raising safety concerns to the DI panel.

> We are satisfied that whether the worker had raised his safety concerns or instead had proceeded to discuss some other matter, for example, such as the state of the weather on the day of the DI interviews, the ultimate response of the DI panel would have been the same, namely, to try to focus his attention on reasons for the ship's grounding. If he had continued to discuss the weather but failed to address critical issues such as the state of the navigational watch, watchkeeping practices, or crew assignment, we are satisfied the DI panel would similarly have concluded that the worker was evading responsibility for the marine incident and not acting like a management team member. In other words, it was not the topic or content of the worker's concerns in and of itself that bothered the employer but rather the fact that the worker was not talking about critical safety concerns that they expected him, as an exempt Master and member of the management team, to address. [At paras. 193-5; emphasis added.]

[18] In the result, the Tribunal allowed the Corporation's appeal and found that it had rebutted the onus under s. 152(3):

> Our conclusion is that the employer was not motivated in any part to terminate the worker's employment because he acted under section 151(c)(i) of the Act in raising safety concerns. Rather, we have found that with the sinking of the ship and the loss of two lives, the worker's continued employment as exempt Master was already in serious jeopardy. Subsequent events confirmed, in the employer's mind, that the employment relationship could not continue. We have found that the employer terminated the worker's employment because he was the on-duty Master of a ship that sunk [*sic*] and in that position he was accountable for that accident; further, the employer lost confidence in the worker's suitability as an exempt Master due to the employer's perception that the worker failed to accept ultimate responsibility and accountability as Master for the marine accident and due to the employer's perception that the worker did not appreciate his role as a member of its management team. We have found that these were the sole reasons for the employer's termination of the worker's employment.
>
> **...**
>
> The grounding and sinking of the ship on March 22, 2006 was a tragedy that cost two people their lives. It was also a tragedy for the worker who had only recently accepted the promotion to exempt Master. By all accounts, prior to the sinking of the ship the employer viewed his performance as a Master as excellent. The worker was asleep in his cabin at the time of the ship's collision and there is no question that he was entitled to be there at the time. His role in the evacuation and rescue of the ship's passengers and crew was heroic. Our ruling in this appeal does not detract from the courage and leadership he displayed in the aftermath of the marine accident. [At paras. 244-46.]

The Tribunal set aside the reinstatement order previously made by the case officer.

Judicial Review – Supreme Court of British Columbia

[19] Mr. Henthorne sought judicial review in the Supreme Court of British Columbia, alleging in his petition that the Tribunal's decision was incorrect or alternatively, patently unreasonable, in that the WCAT had not had evidence of the "state of mind" of each of the individuals who had made the decision to terminate his employment. In particular, he pleaded that the Corporation had failed to adduce any evidence that would show those individuals made their decisions "for reasons untainted by the fact that the petitioner gave BC Ferries information regarding conditions affecting the occupational health or safety of the petitioner and other workers".

[20] The petition for judicial review was heard by Madam Justice Ross over two days in January 2011. Both parties, and the Tribunal itself, were represented by counsel. The Court's reasons for judgment, dated April 1, 2011, are indexed as 2011 BCSC 409.

[21] After briefly summarizing the factual background, Ross J. noted that Mr. Henthorne had raised a preliminary objection to WCAT's standing as a respondent on the basis that its submissions exceeded the limited role normally accorded to a tribunal in a judicial review proceeding. (Para. 15.) She briefly reviewed recent British Columbia case law on this topic, noting that both issues raised by Mr. Henthorne involved the application of the so-called "taint principle", a principle she found to be at the heart of the Tribunal's specialized knowledge and expertise. In light of this, and despite the fact that this case fell at the "adversarial end of the spectrum", she dismissed Mr. Henthorne's objection. (Para. 20.)

[22] The chambers judge characterized the issues raised by Mr. Henthorne on the judicial review as questions of fact or mixed fact and law, presumably acceding to counsel's approach on this point. (Para. 37.) By virtue of s. 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, the standard of review was one of patent unreasonableness. The judge quoted a passage from *Buttar v. Workers' Compensation Appeal Tribunal* 2009 BCSC 1228, where the Court noted this court's

reasoning in *Manz v. Sundher* 2009 BCCA 92, which in turn had adopted a passage from an earlier case, *Speckling v. British Columbia (Workers' Compensation Board)* 2005 BCCA 80, 46 B.C.L.R. (4th) 77. There the "well understood meaning" of the phrase "patently unreasonable" was described:

> As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. [*Manz*, at para. 39; emphasis added.]

[23] The chambers judge then formulated the two issues before her as follows:

> (a) was it patently unreasonable for WCAT to conclude that BC Ferries had discharged its onus in circumstances in which it elected to adduce evidence from only two witnesses, only one of whom was one of the five who made the decision to terminate Captain Henthorne's employment; and
>
> (b) was it patently unreasonable for WCAT to conclude that BC Ferries had discharged its onus of proof in light of Captain Capacci's evidence.

[24] Counsel for Mr. Henthorne argued before the chambers judge, as he did in this court, that the onus referred to in s. 152(3) of the Act may be discharged only if evidence of the state of mind of "each and every person who participated in the decision to terminate an employee" is adduced. As mentioned earlier, only Captains Taylor and Capacci gave evidence regarding the Corporation's decision to terminate Mr. Henthorne's employment, although four other individuals had been consulted and were found to have agreed with Captain Capacci's "recommendation". In response, the Corporation submitted that the Tribunal had had evidence that the other members of the employer's executive management committee had ratified the recommendation, that it had been open to the Tribunal to reach the conclusions it had, and that those conclusions could therefore not be said to be patently unreasonable.

[25] Applying *Speckling,* the chambers judge considered that the issue was one of sufficiency of evidence rather than a "total absence of evidence from several of the decision-makers." (Para. 43.) At para. 46 of her reasons, she listed various salient points of evidence given by Captains Capacci and Taylor as to how the decision had been made. This evidence, she concluded, supported the finding that the other executives had adopted Captain Capacci's recommendation. In her analysis:

> As noted in *Speckling ...* at paragraph 8, "a decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not". This issue goes to the sufficiency of evidence before WCAT with respect to the employer's intention and motivation. WCAT concluded the evidence was sufficient to discharge the onus. There was evidence, as summarized in BC Ferries' submissions, which if accepted, supported the conclusion it reached.
>
> **...**
>
> Here there is evidence to support the panel's findings of fact and the inferences drawn from those findings. It is not for this court to substitute different findings or inferences or to reweigh the evidence. The decision with respect to the sufficiency of evidence is for WCAT, not this court. In my view, WCAT's decision in that regard cannot be said to be evidently or clearly unreasonable. [At paras. 48, 50.]

[26] The chambers judge also answered the second issue before her – which issue is not raised on this appeal – in the employer's favour. On this point, Captain Capacci had testified that he had not been "upset" by the fact that Mr. Henthorne had raised the safety issues he had, but by the that fact he, Henthorne, had failed to focus at the inquiry on what had caused the sinking of the Queen of the North. Captain Capacci described Mr. Henthorne as displaying a "defensive attitude" not in keeping with the understanding of his role as captain of the ship. The chambers judge quoted, *inter alia*, the following exchange in the evidence:

> [Counsel for Mr. Henthorne]: Okay. So I take it from that, and correct me if I'm wrong, if you're saying that he was very forthright in answering questions, that he was responding as he should respond.
>
> Taylor: The context within, with, when I made those comments was when asked a question, I asked the question regarding safety issues that contributed to the incident. ... Captain Henthorne listed off a number of, of safety issues and I asked him if any of those contributed to the incident. And he said no. And I said well, would you please submit a list to me and he was just going on about issues that, like stanchions and, and what not that weren't relevant to the, to the conversation at hand. They were not contributory or

> relevant to the incident which was the purpose of the Divisional Inquiry and whilst he was going through those, it was, he answered the question. Absolutely. But it was off topic. [Emphasis omitted.]

[27] The Court found that the Tribunal's analysis on this point, which the judge said "falls at the heart of the specialized expertise of the tribunal", was entitled to considerable deference. In her view, there had been a sufficient evidentiary foundation for the Tribunal's decision. She found that WCAT's application of the taint principle fell within the range of reasonable interpretations and that it could not be said its decision was patently unreasonable. The application for judicial review was dismissed.

On Appeal

[28] On appeal, Mr. Henthorne advanced the following errors on the part of the court below:

> The chambers judge erred in failing to conclude that the decision of the WCAT panel was patently unreasonable. In particular:
>
> (a) the chambers judge erred in characterizing the issue on judicial review as one of "sufficiency of evidence";
>
> (b) the chambers judge erred in revising the taint principle by finding that an employer with multiple decision-makers may be treated as possessing "one motivation, one attitude"; and
>
> (c) the chambers judge erred in finding evidence that would support the WCAT panel's finding that BC Ferries discharged its onus under the Act.

[29] The appellant asserted no error of jurisdiction or error concerning the applicable standard of review, and indeed, all counsel appear to agree that s. 58(2)(a) of the *Administrative Tribunals Act* mandated that the chambers judge apply the 'patently unreasonable' standard. Nor, I believe, did the appellant take issue with WCAT's finding, affirmed by the court below, that neither Captain Taylor nor Captain Capacci was motivated by what counsel referred to as "anti-safety animus". When asked whether some or all of the issues stated above could not be regarded as raising a question of law – i.e., whether the evidence of two of several decision-makers could rebut the presumption as to the motives of the Corporation –

Mr. Dalziel on behalf of Mr. Henthorne said he was content with the proposition that the issues raised by this appeal were ones of fact. In his submission, the high standard of patent unreasonableness was met because the Tribunal's decision was both irrational, in the sense of being "internally inconsistent", and based on inferences supported by no evidence. I will return to this matter below.

Motion to Strike WCAT's Factum

[30] Although the issues posed on appeal were said to be ones of fact or mixed fact and law, the Tribunal felt it necessary to file a factum and to make oral argument at the hearing of this appeal. Counsel for Mr. Henthorne moved to strike the Tribunal's factum, objecting that most if not all of WCAT's written argument went to the merits of the appeal – something Mr. Dalziel argues is generally not permissible in this jurisdiction. He points out, and I agree, that WCAT's factum consists largely of a recitation of the facts it found, accompanied by the comment that "it was open" to find them.

[31] Mr. Dalziel began his submissions regarding WCAT's standing by referring to *Northwestern Utilities Ltd. v. Edmonton* [1979] 1 S.C.R. 684. It concerned an appeal by a private utility and the Public Utilities Board of Alberta from an order of the Appellate Division of the Supreme Court of Alberta, which had set aside certain orders of the Board. Section 65 of the applicable statute entitled the Board "to be heard ... upon the argument of any appeal". (In British Columbia, see s. 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.) Nevertheless, the Supreme Court in *Northwestern Utilities* said the Board had only "limited status" and could not be considered as a party in the full sense of that term, to an appeal from its own decision. Estey J.A. for the Court continued:

> In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions. [At 708.]

[32] His Lordship observed that the Board's "active and even aggressive" participation in the appeal could have no other effect than to discredit its impartiality in cases where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. Again in his words:

> The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance. [At 709.]

Estey J. also quoted with approval from *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* (1958) 18 D.L.R. (2d) 588, where Aylesworth J.A. had stated:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance. [At 589-90; emphasis added.]

(See also *Canada Labour Relations Board v. Transair Ltd.* [1977] 1 S.C.R. 722 at 746-47.)

[33] *Northwestern Utilities* has come into question in recent years, partly as the result of a decision of three of six judges of the Supreme Court of Canada in *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar* of Canada Ltd. [1989] 2 S.C.R. 983. *Paccar* concerned the judicial review of two orders made by the Labour Relations Board of British Columbia, which were ultimately found to be patently unreasonable. One of the issues arising, however, was whether the Board (later renamed the "Industrial Relations Council") was entitled to make submissions in the Supreme Court of Canada that the court below had erred in finding the Board's interpretation of the *Labour Relations Act* to be patently unreasonable. Although the union relied on *Northwestern Utilities* to argue

that the Board had no standing to make submissions in support of its decision, LaForest J. (with Chief Justice Dickson and L'Heureux-Dubé J. concurring) was of the view that the Board was entitled to argue in favour of the reasonableness, as opposed to correctness, of the decision. LaForest J. was in "complete agreement" with the comments of Taggart J.A. for this court in a 1988 case, *B.C.G.E.U. v. Industrial Relations Counsel* (1988) 26 B.C.L.R. (2d) 145. There, Taggart J.A. had observed:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them. [At 153; emphasis added.]

[34] LaForest J. noted that before the *Paccar* court, the Board had confined its submissions to the question of standard of review and the reasonableness of the Board's decisions. At no point, he emphasized, had the Board argued that its decision was correct. In an apparent reference to *Northwestern Utilities,* he concluded that the Board had not exceeded the "limited role the Court allows to an administrative tribunal in judicial review proceedings." (At 107.)

[35] *Northwestern Utilities* and *Paccar* were considered in 2005 by the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* 75 O.R. (3d) 309. There the Court noted that it is preferable to consider the scope of the standing of a tribunal in a "context-specific manner" rather than according to "precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review." (Para. 34.) Insisting that a tribunal may make submissions to defend its decisions against a standard of reasonableness but not against one of correctness, the Court observed,

would "allow unnecessary and prevent useful argument." More generally, it was said the evolution of administrative law "away from formalism and towards the more flexible practical approach" exemplified by *Pushpanathan v. Canada (Minister of Citizenship and Immigration*) [1998] 1 S.C.R. 982 should inform a court's discretion in each case. (Of course, the "pragmatic and functional approach" in *Pushpanathan* has since been superseded by the "standard of review approach" described in *Dunsmuir v. New Brunswick* 2008 SCC 9, which in this province is subject to the *Administrative Tribunals Act.*)

[36] Mr. Justice Goudge for the Court in *Children's Lawyer* outlined some factors that should guide courts in the exercise of their discretion, including the nature of the problem, the purpose of the legislation, the tribunal's expertise, and the availability of another party to respond to the attacks on the tribunal's decision. (Para. 43.) Most important were the need for a "fully informed adjudication of the issues before the Court" and maintaining the impartiality (and one might add, the appearance of impartiality) of the tribunal. The Court agreed with Professor David J. Mullan (*Essentials of Canadian Law: Administrative Law* (2001)) that the former objective will often prevail where the matter in issue involves factors "peculiarly within the decision maker's knowledge or expertise", where the tribunal "wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent" or where its decision is unlikely to be presented adequately by the losing party or some other party such as the Attorney General. (Mullan at 459, quoted at para. 37 of *Children's Lawyer*.) Goudge J.A. continued at para 44:

> The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

(See also *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)* 2011 ABCA 94 at paras. 28-9.)

[37] The law in British Columbia on this point is well-tilled ground. Among the decisions of this court is *British Columbia (Securities Commission) v. Pacific International Securities Inc.* 2002 BCCA 421, 215 D.L.R. (4th) 58, a statutory appeal from a decision of the Securities Commission on the basis of alleged failure to observe rules of procedural fairness. Mr. Justice K. Smith for the Court reviewed various cases in which *Northwestern Utilities* had been considered, including *Bibeault v. McCaffrey* [1984] 1 S.C.R. 176; *Paccar, supra*; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994) 76 F.T.R. 1 (F.C.); *Re Consolidated-Bathurst Packaging Ltd. et al.* (1985) 20 D.L.R. (4th) 84 (O.C.J., Div. Ct.); *Quintette Coal Ltd. v. Assessment Appeal Board* (1984) 54 B.C.L.R. 359 (B.C.S.C.), *per* Finch J, (as he then was); and *Bekar v. Bulkley-Nechako (Regional District)* (1987) 19 B.C.L.R. (2d) 256 (S.C.), *per* Gow, L.J.S.C. Smith J.A. observed that the rule in *Northwestern Utilities* "has been sapped only slightly" and that it applied to the Commission. He continued:

> None of the encroachments on the rule that I have identified is applicable here. To permit the Commission to argue the merits on the question of whether it has failed to afford procedural fairness would be to permit the "spectacle" described by Estey J. in *Northwestern Utilities* at 710. These parties must return to the Commission for the hearing pursuant to s. 161. Consequently, the Commission ought not to have appeared before us to defend the merits of its decision.
>
> This conclusion does not mean that the Commission's decisions cannot be defended on their merits on appeal. Section 9 of the *Act* provides for the Commission to appoint an Executive Director as its chief administrative officer. In reality, it is the Executive Director that is the appellants' protagonist in this matter. That officer is a party to hearings under s. 161 (Policy Doc. No. 15-601, s. 2.1) and is the officer upon whom the Commission casts the duty of making full disclosure (s. 2.5(b)). As the Executive Director could have appeared on this appeal and made the arguments that were made by the Commission, the appellants have suffered no prejudice by the Commission's actions. However, in the circumstances, I would not award the Commission its costs of the appeal. [At paras. 47-8.]

The Commission itself was limited to making submissions as to jurisdiction. (See para. 45; see also *Barker v. Hayes* 2007 BCCA 51 (Chambers) and *Timberwolf Log Trading Ltd. v. British Columbia (Commissioner)* 2011 BCCA 70.)

[38] In *Lang v. British Columbia (Superintendent of Motor Vehicles)* 2005 BCCA 244, this court reviewed *Northwestern Utilities* and *Paccar, supra,* and observed that the latter decision does not "provide the tribunal a broad opportunity to argue the merits". In Donald J.A.'s words, "While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed." (Para. 54.)

[39] In 2006, in *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)* 2006 BCCA 404, 274 D.L.R. (4th) 523, the question arose whether the TSX Venture Exchange could make submissions at the hearing of an appeal to this court from a decision of a panel of the Securities Commission. As pointed out by Rowles J.A. for the Court, the hearing panel's function was limited to adjudication, whereas the Exchange was "responsible for conducting the investigation of infractions and prosecuting them". (Para. 55.) The Court therefore concluded that permitting the Exchange, as opposed to the Commission, to make submissions did not offend *Northwestern Utilities*, but also commented that to the extent that the case has been taken as an invariable rule, it "may be due for a re-evaluation". (See also*Vancouver Rape Relief Society v. Nixon* 2005 BCCA 601, lve. to app. refused [2006] S.C.C.A. No. 365.)

[40] The foregoing authorities and others are reviewed in an article by Mr. F. Falzon, Q.C., *Tribunal Standing on Judicial Review*, (2008) 21 C.A.L.T. 21. The author observes that "judges are not necessarily of like mind regarding the extent to which tribunal participation in court truly discredits a tribunal's impartiality" and points out at 35 that the Supreme Court of Canada has itself, without objection or comment, permitted administrative tribunals to participate fully in court hearings on natural justice issues. (See e.g., *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221.) Elsewhere, the author refers to "confusion" in the law on this matter and suggests that a "categories and exceptions" approach to the issue of tribunal standing is, like *Northwestern Utilities* itself, "due for re-evaluation". (At 38.) He urges that the matter be clarified by the Supreme Court of Canada.

[41] In the meantime, the authorities in this province are in my opinion clearly in favour of applying *Northwestern Utilities*, subject to some exceptions (or "encroachments") arising from *Paccar.* But even if a more nuanced 'balancing' approach like that suggested in *Children's Lawyer* were to be mandated in British Columbia, that approach would not in my view militate in favour of permitting WCAT to make the submissions it has in the case at bar.

[42] As already noted, no jurisdictional error (in the narrow sense suggested by *Dunsmuir, supra,* at para. 59) or error in the choice of standard of review was advanced here; nor is there an allegation of a breach of the rules of natural justice. The appeal does not involve the construction of the *Workers Compensation Act* or Regulations. The dispute is essentially a private one between Mr. Henthorne and his former employer, in which a private remedy is sought. The employer, a large corporation, is well represented and has made extensive and helpful submissions. The Tribunal's reasons for reversing the decision of first instance dealt at length with the issues that subsequently became the focus of the judicial review. In these circumstances, there is little that the Tribunal could add, or has in fact added, to the proper adjudication of the appeal. As against this, the importance of fairness, real and perceived, weighs more heavily. To permit both the employer and the tribunal whose decision is being reviewed to be lined up against the appellant does not seem to me to be "just and efficient" (see *Orange Julius Canada Ltd. v. Surrey (City)* 1999 BCCA 430 (Chambers) at para. 7), particularly at a time when courts are being urged to ensure the speedy resolution of disputes.

[43] I would grant Mr. Henthorne's motion to strike the factum filed by WCAT.

[44] Before returning to the substantive appeal, I should note the comment at para. 60 of *Children's Lawyer, supra,* that the proper procedure for seeking to limit the standing of an administrative tribunal is for the applicant to file a notice of motion and for additional material then to be filed. The motion can then be heard at the same time as the main appeal. The Court observed that this approach should not unduly complicate judicial review proceedings. The difficulty, however, is that in

each case the tribunal in question files the additional material it wishes, which the appellant must then respond to in writing, before the main appeal is heard. Thus there is no real savings in time and expense if the question of standing is ultimately decided against the tribunal. Further, once the court has read the material in preparation for the appeal, it will be the rare appellant who takes the trouble to make a motion to strike. Given this, I am of the view that the appellate court should not hesitate to make an appropriate costs order if *Northwestern Utilities* is still to have any practical effect.

The Main Question

[45] I turn finally to the substantive appeal. Mr. Dalziel submitted at the outset that although technically this is an appeal from the order of the chambers judge, the proceedings in this court are a "re-do" of the judicial review application below, albeit on only one ground instead of two. In this regard, he cited the following passage from *Dr. Q v. College of Physicians and Surgeons of British Columbia* 2003 SCC 19 [2003] 1 S.C.R. 226, where Chief Justice McLachlin for the Court dealt with the role of a "secondary" appellate court:

> The Court of Appeal stated that "[t]he standard that we must apply in assessing the judgment of Madam Justice Koenigsberg is whether in her re-weighing of the evidence she was clearly wrong" (para. 25). This is not the appropriate test at the secondary appellate level. The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen* [*v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235] apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. The Court of Appeal erred by affording deference where none was due.
>
> The Court of Appeal should have corrected the reviewing judge's error, substituted the appropriate standard of administrative review, and assessed the Committee's decision on this basis. Judged on the proper standard of reasonableness, there was ample evidence to support the Committee's conclusions on credibility, burden of proof and application of the burden of proof to the factual findings. It follows that the decisions of the reviewing judge and the Court of Appeal should be set aside and the order of the College restored. [At paras. 43-4; emphasis added.]

[46] I note that the Court did not purport to apply the *Housen* standard of "clear and palpable" error to the findings of the reviewing court once the correct standard of review had been selected, but instead applied the reasonableness standard directly to the administrative body's decision as if the Court itself were the reviewing court. In a subsequent line of cases exemplified by *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* 2006 FCA 31, 265 D.L.R. (4th) 154, it has indeed been suggested that:

> ... in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal's decision. See for example *Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77 at paragraphs 29-45 *per* Major J. See also *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 218 D.L.R. (4th) 61 at paragraphs 25-26 *per* Berger J.A. The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly: see *Zenner* at paragraphs 29-30. In practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review. [At para. 14; emphasis added.]

(This reasoning has been adopted in *Marine Research Inc. v. Canada (Attorney General*) 2006 FCA 425, [2007] 4 F.C.R. 780 at para. 35; *CRA v. Telfer* 2009 FCA 23 at para. 19; and *Canada (Attorney General) v. Mowat* 2009 FCA 309, [2010] 4 F.C.R. 579 at para. 26.)

[47] I also note an article by Mr. Justice John Evans (of the Federal Court of Appeal) entitled *The Role of Appellate Courts in Administrative Law*, 20 Can. J. Admin. L. & Prac 1. Evans describes two possible interpretations of the statement in *Dr. Q* that the (second) appellate court's role is to ensure that the lower court selects and applies the appropriate standard of review:

> First, the Court may have meant that, once satisfied that the reviewing court selected the correct standard of review, which it then "applied", an appellate court may only interfere with the result of that application if it was vitiated by palpable and overriding error. However, if some more general question of law can be readily extricated from the reviewing court's reasons, the standard of correctness applies to that question. If this is what the Court meant, then *Housen* would apply to a reviewing court's application of the law, including the standard of review appropriate for the administrative action in dispute.
>
> Second, the Court may have meant that an appellate court must ensure that the reviewing court was correct, not only in its selection of the standard of review, but also in its application of the standard to the facts of the case. In

> other words, when determining whether the administrative decision under review was correct, or patently or simply unreasonable (as the case may be), the appellate court puts itself in the same position as the reviewing judge, to whom no deference is owed. Thus, unlike cases to which *Housen* applies, the question before the appellate court is the same as that before the reviewing judge: does the impugned administrative decision satisfy the relevant standard of review when it is applied to the facts found by the administrative agency? [At p. 5; emphasis added.]

[48] The author notes three cases from the Supreme Court of Canada – *Mugesera v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 40, *Zenner v. Prince Edward Island College of Optometrists, supra,* and *Barrie Public Utilities v. Canadian Cable Television Assn.* 2003 SCC 28, two of which were decided post-*Dr. Q*. In none of them, he observes, did the Supreme Court purport to show deference to the intermediate appellate court's application of the standard of review selected by the lower court, nor suggest that the secondary appellate court should have deferred to the lower court's application of the standard of review. (This may or may not have any relevance to an intermediate appellate court.) The author goes on to suggest that the statement quoted above from *Dr. Q* regarding *Housen* was *obiter,* that it was "probably not intended to have the far reaching effect on the role of appellate courts that a literal reading may suggest," and that it may not have been "intended to extend beyond the selection [my emphasis] of the appropriate standard of review." He continues:

> ... it had been widely assumed before *Dr. Q.* that appellate courts did not afford deference to reviewing courts' application of the correct standard of review. Limiting the role of an appeal court to the detection of palpable and overriding error in a reviewing court's application of the standard of review, absent some readily extricable question of law, would be a major change in the law of appellate review. It is surely unlikely that the Court intended its brief reference to the applicability of *Housen* to administrative law cases to reverse well established law.
>
> Third, for an appellate court to apply the palpable and overriding standard to a reviewing court's application of the appropriate standard of review to the administrative decision would be to pile standards of review on standards of review, and thus needlessly further confuse an already complex area of the law. To reduce the role of appeal courts in this way would remove them a long way from the essential dispute: whether the parties' rights had been violated by unlawful administrative action.
>
> For example, the role of an appellate court would be highly residual if it could only reverse a reviewing court's conclusion that a tribunal's findings of fact

> were patently unreasonable when satisfied that the court had made a palpable and overriding error in its application of this least demanding standard of review. And, it would, in my view, make no sense to have to ask if the reviewing court had made a palpable and overriding error in its application of the correctness standard to the administrative tribunal's interpretation of a provision in the enabling legislation. [At 5-6; emphasis added.]

[49] These are difficult issues that will not be resolved by this court. It may be that as *Prairie Acid Rain* suggests, the practical effect of the difference between the two approaches – i.e., between our asking whether the reviewing court was clearly and palpably wrong in its assessment of the reasonableness of the findings of fact or mixed fact and law of the administrative body, and asking whether that body itself acted unreasonably (or in this instance, patently unreasonably) in making its findings of fact or mixed fact and law – will usually be insubstantial. It seems obvious that where a reviewing court is found to have erred in its selection of the standard of review, the second appellate court has no option but to carry out the judicial review afresh on the correct standard, rather than deferring to findings made by the court below. Where the correct standard of review <u>was</u> selected by the reviewing court, however, there is arguably no reason to depart from the deferential standard mandated by the *Administrative Tribunals Act* and place ourselves in the shoes of the court below.

[50] I repeat for convenience here the grounds of appeal advanced on behalf of Mr. Henthorne in this court:

> The chambers judge erred in failing to conclude that the decision of the WCAT panel was patently unreasonable. In particular:
>
> (a) the chambers judge erred in characterizing the issue on judicial review as one of "sufficiency of evidence";
>
> (b) the chambers judge erred in revising the taint principle by finding that an employer with multiple decision-makers may be treated as possessing "one motivation, one attitude"; and
>
> (c) the chambers judge erred in finding evidence that would support the WCAT panel's finding that BC Ferries discharged its onus under the Act. [Emphasis added.]

[51] Although Mr. Dalziel for the appellant described the issues raised on the judicial review as ones of fact or mixed fact and law, I am satisfied that the errors advanced in this court include at least one issue of law that is clearly extricable. Certainly the chambers judge's characterization of the issue on judicial review as one of "sufficiency of evidence", as opposed to absence of evidence, is itself a conclusion of law that must be reviewed on a standard of correctness; and Mr. Dalziel's argument that logically, the onus created by s. 152 required the Corporation to adduce evidence of the "state of mind" of all five executives in order to rebut it, also seems to be a proposition of law to which, under *Housen*, the correctness standard applies. I also note the statement made by Lord Reid in *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153 (H.L.) at 170 to the effect that "It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent." This statement was quoted with approval in *Rhône (The) v. Peter A.B. Widener (The)* [1993] 1 S.C.R. 497 at 516.

[52] Thus I would restate issues (a) and (b) above as asking whether the evidence of two 'key' players at the Corporation could in law rebut the onus. Issue (c) – whether the onus was in fact discharged in this case – is obviously one of fact. This type of distinction between the evidence necessary to meet a threshold, and the persuasiveness of the evidence once that threshold is met, has parallels in many areas of the law, the most obvious example being in criminal law, where the question of whether there is evidence capable of supporting a conviction is a question of law for the judge, while the question of whether the evidence actually supports a conviction is left to the finder of fact: see Sopinka*,* Lederman and Bryant, *The Law of Evidence in Canada* (1992) at 56-65.

[53] I emphasize that the chambers judge was not presented squarely with the formulation of the proposition of law I have described, and that the issues enunciated before her (see para. 23, *supra*) were ones of fact. In respect of those, the standard of review was obviously one of patent unreasonableness, as she found, and as all parties agree. Since the operation of *Housen* and *Dr. Q* in this context is

difficult to judge, I propose to apply both approaches discussed by Evans, *supra*, to the question of the sufficiency of the evidence before the Tribunal.

[54] The first question, however, is whether evidence of, or about, the "mindset" of each of the executive officers consulted by Captain Capacci was required in law to meet the onus arising under s. 152(3). WCAT has not laid down any such rule, and it is said to have expertise in this area. No other authority was cited for the proposition that the evidence was not capable of discharging the onus on the employer; nor were we referred to any provision of the Act or Regulations that would require such a rule. The decisions of large corporations are often the product of 'recommendations' of one or two persons directly concerned, made and agreed to (or not) by others less directly involved. Some may express reasons for their views; others may simply be content with the proposed result; others may be entirely disinterested. In the end, it is the decision of the corporation itself, not that of each individual, that is at issue.

[55] Canadian courts have, in the criminal law context, generally attempted to identify the "directing mind(s)" of corporations in determining *mens rea*: see *The Rhône, supra.* This approach is concerned with "who has been left with the decision-making power in a relevant sphere of corporate activity," rather than with the formal delegation of powers. In my view, the Tribunal's approach to the Corporation's decision to terminate Mr. Henthorne's employment was at least consistent with this approach. The object of the whistle-blower provisions might very well be furthered by a stringent requirement for evidence from or about each and every person consulted, but in my view, the Corporation was not required as a matter of law to adduce such evidence.

[56] Did the chambers judge err, then, in concluding that it was not patently unreasonable for the Tribunal to decide in the circumstances of this case that the presumption was in fact rebutted? In deciding that the evidence before it provided sufficient insight into the Corporation's motivation, the Tribunal referred to Captain Taylor's testimony regarding the termination decision, including the fact that "as a

practical matter this decision was made on the basis of Captain [Capacci's] recommendation and with additional input from Captain [Taylor]"; the fact that Captain Henthorne ultimately reported to Captain Capacci, who had been instrumental in promoting him to the position of exempt master and knew his qualities; Captain Capacci's seniority and knowledge, which made his recommendation "central" to the Corporation's decision; and the importance of Captain Taylor's endorsement of Captain Capacci's recommendation. There was also ample evidence that on past occasions when Captain Henthorne had raised safety concerns, the Corporation had not reacted negatively – indeed, keeping track of safety conditions on his vessel was part of the appellant's job. All this, together with the very strong evidence of the maritime ethos which requires a captain to take responsibility for the sinking of his ship, and the concern of Captains Capacci and Taylor regarding Mr. Henthorne's apparent failure to do so, led the Tribunal to reach the conclusion it did. Again it may be that in another case, WCAT would not be persuaded without greater evidence of the decision-making process and of the actual 'mindset' of every individual involved; but it cannot be said there was no evidence supporting the Tribunal's conclusion in this instance or that it was otherwise patently unreasonable.

[57] In the result, I cannot agree that the chambers judge was clearly wrong in concluding that the Tribunal's conclusions were supported by evidence and were not otherwise patently unreasonable. Similarly, if one assumes this court steps into the shoes of the reviewing court, I cannot agree that it was patently unreasonable for WCAT to draw the inferences it did.

[58] With thanks to counsel, I would therefore dismiss the appeal.

[59] Counsel may wish to make written submissions regarding costs. We assume they will be able to agree upon an appropriate timetable for doing so.

"The Honourable Madam Justice Newbury"

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[60] I have had the opportunity to read a draft of my colleague Newbury J.A.'s reasons for judgment in this matter. I am in agreement with her that the WCAT's factum should be struck, and with her reasons for doing so. I also agree with her that the appeal should be dismissed, and with much of her reasoning for doing so.

[61] I am, however, unable to agree with her characterization of one of the questions on this appeal as a question of fact, and accordingly am of the view that this is not a case calling for deference to the findings of the chambers judge. In my opinion, all of the questions on this appeal are questions of law, as were the questions before the chambers judge on the judicial review application. More generally, I am not persuaded that the Supreme Court of Canada's judgment in *Dr. Q* leaves the appellate standard of review on appeals from judicial review applications in doubt. Rather, I see the case as simply re-affirming the historic role of an appeal court.

[62] In the case before us, the chambers judge, at para. 38 of her judgment, summarized the two issues before her. This appeal is concerned only with the first of those issues:

> (a) was it patently unreasonable for WCAT to conclude that BC Ferries had discharged its onus in circumstances in which it elected to adduce evidence from only two witnesses, only one of whom was one of the five who made the decision to terminate Captain Henthorne's employment.

[63] That issue resolved itself into several questions. The primary ones are represented by the issues put forward by the appellant on this appeal:

> The chambers judge erred in failing to conclude that the decision of the WCAT panel was patently unreasonable. In particular:
>
> (a) the chambers judge erred in characterizing the issue on judicial review as one of "sufficiency of evidence";
>
> (b) the chambers judge erred in revising the taint principle by finding that an employer with multiple decision-makers may be treated as possessing "one motivation, one attitude"; and

> (c) the chambers judge erred in finding evidence that would support the WCAT panel's finding that BC Ferries discharged its onus under the Act.

[64] I agree with my colleague that the first and second of these issues raise questions of law. I do not, however, agree with her characterization of the third issue as one of fact.

[65] In cases like the one before us, the judicial review application may be described as judicial review for error of fact. That is an accurate description – what is alleged is that the tribunal erred in making findings of fact or in drawing factual inferences from those findings. The use of that description should not, however, be taken to mean that a court, in undertaking judicial review, is answering questions of fact.

[66] The question for the chambers judge, under s. 58(2)(a) of the *Administrative Tribunals Act*, was whether the WCAT's findings of fact were "patently unreasonable". There was considerable discussion on this appeal as to what is meant by a "patently unreasonable" finding of fact. This Court has said that "a decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not" – see, for example, *Speckling v. British Columbia (Workers' Compensation Board),* 2005 BCCA 80 at para. 6. The test was described more completely in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.).

[67] This test does not call on the reviewing court to exercise a fact-finding function. It was not the chambers judge's role to determine disputed issues of fact, nor was it her role to determine whether the evidence presented by the respondent

convinced her of the merits of its position on the reason for Captain Henthorne's dismissal. Her reasons indicate that she appreciated her limited role.

[68] The chambers judge "found" evidence only in the sense that she reviewed the record and located evidence that was capable, as a matter of law, of supporting the WCAT's findings. The chambers judge was dealing with a question of law. Accordingly, this Court is called upon to determine whether her analysis was correct. It does not owe her deference in respect of that analysis.

[69] Even applying this stricter standard of review, however, I reach the same result as my colleague. I am not persuaded that the chambers judge erred in finding that there was evidence capable of supporting the Tribunal's determinations, and would not interfere with her decision.

[70] With respect to the broader question of the standard of appellate review on appeals from judicial review applications, I am not convinced that anything in *Dr. Q* casts doubt on the principles.

[71] *Dr. Q* was not a case arising out of judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Rather, it was a statutory appeal from a decision of an Inquiry Committee of the B.C. College of Physicians and Surgeons. The issue in the case was whether or not findings of fact made by the Inquiry Committee should be upheld. The chambers judge had considered the proper test to be as follows:

> [39] When exercising the function of an Appellate Court, I am mindful that the question to be asked in reviewing the evidence as a whole and the conclusions of the tribunal of first instance, is not, is there any evidence which can support the conclusions? In this case, there is some such evidence. The question is, instead, is the evidence sufficiently cogent that it is safe to uphold the findings of the panel.
>
> (*Re Dr. Q*, [1999] B.C.J. No. 2408 (QL), 1999 CanLII 5112 (S.C.))

[72] This Court accepted that the Supreme Court judge was correct in finding that her function included the re-weighing of the evidence. Further, this Court held that it was required to defer to the findings of the Supreme Court judge:

> [T]his is a case about the weighing of the evidence and the re-weighing of the evidence in the appeal process. The standard that we must apply in assessing the judgment of Madam Justice Koenigsberg is whether in her re-weighing of the evidence she was clearly wrong.
>
> *Q. v. College of Physicians & Surgeons of British Columbia*, 2001 BCCA 241 at para. 25.

[73] The Supreme Court of Canada disagreed, holding that the chambers judge erred in re-weighing the evidence. The fact that the proceedings before her were by way of appeal rather than judicial review did not give her the power to re-evaluate the evidence. The Court also held that this Court had erred in deferring to the chambers judge's determination. In doing so, it said, at para. 43:

> The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen*, *supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge.

[74] Accordingly, no deference is owed to the reviewing judge in respect of his or her determination of the appropriate standard of review. That standard may, under *Dunsmuir*, be a standard of correctness or one of reasonableness. Other standards may be established by statute – for instance, patent unreasonableness under the *Administrative Tribunals Act*. Whatever standard applies, however, the question for the reviewing court is whether the tribunal erred in law by making a decision that did not satisfy the standard. The question of whether the tribunal decision met the standard is a question of law on which the reviewing court will not be entitled to deference on appeal.

[75] As I read *Dr. Q*, the point made by the Court in the passage quoted above is simply that no deference is to be afforded to a subordinate court on an issue of law, whether that court is a decision-maker in the first instance or is reviewing the decision of an administrative body. In that sense, the subordinate court is not in the privileged position that some administrative tribunals are on judicial review.

[76] It is because no deference is afforded the court of first instance on either the issue of the appropriate standard of review or the application of that standard that Rothstein J.A. (as he then was) said, in *Prairie Acid Rain Coalition* (at para. 14), that "[i]n practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review." That proposition has been quoted and followed in numerous cases, including *Corbiere v. Wikwemikong Tribal Police Services Board*, 2007 FCA 97 and *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23.

[77] I would add only one note of caution. While judicial review applications are concerned almost exclusively with questions of law, there are certain exceptions. A chambers judge on a judicial review application may be called upon to make original findings of fact in limited circumstances – for example, it might be alleged that a tribunal breached the requirements of procedural fairness in a manner that is not evident from the tribunal's formal record. In deciding the issue, the chambers judge may have to weigh affidavit evidence (or testimony) to determine what actually occurred. Whenever a chambers judge is legitimately called upon to make original findings of fact on a judicial review application, the criteria set out in *Housen* dictate that an appellate court will grant deference to these findings.

[78] Equally, a chambers judge on judicial review may be called upon to exercise discretion, either in deciding to allow the application to proceed, or in determining the appropriate remedy. Such original exercises of discretion by the chambers judge are also entitled to deference under the analysis in *Housen* (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 39).

[79] In summary, it is my view that even when judicial review is concerned with alleged errors of fact by the tribunal, the issues before the reviewing court will be questions of law. Indeed, almost all judicial review applications concern issues of law. On those issues, an appeal court owes no deference to the chambers judge. In accordance with the criteria set out in *Housen,* then, the appellate court will, for practical purposes be in the same position as it would be if it were reviewing the

decision of the tribunal directly. Deference will be owed to the chambers judge who conducted the judicial review only in those limited situations where he or she was called upon to make an original finding of fact, or to undertake an original exercise of discretion.

[80] As the WCAT's findings of fact in this case were not patently unreasonable, the chambers judge was correct in dismissing the application for judicial review. Like my colleague, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I Agree:

"The Honourable Madam Justice Garson"

Tab 2

BRITISH COLUMBIA UTILITIES COMMISSION ORDER NO. C-6-12 DATED APRIL 30, 2012 COMPLIANCE FILING

On February 29, 2012, FEI filed an application with the British Columbia Utilities Commission (the "Commission") for a Certificate of Public Convenience and Necessity ("CPCN") to construct and operate a Compressed Natural Gas ("CNG") refueling station at the premises of BFI Canada Inc. ("BFI", the project being referred to as the "BFI Project", and the application being referred to as "the Application" or the "BFI Application"). On April 30, 2012, the Commission issued Order No. C-6-12, granting a CPCN for the BFI Project but declining to approve the rates to be charged to BFI for providing the CNG fueling service. The Commission directed FEI to file an updated rate and rate design (the "Compliance Filing") within 30 days of that Order.

After seeking and obtaining extensions to file the Compliance Filing, FEI hereby files the updated rate to be charged to BFI.

The updated rates in this Compliance Filing are designed in accordance with the Commission Directives. However, FEI notes that together with this Compliance Filing, FEI is filing an application seeking to reconsider certain aspects of Order No. C-6-12. In light of the Reconsideration Application, FEI seeks approval of the updated rates provided in this Compliance Filing on an interim basis, pending the determination of the Reconsideration Application. If the Reconsideration Application is granted, FEI may provide a further update and propose a treatment of differences in the updated rate, if any and appropriate. If the reconsideration is not granted, FEI requests that the interim rates be made permanent as part of the Reconsideration Application decision.

Further on page 17 of the BFI decision, the Commission states:

> "FEI is directed to either revise the rate or, alternatively, to ensure that any amounts which relate to the BFI Project and are not borne by BFI are borne by the shareholder and the not the ratepayer."

As outlined below, the revised rate that FEI will charge BFI for CNG Fueling Service includes the costs outlined in 5(c) of the Order No. C-6-12 and is in compliance with General Terms and Condition Section 12B ("GT&C 12B") of FEI's tariff. Thus, FEI believes that it addresses the Commission's concern.

1. RATE DESIGN – FUELING SERVICE CHARGE

This section describes the Commission directives related to the fueling service charge applicable to BFI and FEI's response to those directives. Revised financial schedules are included in Appendix A to this Compliance Filing.

1.1 Commission Directives and Summary of FEI's Compliance

In Order No. C-6-12, the Commission directs FEI, among other things, to add costs in several categories into the rate applicable to BFI and to recalculate the Overhead and Marketing charge.[1] The following table summarizes these directives and FEI's responses.

Table 1: FEI's Compliance with Directives from the BFI Decision

Order C-6-12 Directive	FEI Compliance
All overhead and marketing expenses, including, without limitation, business development, customer education and all costs relating to the CNG/LNG Service program are to be determined using approved fully allocated cost of service methodology and included in the cost of service.	FEI has included all overhead and marketing expenses in the cost of service model for the revised rate calculation.
Fortis is to recalculate the Operations and Maintenance charge in the BFI rate to reflect the cost of the CNG/LNG Service program using the figures of $569,396 for 2012 and $601,119 for 2013, to be allocated among CNG/LNG Service customers in a reasonable manner.	Subject to the Reconsideration Application, FEI has revised its Overhead and Marketing charge to be $0.39/GJ (from $0.20/GJ), based on calculations using $569,396 for 2012 and $601,119 for 2013.
Actual construction costs for the BFI Fuelling Station;	Construction costs will be updated to actual upon completion of the fueling station. In the meantime the forecast costs for the station have been used in the rate calculations.
Cost of the BFI Application in the amount of $75,000;	The amount of $75,000 is added into the calculation of the fueling service charge (see deferred charges in cost of service model)
Branding Costs for the installation of signs and to affix decals	Signage and decal costs of $265 (fueling station signage) and $2,500 (vehicle decals) are added to capital cost of fueling station charge
Any other costs which may not have been factored into the cost charged to BFI including, for example, increased insurance premiums, as Fortis is required to obtain a number of specific insurance coverages, and to include BFI as an additional insured on its Comprehensive General Liability Policy	FEI's cost of adding BFI as an additional insured is approximately $900 per year. This is added to annual O&M charge. At this time FEI is not aware of any other costs that would be attributable to BFI.

The rate adjustments applicable to BFI's cost of service model are explained in greater detail in the sections below.

[1] BFI Decision, at page 20

1.2 BFI Fueling Service Charge

In compliance with the Commission directives, FEI has included the following amounts in the updated rate applicable to BFI:

- In the BFI Application, FEI forecast capital expenditures of $1,885,259 (including AFUDC). With the inclusion of the signage and vehicle decal costs of $2,765 this total increases to $1,888,072 (including AFUDC). Any variance between this capital cost estimate and the actual construction cost of the fueling station will be amended upon completion of the fueling station.
- The $75,000 cost of the BFI Application is included as a deferred charge, amortized over the contract term, and recovered in the cost of service volumetric contract rate.
- An insurance premium of $900 is added to the existing O&M cost of $50,000 per year for a total of $50,900 per year.
- FEI has recalculated its Overhead and Marketing charge to be $0.39, which includes the figures of $569,396 for 2012 and $601,119 for 2013. Please refer to section 1.3 for the explanation of the revised Overhead and Marketing charge. Also, as noted above, this directive is subject to the reconsideration application filed in tandem with the Compliance Filing.

In addition to the above adjustments, FEI has also updated the applicable property taxes as explained below.

1.2.1 PROPERTY TAXES

Subsequent to filing of the BFI Application and responding to information requests, additional information on property tax applicable to the BFI Project has emerged. As such, FEI has taken this opportunity to revise the two components of property tax expense included in the forecast cost of service for the BFI Project. These two revisions to property taxes result in an average annual decrease to the cost of service of approximately $15 thousand.

General, School and Other Taxes

The City of Coquitlam has provided updated general, school and other tax rates effective for 2012. As a result, the updated mill rate applicable to BFI drops from 3.91% to 1.75%.

1% in Lieu

In this filing, FEI has corrected its property tax calculations to exclude the “1% in lieu” charge.

In conducting a review of the property tax assumptions for the BFI Project, FEI became aware that its previous assessment of property taxes had overlooked a provision in section 353 of the *Local Government Act*. Based on this discovery, FEI has now excluded the 1% in lieu tax for BFI (and will exclude for other future CNG/LNG service customers), as further explained below.

Under section 353, a "Utility Company" carrying on business in a municipality is required to pay 1% of revenues collected within the municipality in lieu of general municipal property taxes, excluding revenues from "gas supplied for the operation of motor vehicles fueled by natural gas". For BFI, the exclusion would be applicable to the revenues collected for the CNG station, including the compression and dispensing equipment, as well as any concrete foundations to which the compressor enclosure or dispensing equipment is affixed.

The combined effect of the above rate adjustments result in a total increase to BFI's fueling service charge from $4.66 per GJ to $4.89 per GJ. The three components of this fueling charge are summarized in the table below.

Table 2: Revised Rate for BFI

Component	Fueling Charge ($ per GJ)	Escalation per year
Capital	$ 3.66	2%
O&M	$ 0.85	CPI
Overhead	$ 0.38	CPI
Total charge	**$ 4.89**	

The $0.23/GJ increase represents an increase of approximately 5.0 percent for BFI in its Fueling Charge rate. Please see Appendix A for the detailed financial schedules.

1.2.2 OVERHEAD & MARKETING CHARGE

In the BFI Application, FEI proposed a methodology which would recover the incremental overhead and marketing costs associated with another NGT customer such as BFI. FEI proposed a charge of $0.20 per GJ, which would have recovered approximately $84,000 from BFI over the initial term of their contract.

The BFI Decision directed FEI to revise this charge "using approved fully allocated cost of service methodology and included in the cost of service" and to recalculate the Operations and Maintenance charge in the BFI rate "using the figures of $569,396 for 2012 and $601,119 for 2013, to be allocated among CNG/LNG Service customers in a reasonable manner." As the Commission acknowledged that these figures are approved in the Commission's decision regarding the FortisBC Energy Utilities Revenue Requirements Application for the 2012 and 2013 test years (the "FEU 2012-2013 RRA") "for overhead, marketing, business development and customer education related to natural gas vehicle (NGV) services."

As more fully argued in the Reconsideration Application, FEI believes that the Commission erred in this directive. FEI maintains its position that the $569,396 for 2012 and $601,119 for 2013 pertain to the overall development and advocacy of using natural gas as a fuel for transportation, not just the development of the CNG/LNG fueling services. However, for the purposes of this Compliance Filing, the calculations comply with the Commission direction set forth in the BFI Decision, pending determination of the Reconsideration Application.

The following provides additional detail and commentary on the range of activities FEI is involved in to promote and develop the use of natural gas for transportation in BC:

1) The amounts of $569,396 for 2012 and $601,119 for 2013 include, but are not limited to, the following NGT activities:

    a. NGT development and advocacy within British Columbia;
    b. Natural gas delivery service support (Rate Schedules 6, 16, 23, 25);
    c. Development of marine market applications;
    d. Development of Rate Schedule 16 amendments application; and
    e. Consultation and advice on the Province's recently enacted *Greenhouse Gas Reduction (Clean Energy) Regulation* (the "GGR Regulation" or the "Section 18 Regulation").

    FEI strongly believes that other third party service providers will also benefit from these activities. For example, if FEI is successful in receiving Commission approvals for increased access under Rate Schedule 16 to LNG from FEI's Tilbury LNG facility, other parties may have increased access to LNG for their customers elsewhere. Secondly, potentially numerous parties can benefit from the GHG Regulation, including equipment manufacturers such as Westport Innovations and IMW Industries, and other third party service providers such as Clean Energy Fuels and Ferus Inc.

2) As stated in the BFI proceeding (see BCUC IR 1.11.2.1 and BCSEA IR 1.3.3), FEI expended resources educating the City of Surrey on the economic and environmental benefits of NGVs. FEI believes this played a substantive role in the City's decision to mandate CNG in their Request for Proposal. In absence of this education, FEI does not believe that the City would have issued an RFP mandating CNG vehicles for its waste management services. Furthermore, all FEI customers would have forgone the annual delivery margin benefit of $84,000 created by this incremental natural gas load on FEI's system. To this point, FEI respectfully disagrees with the Commission Panel's statement on page 11 of the BFI Decision that "little to no incremental benefits flow to Fortis' ratepayers as a result of Fortis' construction, ownership and operation of a CNG fuelling facility."

    In sum, the costs of promoting natural gas as a transportation fuel to the City of Surrey (in the past) and other potential customers (going forward) is embedded in O&M levels already approved by the Commission in the FEU's 2012-2013 RRA. If BFI decides to purchase additional CNG vehicles for its fleet, additional delivery margin benefits will accrue with no additional or very little development costs. This example illustrates how NGT market development activities stimulate projects, directly and indirectly, and generate delivery margin benefits for all natural gas ratepayers.

3) In the 2010-2011 RRA, FEI included in its rates "one staff member devoted to this initiative in addition to support from other regional sales staff that to date have been selling Rate Schedule 6 Natural Gas Vehicle Service. This is not a new service as TGI has been in this marketplace for over a decade."[2] FEI believes NGT development costs beginning in 2010 are largely incremental to previous NGT activities. However in the

[2] FEU 2010-2011 RRA, BCUC IR 1.21.1.

cost methodology described below, FEI has used the $569,396 and $601,119 as directed by the Commission.

1.2.3 IMPLICATIONS OF THE GGR REGULATION ON O&M CHARGE

As previously mentioned, FEI has recalculated the O&M charge using the $569,396 and $601,119 amounts for 2012 and 2013 respectively. In the NGT Decision, the Commission directed FEI to calculate the O&M charge to reflect expected CNG/LNG volumes. Based on the GGR Regulation, FEI has forecast volumes associated with this initiative. In the BFI proceeding, in response to CEC IR 1.5.1, FEI presented a forecast of CNG volumes of 779,239 GJ by 2017 and LNG volumes of 2,103,048 GJs by 2017 if a "prescribed undertaking" under section 18 of the *Clean Energy Act* was enacted. FEI has adopted this forecast in its calculation of the O&M charge.

At a high level, the methodology for the overhead charge takes the annual costs of $569,396 for 2012 and $601,119 for 2013 and corresponding amounts for each year to the end of the 7-year contract period and divides by the CNG/LNG volume forecast which is stimulated by the GHG Regulation and levelizes it over the 7 year contract period. The resulting charge is $0.39 per GJ, nearly double the $0.20 per GJ proposed in the BFI Application.

FEI will file a future application which deals with the proposed rate treatment of prescribed undertaking expenditures under the GGR Regulation. Below FEI has summarized why the administration and marketing expenditures set out in the GGR Regulation have not been included in the O&M charge for the BFI Project:

- Section (2) (b) (ii) and (3) (b) (ii) of the GGR Regulation cites expenditure amounts of up to $240,000 and $250,000 respectively, which a public utility may recover related to the administration and marketing for CNG and LNG fueling stations. These amounts are incremental expenditures to the levels of operating and maintenance expenses approved in FEU's 2012 – 2013 RRA. Therefore, considering these to be expenditures as part of the approved O&M expense levels for NGT without an adjustment to FEI rate levels, to accommodate these expenses would be inappropriate.

- Section (1) (c) (ii) (A) of the GGR Regulation refers to expenditures for administration, marketing, training and education, not exceeding $3.1 million, related to providing grants for eligible vehicles. In other words, FEI believes that this cost allowance is limited to activities associated to implementing, administering, and marketing an open and competitive incentive program for vehicles. As no public utilities within the Province presently offer such vehicle incentive programs (prior to this regulation), FEI views these activities as incremental to its existing approved NGT O&M costs. FEI's 2012-2013 RRA did not include costs associated with an incentive program for vehicles and no such expenditures were approved. The treatment of these costs will be discussed in a future application to the Commission.

As stated in previous applications, FEI believes CNG/LNG volumes are strongly influenced by the availability of incentives for vehicles. The GGR Regulation permits FortisBC to expend approximately $62 million over 5 years related to incentives for vehicles. FEI's CNG/LNG volume forecast based on the impact of the GGR Regulation is derived from the following assumptions:

- Funding level of up to: 80 percent in 2012, 70 percent in 2013, 60 percent in 2014, 50 percent in 2015, and 40 percent in 2016;
- Incremental capital cost (e.g. price premium) of $40,000 for CNG vocational trucks in 2012; decreases to $30,000 by 2016;
- Incremental capital cost of $50,000 for CNG buses in 2012; decreases to $40,000 by 2016;
- Incremental capital cost of $80,000 for LNG vehicles in 2012; decreases to $50,000 by 2016;
- Conversion cost of $3,500,000 for LNG marine vehicles in 2013; decreases to $2,000,000 by 2016;
- Average fuel consumption of 1,000 GJs per year for CNG vehicles, 2,500 GJs per year for LNG vehicles, and 100,000 GJs per year for marine vehicles;
- Volume additions are staggered one year behind the corresponding incentive expenditures;
- NGVs under the program remain in operation for their expected vehicle life;
- Vehicles are fueled by CNG or LNG from FEI's distribution system and LNG facilities; and
- CNG and LNG volumes are independent of whether FEI or another service provider contracts with the customer for CNG/LNG fueling service.

Related to the last point, FEI acknowledges its proposed O&M cost may not be entirely recovered over the volume total of 3.41 PJ by 2018 as fleet owners may elect to construct and install their own fueling station or contract with other service providers. FEI will only recover the overhead charge from those fueling stations which it has service agreements with. As other service providers may benefit from FEI's NGT market development costs, FEI submits that the $0.39 per GJ charge for BFI represents a reasonable allocation despite the limitations of only collecting through CNG/LNG fueling service contracts.

In its forthcoming application for approval of the rate treatment of incentive expenditures, FEI will present additional details and scenarios related to this forecast.

1.2.4 COST ALLOCATION CALCULATION

As noted above, the methodology for the overhead charge is the division of the levelized forecast costs by the forecast CNG/LNG volumes (stimulated by the GGR Regulation), over the contract period. FEI intends to apply this methodology to future CNG/LNG service agreements.

To derive the total expected costs, FEI has escalated the forecasts of $569,396 and $601,119 by 2 percent per year until 2018. Please note that FEI has developed this forecast for the purpose of calculating this O&M charge and as such it may not be reflective of future NGT O&M forecasts put forward in RRA submissions. Further, FEI will report its O&M costs related to NGT through the established RRA process.

The forecast O&M costs and FEI's forecast CNG and LNG volumes are summarized in the table below.

Table 3: Projected NGT O&M Budgets and Volume Forecast

Overheads	2012	2013	2014	2015	2016	2017	2018
Labour and Loading	$ 508,396	$ 526,119	$ 536,641	$ 547,374	$ 558,322	$ 569,488	$ 580,878
Customer Education	$ 61,000	$ 75,000	$ 80,000	$ 90,000	$ 70,000	$ 60,000	$ 50,000
Total Overhead	$ 569,396	$ 601,119	$ 616,641	$ 637,374	$ 628,322	$ 629,488	$ 630,878

Section 18 Demand Forecast	2012	2013	2014	2015	2016	2017	2018
CNG stations	1	3	5	8	12	16	19
LNG stations	1	3	5	7	10	15	17
Total Fueling Stations	**2**	**6**	**10**	**15**	**22**	**31**	**36**
CNG Demand (GJ)	28,000	136,063	219,090	379,937	550,072	779,239	921,061
LNG Demand (GJ)	150,000	321,875	698,065	1,036,161	1,482,315	2,103,048	2,485,921
Total Demand (GJ)	**178,000**	**457,938**	**917,155**	**1,416,098**	**2,032,387**	**2,882,287**	**3,406,982**

This charge of $0.39 per GJ is embedded in the O&M portion of the fueling charge charged to BFI and will escalate by BC CPI annually. FEI will amend the CNG fueling service agreement with FEI. Under an amended BFI Agreement, the total overhead and marketing charge ($0.385 per GJ x 60,000 GJ) would recover $23,100 per year, or $161,700 (plus inflation) over the 7 year contract term.

FEI will continue to monitor the overhead charge and will review the charge in future Revenue Requirement Applications, or other Applications as may be appropriate.

Appendix A
REVISED FINANCIAL SCHEDULES

Financial Schedules
CNG BFI Cost of Service

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Revenue Requirement
Schedule 1
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Revenue Requirement**																					
2	Cost of Energy Sold		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
3	Operation and Maintenance	Schedule 2, Line 19	51	52	53	54	55	56	57	59	60	61	62	63	65	66	67	69	70	72	73	75
4	Property Taxes	Schedule 2, Line 29	8	8	8	8	8	9	9	9	9	9	9	10	10	10	10	10	11	11	11	11
5	Depreciation Expense	Schedule 8, Line 15 + Line 34	95	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94
6	Removal Cost Provision	Schedule 8, Line 40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
7	Amortization Expense	Schedule 9, Line 18	8	8	8	8	8	8	8	-	-	-	-	-	-	-	-	-	-	-	-	-
8	Other Revenue	Schedule 2, Line 24	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
9	Income Taxes	Schedule 3, Line 20	6	(37)	(21)	(8)	2	10	16	18	22	25	27	28	29	29	30	30	29	29	28	24
10	Earned Return	Schedule 5, Line 27	144	142	133	125	117	109	101	93	85	78	70	63	55	48	40	33	25	18	10	3
11																						
12	**Annual Revenue Requirement**	Sum of Lines 2 through 10	**312**	**267**	**277**	**283**	**286**	**287**	**286**	**274**	**271**	**268**	**263**	**259**	**254**	**248**	**242**	**236**	**230**	**224**	**218**	**208**

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: O&M, Other Revenue and Property Tax
Schedule 2
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Gross O&M**																					
2	Labour Costs		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
3																						
4	Vehicle Costs		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
5	Employee Expenses		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
6	Materials & Supplies		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
7	Computer Costs		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
8	Fees & Administrations Costs		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
9	Contractor Costs		50	51	52	53	54	55	56	58	59	60	61	62	64	65	66	68	69	70	72	73
10	Facilities		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
11	Recoveries & Revenue		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
12																						
13	Non-Labour Costs		51	52	53	54	55	56	57	59	60	61	62	63	65	66	67	69	70	72	73	75
14																						
15	Total Gross O&M Expenses		51	52	53	54	55	56	57	59	60	61	62	63	65	66	67	69	70	72	73	75
16																						
17	(Less): Capitalized Overhead		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
18	Add (Less): Adjustment		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
19	Net O&M		51	52	53	54	55	56	57	59	60	61	62	63	65	66	67	69	70	72	73	75
20																						
21	**Other Revenue**																					
22	Environmental Credits		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
23	Miscellaneous		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
24	Total Other Revenue		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
25																						
26	**Property Taxes**																					
27	General, School and Other		8	8	8	8	8	9	9	9	9	9	9	10	10	10	10	10	11	11	11	11
28	1% in Lieu of General Municipal Tax[1]	Schedule 11, Line 29/1000 x 1%	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
29	Total Property Taxes		8	8	8	8	8	9	9	9	9	9	9	10	10	10	10	10	11	11	11	11
30																						
31	1- Calculation is based on the second preceeding year; ex., 2012 is based on 2010 revenue																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Income Tax Expense
Schedule 3
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Income Tax Expense**																					
2																						
3	Earned Return	Schedule 5, Line 27	144	142	133	125	117	109	101	93	85	78	70	63	55	48	40	33	25	18	10	3
4	Deduct: Interest on debt	Schedule 5, Line 26	(75)	(74)	(69)	(65)	(61)	(57)	(52)	(48)	(44)	(41)	(37)	(33)	(29)	(25)	(21)	(17)	(13)	(9)	(5)	(2)
5	Add (Deduct): Amortization Expense	Schedule 9, Line 18	8	8	8	8	8	8	8	-	-	-	-	-	-	-	-	-	-	-	-	-
6	Add: Depreciation Expense	Schedule 8, Line 15 + Line 34	95	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94	94
7	Add: Removal Cost Provision	Schedule 8, Line 40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
8	Deduct: Overhead Capitalized Expensed for Tax Purposes		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
9	Deduct Removal Costs	Schedule 8, Line 41	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(10)
10	Deduct: Capital Cost Allowance	Schedule 4, Line 29	(155)	(282)	(229)	(186)	(152)	(125)	(103)	(85)	(70)	(59)	(49)	(41)	(35)	(30)	(26)	(22)	(19)	(17)	(15)	(13)
11	Taxable Income After Tax	Sum of Lines 3 through 10	17	(111)	(62)	(23)	7	30	49	55	66	74	80	84	86	88	89	89	88	87	85	73
12																						
13	Income Tax Rate		25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%
14	1 - Current Income Tax Rate	1 - Line 13	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75
15																						
16	Taxable Income	Line 11 / Line 14	23	(148)	(83)	(31)	9	40	65	73	87	98	106	112	115	117	118	118	117	116	113	98
17																						
18	Total Income Tax Expense	Line 16 x Line 13	6	(37)	(21)	(8)	2	10	16	18	22	25	27	28	29	29	30	30	29	29	28	24
19	Adjustments		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
20	Net Tax Expense	Line 18 + Line 19	6	(37)	(21)	(8)	2	10	16	18	22	25	27	28	29	29	30	30	29	29	28	24

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Capital Cost Allowance
Schedule 4
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**CNG Dispensing Equipment- Class 8 @ 20%**																					
2	Opening Balance	Preceeding Year, Line 5	-	1,241	992	794	635	508	407	325	260	208	167	133	107	85	68	55	44	35	28	22
3	Additions	Schedule 7 , Line 11 - AFUDC	1,378	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
4	CCA	[Line 2 + (Line 3 x 1/2)] x CCA Rate	(138)	(248)	(198)	(159)	(127)	(102)	(81)	(65)	(52)	(42)	(33)	(27)	(21)	(17)	(14)	(11)	(9)	(7)	(6)	(4)
5	Closing Balance	Sum of Lines 2 through 4	1,241	992	794	635	508	407	325	260	208	167	133	107	85	68	55	44	35	28	22	18
6																						
7	**Foundation- Class 1.3 @ 6%**																					
8	Opening Balance	Preceeding Year, Line 11	-	429	403	379	356	335	315	296	278	261	246	231	217	204	192	180	169	159	150	141
9	Additions	Schedule 7 , Line 12 - AFUDC	442	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
10	CCA	[Line 8 + (Line 9 x 1/2)] x CCA Rate	(13)	(26)	(24)	(23)	(21)	(20)	(19)	(18)	(17)	(16)	(15)	(14)	(13)	(12)	(12)	(11)	(10)	(10)	(9)	(8)
11	Closing Balance	Sum of Lines 8 through 10	429	403	379	356	335	315	296	278	261	246	231	217	204	192	180	169	159	150	141	132
12																						
13	**NG Dehydrator- Class 8 @ 20%**																					
14	Opening Balance	Preceeding Year, Line 17	-	39	31	25	20	16	13	10	8	6	5	4	3	3	2	2	1	1	1	1
15	Additions	Schedule 7 , Line 13 - AFUDC	43	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16	CCA	[Line 14 + (Line 15 x 1/2)] x CCA Rate	(4)	(8)	(6)	(5)	(4)	(3)	(3)	(2)	(2)	(1)	(1)	(1)	(1)	(1)	(0)	(0)	(0)	(0)	(0)	(0)
17	Closing Balance	Sum of Lines 14 through 16	39	31	25	20	16	13	10	8	6	5	4	3	3	2	2	1	1	1	1	1
18																						
19																						
20	**Capitalized Overhead- Class 0 @ 0%**																					
21	Opening Balance	Preceeding Year, Line 24	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
22	Additions	Schedule 2 , Line 17 x 0 / 0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
23	CCA	[Line 21 + (Line 22 x 1/2)] x CCA Rate	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
24	Closing Balance	Sum of Lines 21 through 23	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
25																						
26	**Total CCA**																					
27	Opening Balance	Preceeding Year, Line 30	-	1,708	1,426	1,198	1,011	859	734	631	546	476	417	368	327	292	262	237	214	195	179	164
28	Additions	[1]	1,863	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
29	CCA		(155)	(282)	(229)	(186)	(152)	(125)	(103)	(85)	(70)	(59)	(49)	(41)	(35)	(30)	(26)	(22)	(19)	(17)	(15)	(13)
30	Closing Balance	Sum of Lines 27 through 29	1,708	1,426	1,198	1,011	859	734	631	546	476	417	368	327	292	262	237	214	195	179	164	151
31																						
32	1- Schedule 7 , Line 15 - Line 14, + Line 22 above - AFUDC																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Rate Base
Schedule 5
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Rate Base**																					
2	Gross Plant In Service- Beginning	Schedule 7, Line 8	-	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888
3	Gross Plant In Service- Ending	Schedule 7, Line 29	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888
4																						
5	Accumulated Depreciation- Beginning	Schedule 8, Line 8	-	(95)	(189)	(283)	(378)	(472)	(567)	(661)	(755)	(850)	(944)	(1,039)	(1,133)	(1,228)	(1,322)	(1,416)	(1,511)	(1,605)	(1,700)	(1,794)
6	Accumulated Depreciation- Ending	Schedule 8, Line 29	(95)	(189)	(283)	(378)	(472)	(567)	(661)	(755)	(850)	(944)	(1,039)	(1,133)	(1,228)	(1,322)	(1,416)	(1,511)	(1,605)	(1,700)	(1,794)	(1,888)
7																						
8	Contributions in Aid of Construction- Beginning	Schedule 7, Line 33	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
9	Contributions in Aid of Construction- Ending	Schedule 7, Line 36	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
10																						
11	Negative Salvage - Beginning	Schedule 8, Line 39	-	(1)	(1)	(2)	(2)	(3)	(3)	(4)	(4)	(5)	(5)	(6)	(6)	(7)	(7)	(8)	(8)	(9)	(9)	(10)
12	Negative Salvage - Ending	Schedule 8, Line 42	(1)	(1)	(2)	(2)	(3)	(3)	(4)	(4)	(5)	(5)	(6)	(6)	(7)	(7)	(8)	(8)	(9)	(9)	(10)	-
13																						
14	Accumulated Amortization- Beginning	Schedule 8, Line 33	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	Accumulated Amortization- Ending	Schedule 8, Line 36	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16																						
17	Net Plant in Service, Mid-Year	Sum (Lines 2 through 15)/2	896	1,745	1,651	1,556	1,461	1,366	1,271	1,176	1,081	986	891	796	702	607	512	417	322	227	132	42
18																						
19	Adjustment to 13-month average	[1]	902	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
20	Unamortized Deferred Charges, Mid-Year	Schedule 9, Line 21	24	44	36	28	20	12	4	-	-	-	-	-	-	-	-	-	-	-	-	-
21	Cash Working Capital	[2]	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)	(4)
22	**Total Rate Base**	**Sum of Lines 17 through 21**	**1,818**	**1,786**	**1,683**	**1,580**	**1,477**	**1,374**	**1,271**	**1,172**	**1,077**	**982**	**888**	**793**	**698**	**603**	**508**	**413**	**318**	**223**	**128**	**38**
23																						
24	**Return on Rate Base**																					
25	Equity Return	Line 22 x ROE x Equity %	69	68	64	60	56	52	48	45	41	37	34	30	27	23	19	16	12	8	5	1
26	Debt Component	[3]	75	74	69	65	61	57	52	48	44	41	37	33	29	25	21	17	13	9	5	2
27	Total Earned Return	Line 25 + Line 26	**144**	**142**	**133**	**125**	**117**	**109**	**101**	**93**	**85**	**78**	**70**	**63**	**55**	**48**	**40**	**33**	**25**	**18**	**10**	**3**
28	Return on Rate Base %	Line 27 / Line 22	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%	7.93%
29																						
30	1- [Schedule 7, (Line 15 + Line 34) + Schedule 8, (Line 15+ Line 34)] x (Days In-service/365-1/2)																					
31	2- Schedule 7, Line 29 x FEI CWC/Closing GPIS %																					
32	3- Line 22 x (LTD Rate x LTD% + STD Rate x STD %)																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Capital Spending
Schedule 6
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	Capital Spending Prior to 2012																					
2	CNG Dispensing Equipment		1,378																			
3	Foundation		442																			
4	NG Dehydrator		43																			
5	Total Capital Spending Prior to 2012	Sum of Lines 2 through 4	1,863																			
6																						
7	AFUDC Prior to 2012																					
8	CNG Dispensing Equipment		24																			
9	Foundation		-																			
10	NG Dehydrator		1																			
11	Total AFUDC Prior to 2012	Sum of Lines 8 through 10	25																			
12																						
13	Capital Spending 2012 Onwards																					
14	CNG Dispensing Equipment		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	Foundation		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16	NG Dehydrator		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
17	Total Capital Spending 2012 Onwards	Sum of Lines 14 through 16	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
18																						
19	AFUDC 2012 Onwards																					
20	CNG Dispensing Equipment		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
21	Foundation		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
22	NG Dehydrator		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
23	Total AFUDC 2012 Onwards	Sum of Lines 20 through 22	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
24																						
25	Total Capital Spending[1]	Line 5 + Line 17	1,863	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
26	Total AFUDC	Line 11 + Line 23	25	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
27	Total Annual Capital Spending and AFUDC	Line 25 + Line 26	1,888	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
28																						
29	Contributions in Aid of Construction		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
30	Removal Costs		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10
31	Net Annual Project Costs- Capital	Line 27 + Line 29 + Line 30	1,888	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10
32																						
33	Total Project Costs- Capital Spending and AFUDC	Sum of Line 27	**1,888**																			
34	Total Net Project Costs- including CIAC & Removal Costs	Sum of Line 31	**1,898**																			
35																						
36	1- Excluding capitalized overhead; First year of analysis includes all prior year spending																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Gross Plant in Service & Contributions in Aid of Construction
Schedule 7
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Gross Plant in Service**																					
2																						
3	Gross Plant in Service, Beginning																					
4	CNG Dispensing Equipment	Preceeding Year, Line 25	-	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402
5	Foundation	Preceeding Year, Line 26	-	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442
6	NG Dehydrator	Preceeding Year, Line 27	-	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44
7	Capitalized Overhead	Preceeding Year, Line 28	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
8	Total Gross Plant in Service, Beginning	Sum of Lines 4 through 7	-	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888
9																						
10	Gross Plant in Service, Additions																					
11	CNG Dispensing Equipment	Schedule 6, Lines 2 + 8 + 14 + 20	1,402	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
12	Foundation	Schedule 6, Lines 3 + 9 + 15 + 21	442	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
13	NG Dehydrator	Schedule 6, Lines 4 + 10 + 16 + 22	44	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
14	Capitalized Overhead	Schedule 2, Line 17	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	Total Gross Plant in Service, Additions	Sum of Lines 11 through 14	1,888	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16																						
17	Gross Plant in Service, Retirements																					
18	CNG Dispensing Equipment		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
19	Foundation		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
20	NG Dehydrator		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
21	Capitalized Overhead		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
22	Total Gross Plant in Service, Retirements	Sum of Lines 18 through 21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
23																						
24	Gross Plant in Service, Ending																					
25	CNG Dispensing Equipment	Line 4 + Line 11 + Line 18	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402	1,402
26	Foundation	Line 5 + Line 12 + Line 19	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442	442
27	NG Dehydrator	Line 6 + Line 13 + Line 20	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44	44
28	Capitalized Overhead	Line 7 + Line 14 + Line 21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
29	Total Gross Plant in Service, Ending	Sum of Lines 25 through 28	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888	1,888
30																						
31																						
32	**Contributions in Aid of Construction (CIAC)**																					
33	CIAC, Beginning	Preceeding Year, Line 36	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
34	Additions		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
35	Retirements		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
36	CIAC, Ending	Sum of Lines 33 through 35	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Accumulated Depreciation & Amortization
Schedule 8
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Accumulated Depreciation**																					
2																						
3	Accumulated Depreciation, Beginning																					
4	CNG Dispensing Equipment	Preceeding Year, Line 25	-	(70)	(140)	(211)	(281)	(351)	(421)	(491)	(561)	(631)	(701)	(771)	(842)	(912)	(982)	(1,052)	(1,122)	(1,192)	(1,262)	(1,332)
5	Foundation	Preceeding Year, Line 26	-	(22)	(44)	(66)	(88)	(111)	(133)	(155)	(177)	(199)	(221)	(243)	(265)	(287)	(309)	(332)	(354)	(376)	(398)	(420)
6	NG Dehydrator	Preceeding Year, Line 27	-	(2)	(4)	(7)	(9)	(11)	(13)	(15)	(18)	(20)	(22)	(24)	(26)	(28)	(31)	(33)	(35)	(37)	(39)	(42)
7	Capitalized Overhead	Preceeding Year, Line 28	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
8	Total Accumulated Depreciation, Beginning	Sum of Lines 4 through 7	-	(95)	(189)	(283)	(378)	(472)	(567)	(661)	(755)	(850)	(944)	(1,039)	(1,133)	(1,228)	(1,322)	(1,416)	(1,511)	(1,605)	(1,700)	(1,794)
9																						
10	Accumulated Depreciation, Depreciation Expense[1]																					
11	CNG Dispensing Equipment@ 5%	Schedule 7, Line 4 & Line 11	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)	(70)
12	Foundation@ 5%	Schedule 7, Line 5 & Line 12	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)	(22)
13	NG Dehydrator@ 5%	Schedule 7, Line 6 & Line 13	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
14	Capitalized Overhead@ 0%	Schedule 7, Line 7 & Line 14	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	Total Accumulated Depreciation, Depreciation Exp	Sum of Lines 11 through 14	(95)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)	(94)
16																						
17	Accumulated Depreciation, Retirements																					
18	CNG Dispensing Equipment	Schedule 7, Line 18	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
19	Foundation	Schedule 7, Line 19	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
20	NG Dehydrator	Schedule 7, Line 20	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
21	Capitalized Overhead	Schedule 7, Line 21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
22	Total Accumulated Depreciation, Retirements	Sum of Lines 18 through 21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
23																						
24	Accumulated Depreciation, Ending																					
25	CNG Dispensing Equipment	Line 4 + Line 11 + Line 18	(70)	(140)	(211)	(281)	(351)	(421)	(491)	(561)	(631)	(701)	(771)	(842)	(912)	(982)	(1,052)	(1,122)	(1,192)	(1,262)	(1,332)	(1,403)
26	Foundation	Line 5 + Line 12 + Line 19	(22)	(44)	(66)	(88)	(111)	(133)	(155)	(177)	(199)	(221)	(243)	(265)	(287)	(309)	(332)	(354)	(376)	(398)	(420)	(442)
27	NG Dehydrator	Line 6 + Line 13 + Line 20	(2)	(4)	(7)	(9)	(11)	(13)	(15)	(18)	(20)	(22)	(24)	(26)	(28)	(31)	(33)	(35)	(37)	(39)	(42)	(44)
28	Capitalized Overhead	Line 7 + Line 14 + Line 21	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
29	Total Accumulated Depreciation, Ending	Sum of Lines 25 through 28	(95)	(189)	(283)	(378)	(472)	(567)	(661)	(755)	(850)	(944)	(1,039)	(1,133)	(1,228)	(1,322)	(1,416)	(1,511)	(1,605)	(1,700)	(1,794)	(1,888)
30																						
31																						
32	**Accumulated Amortization of Contributions in Aid of Construction (CIAC)**																					
33	Accumulated Amortization CIAC, Beginning	Preceeding Year, Line 36	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
34	Amortization	[1]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
35	Retirements		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
36	Accumulated Amortization CIAC, Ending	Sum of Lines 33 through 35	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
37																						
38	**Negative Salvage Continuity - Foundation**																					
39	Opening Balance	Preceeding Year, Line 42	-	(1)	(1)	(2)	(2)	(3)	(3)	(4)	(4)	(5)	(5)	(6)	(6)	(7)	(7)	(8)	(8)	(9)	(9)	(10)
40	Provision (Cr.)[2]	Annual Salvage Rate x Schedule 7, (Line 5 + Line 26) /2	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
41	Removal Costs		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	10
42	Ending Balance	Sum of Lines 39 through 41	(1)	(1)	(2)	(2)	(3)	(3)	(4)	(4)	(5)	(5)	(6)	(6)	(7)	(7)	(8)	(8)	(9)	(9)	(10)	-
43																						
44	1- Depreciation & Amortization Expense calculation is based on opening balance + (additions x in-service days/365 if it is the in-service year for project/; otherwise, additions x 1/2)																					
45	2- Annual Salvage Rate calculation is 0.11% based on (foundation costs / removal costs / retirement years																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Deferred Charges & Deficiency / Surplus [Tracker]
Schedule 9
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Deficiency / Surplus [Tracker]**																					
2	Opening Balance	Previous Year, Line 10	-	41	36	34	32	27	17	-	-	-	-	-	-	-	-	-	-	-	-	-
3	Gross Addition	Schedule 11, Line 15	41	(8)	(5)	(4)	(7)	(12)	(18)	-	-	-	-	-	-	-	-	-	-	-	-	-
4	Tax		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
5	Net Addition	Line 3 + Line 4	41	(8)	(5)	(4)	(7)	(12)	(18)	-	-	-	-	-	-	-	-	-	-	-	-	-
6	AFUDC																					
7	Equity	(Line 2) x (Schedule 10, Lines 7 x 8)	-	2	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-
8	Debt	[1]	-	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-
9	Interest Adjustment	[2]	-	-	-	-	-	-	(0)	-	-	-	-	-	-	-	-	-	-	-	-	-
10	Closing Balance	Sum of Lines 5 through 9	41	36	34	32	27	17	-	-	-	-	-	-	-	-	-	-	-	-	-	-
11																						
12	**BFI Application Costs**																					
13	Opening Balance	Previous Year, Line 20	-	48	40	32	24	16	8	-	-	-	-	-	-	-	-	-	-	-	-	-
14	Opening Balance, Adjustment		-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
15	Gross Additions		75	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
16	Tax		(19)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
17	Net Additions		56	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
18	Amortization Expense		(8)	(8)	(8)	(8)	(8)	(8)	(8)	-	-	-	-	-	-	-	-	-	-	-	-	-
19	Closing Balance	Line 13 + Line 17 + Line 18	48	40	32	24	16	8	-	-	-	-	-	-	-	-	-	-	-	-	-	-
20																						
21	Deferred Charge, Mid-Year	(Line 13+ Line 14 + Line 19) / 2	24	44	36	28	20	12	4	-	-	-	-	-	-	-	-	-	-	-	-	-
22																						
23	1- (Line 2) x [Schedule 10 , (Lines 10 x 11+ Lines 12 x 13) x (1- Tax Rate)]																					
24	2- Adjustment to net account to zero in final year; result of varying WACC rates throughout contract																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Present Value of Revenue Requirement
Schedule 10
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1																						
2	Annual Revenue Requirement (Excluding O&M)	Schedule 1, Line 12 -Line 3	260.7	215.5	223.7	228.6	230.6	230.5	228.6	214.9	211.2	206.6	201.2	195.3	188.8	182.0	174.9	167.6	160.0	152.3	144.5	133.7
3	Annual Revenue Requirement (O&M)	Schedule 1, Line 3	50.9	51.9	53.0	54.1	55.2	56.3	57.4	58.6	59.8	61.0	62.2	63.5	64.8	66.1	67.4	68.8	70.2	71.6	73.1	74.6
4																						
5	**Annual Discount Rate**																					
6	Equity Component																					
7	ROE %		9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%	9.50%
8	Equity Portion		40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%	40.00%
9	Debt Component																					
10	Long Term Debt Rate		6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%	6.95%
11	Long Term Debt Portion		58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%	58.37%
12	Short Term Debt Rate		4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
13	Short Term Debt Portion		1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%	1.63%
14																						
15	Tax Rate		25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
16	Pre- Tax Weighted Average Cost of Capital (WACC)[1]		9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%	9.19%
17	After- Tax Weighted Average Cost of Capital (WACC)[2]		6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%
18																						
19	**Present Value of Revenue Requirement**																					
20	PV of Annual Cost of Service (excl O&M) Revenue Requirement	Line 2 / (1 + Line 17)^Yr	243.9	188.6	183.2	175.0	165.2	154.5	143.3	126.1	115.9	106.0	96.6	87.7	79.4	71.6	64.3	57.7	51.5	45.9	40.7	35.2
21	Total PV of Cost of Service (excl O&M)	Sum of Line 20	2,232.4																			
22	Total PV of Cost of Service (excl O&M) over contract term		1,253.7																			
23	PV of Annual O&M	Line 3 / (1 + Line 17)^Yr	47.6	45.4	43.4	41.4	39.5	37.7	36.0	34.4	32.8	31.3	29.9	28.5	27.2	26.0	24.8	23.7	22.6	21.6	20.6	19.7
24	Total PV of O&M	Sum of Line 23	634.1																			
25	Total PV of O&M over contract term		291.1																			
26																						
27	**Tariff Analysis**																					
28	Annual Volume (TJ)		60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0
29																						
30	**Levelized Tariff Analysis**																					
31	PV of Annual Volume (TJ)	Line 28 / (1 + Line 17)^Yr	56.1	52.5	49.1	46.0	43.0	40.2	37.6	35.2	32.9	30.8	28.8	27.0	25.2	23.6	22.1	20.6	19.3	18.1	16.9	15.8
32	Total PV of Volume (TJ)	Sum of Line 31	640.8																			
33																						
34	Levelized Volumetric Delivery Rate ($/GJ)	(Line 21 + Line 24) / Line 32	**4.473**																			
35																						
36	1- (Line 7 x Line 8) / 1- Line 15 + (Line 10 x Line 11 + Line 12 x Line 13)																					
37	2- Line 8 x Line 9 + [(Line 11 x Line 12 + Line 13 x Line 14) x 1- Line 16]																					

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Contract Rate Design
Schedule 11
($), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Cost of Service (Excluding O&M)**																					
2	Required Delivery Revenue ($) (discounted) - 20 years	Schedule 10, Line 21 x 1000	2,232,390																			
3	Required Delivery Revenue ($) (discounted, contract term) - 7 yrs	Schedule 10, Line 22 x 1000	1,253,729																			
4	Year 1 Contract Rate, Escalated at 2% Annually	[1]	219,398																			
5	Annual Contract Rate Escalation		2.00%																			
6																						
7	Annual Discount Rate (After- Tax WACC)	Schedule 10, Line 17	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%
8	Annual Contract Rate	[2]	219,398	223,786	228,262	232,827	237,484	242,234	247,078	214,929	211,211	206,580	201,218	195,269	188,848	182,047	174,943	167,593	160,046	152,341	144,507	133,697
9	PV of Annual Contract Rate	Line 8 / (1 + Line 7)^Yr	205,246	195,847	186,878	178,319	170,153	162,361	154,925	126,074	115,901	106,047	96,632	87,726	79,368	71,575	64,345	57,665	51,516	45,873	40,707	35,233
10	PV of Revenue Collected	Sum of Line 9	2,232,390																			
11																						
12	Annual Volumetric Contract Rate ($/GJ)	Line 8 / Line 23 / 1000	**3.657**	**3.730**	**3.804**	**3.880**	**3.958**	**4.037**	**4.118**	**3.582**	**3.520**	**3.443**	**3.354**	**3.254**	**3.147**	**3.034**	**2.916**	**2.793**	**2.667**	**2.539**	**2.408**	**2.228**
13																						
14	Annual Cost of Service (excl O&M)	Schedule 10, Line 2 x 1000	260,699	215,461	223,728	228,557	230,630	230,497	228,594	214,929	211,211	206,580	201,218	195,269	188,848	182,047	174,943	167,593	160,046	152,341	144,507	133,697
15	Annual Difference (Cost of Service - Contract Rate)	Line 14 - Line 8	41,300	(8,326)	(4,534)	(4,271)	(6,854)	(11,737)	(18,484)	-	-	-	-	-	-	-	-	-	-	-	-	-
16																						
17	**Cost of Service (O&M)**																					
18	Forecast Annual BC CPI Rate	CPI BC Stats Canada	1.99%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%	2.03%
19	Annual O&M Expense	Schedule 1, Line 3 x 1000	50,900	51,933	52,988	54,063	55,161	56,280	57,423	58,589	59,778	60,991	62,230	63,493	64,782	66,097	67,439	68,808	70,204	71,629	73,084	74,567
20																						
21	Annual O&M Volumetric Contract Rate ($/GJ)	Line 19 / Line 23 / 1000	**0.848**	**0.866**	**0.883**	**0.901**	**0.919**	**0.938**	**0.957**	**0.976**	**0.996**	**1.017**	**1.037**	**1.058**	**1.080**	**1.102**	**1.124**	**1.147**	**1.170**	**1.194**	**1.218**	**1.243**
22																						
23	Annual Volume (TJ)	Minimum contract demand	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0	60.0
24																						
25	Cost of Service (excl O&M) Volumetric Contract Rate ($/GJ)	Line 12	3.657	3.730	3.804	3.880	3.958	4.037	4.118	3.582	3.520	3.443	3.354	3.254	3.147	3.034	2.916	2.793	2.667	2.539	2.408	2.228
26	O&M Volumetric Contract Rate ($/GJ)	Line 21	0.848	0.866	0.883	0.901	0.919	0.938	0.957	0.976	0.996	1.017	1.037	1.058	1.080	1.102	1.124	1.147	1.170	1.194	1.218	1.243
27	Annual Overhead Allocation Charge ($/GJ)	[3]	0.385	0.393	0.401	0.409	0.417	0.426	0.434	0.443	0.452	0.461	0.471	0.480	0.490	0.500	0.510	0.520	0.531	0.542	0.553	0.564
28	**Total Annual Volumetric Contract Rate ($/GJ)**	Sum of Line 25 to Line 27	**4.890**	**4.988**	**5.088**	**5.190**	**5.295**	**5.401**	**5.509**	**5.002**	**4.969**	**4.921**	**4.861**	**4.793**	**4.717**	**4.636**	**4.550**	**4.460**	**4.369**	**4.275**	**4.179**	**4.035**
29	**Annual Forecast Revenue**	(Line 23 x Line 28) x 1000	**293,397**	**299,288**	**305,296**	**311,425**	**317,677**	**324,055**	**330,560**	**300,106**	**298,116**	**295,250**	**291,688**	**287,575**	**283,028**	**278,140**	**272,986**	**267,626**	**262,110**	**256,476**	**250,757**	**242,104**
30																						
31	**Contract Termination[4]**																					
32																						
33	Deferral Account Repayment	Schedule 9, Line 10	41,300	35,822	33,759	31,816	27,156	17,292	-	-	-	-	-	-	-	-	-	-	-	-	-	-
34	Residual Asset Value	[5]	1,792,910	1,698,006	1,603,103	1,508,199	1,413,296	1,318,392	1,223,488	1,128,585	1,033,681	938,777	843,874	748,970	654,067	559,163	464,259	369,356	274,452	179,549	84,645	9,741
35	Approximate Contract Termination Fee ($)	Line 33 + Line 34	1,834,210	1,733,829	1,636,861	1,540,015	1,440,452	1,335,684	1,223,488	1,128,585	1,033,681	938,777	843,874	748,970	654,067	559,163	464,259	369,356	274,452	179,549	84,645	9,741
36																						

37 1- Line 3 /sum of [(1+2%) ^ year / (1+WACC) ^ year] for each year of the contract
38 2- Previous Year x (1+ 2%); in 2019+, Line 14
39 3- Previous Year x (1+ BC CPI)
40 4- The forecast early termination fee has been calculated on a year end basis. The actual fee would be determined at the time of contract termination and may be different than the amount shown on Line 35. Reference to Section 12B.5, Clause 11.1 of Appendix B in BFI Application
41 5- Schedule 5, (Line 3 + Line 6+ Line 9+ Line 12+ Line 15 + Schedule 8 Line 41) x 1000

FortisBC Energy Inc.
CNG BFI Cost of Service
Order C-6-12

CNG BFI Cost of Service: Discounted Cash Flow Analysis
Schedule 12
($000's), unless otherwise stated

Line	Particulars	Reference	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031
1	**Cash Flow**																					
2	Add: Revenue	Schedule 11, Line 29	293	299	305	311	318	324	331	300	298	295	292	288	283	278	273	268	262	256	251	242
3	Less: O&M, Property Tax Expense	Schedule 1, - (Line 3 + Line 4)	(59)	(60)	(61)	(62)	(64)	(65)	(66)	(67)	(69)	(70)	(72)	(73)	(75)	(76)	(78)	(79)	(81)	(82)	(84)	(86)
4	EBITDA[1]	Line 2 + Line 3	235	239	244	249	254	259	264	233	229	225	220	214	208	202	195	188	181	174	167	156
5	Capital Expenditures[2]	Schedule 6, Line 25 + Line 29	(1,863)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(10)
6	Pre-Tax Cash Flow	Line 4 + Line 5	(1,629)	239	244	249	254	259	264	233	229	225	220	214	208	202	195	188	181	174	167	146
7	Income Tax Expense	Line 4 x (- Schedule 3, Line 13)	(59)	(60)	(61)	(62)	(64)	(65)	(66)	(58)	(57)	(56)	(55)	(54)	(52)	(51)	(49)	(47)	(45)	(43)	(42)	(39)
8	Overhead Capitalized Tax Shield	Schedule 3, -Line 8 x Line 13	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
9	CCA Tax Shield/Removal Cost	Schedule 3, (-Line 9 + Line 10) x Schedule 3, Line 13	39	70	57	47	38	31	26	21	18	15	12	10	9	7	6	6	5	4	4	6
10	Terminal Value of CCA Tax Shield	[4]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	19
11	Terminal Value	[5]	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
12																						
13	Free Cash Flow	Line 6 + Line 7	(1,648)	250	240	233	229	226	224	196	190	183	177	171	165	159	153	147	141	135	129	132
14																						
15	After Tax WACC %	Schedule 10, Line 17	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%	6.90%
16	Present Value of Free Cash Flow [3]	Line 13 / (1 + Line 15)^Yr	(1,662)	219	197	179	164	151	140	115	104	94	85	77	69	63	56	51	45	41	36	35
17	Total Present Value of Free Cash Flow	Sum of Line 16	**258**																			
18																						
19	1- Earnings Before Interest, Taxes, Depreciation & Amortization (EBITDA)																					
20	2- Net of CIAC and removal costs (if applicable) and excludes capitalized overhead																					
21	3- 2012 present value calculates capital expenditure to occur at time zero																					
22	4- [Class 8 UCC Closing Balance x CCA Rate / (CCA Rate + WACC) + Class 1.3 UCC Closing Balance x CCA Rate / (CCA Rate + WACC)] x Income Tax Rate																					
23	5- Evaluation period reflects the useful life of the assets, therefore it is assumed that the terminal value is zero																					