FASKEN

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

550 Burrard Street, Suite 2900
Vancouver, British Columbia V6C 0A3
Canada

T +1 604 631 3131
+1 866 635 3131
F +1 604 631 3232

fasken.com

Matthew Ghikas
Direct +1 604 631 3191
Facsimile +1 604 632 3191
mghikas@fasken.com

July 27, 2018
File No.: 240148.00819/14797

Electronic Filing

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

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

Re: Application to Exclude Employee Information from 2015 Data Order G-161-15
FortisBC Energy Inc.'s Submission on Jurisdiction

We enclose for filing in the above proceeding FEI's Submission on Jurisdiction, dated July 27, 2018, together with copies of the following authorities cited in the Submission:

- *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 (A copy of this decision was also appended to the Application, Exhibit B-1.)
- *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission),* (1996), 20 BCLR 3d 106 (A copy of this decision was also appended to the Application, Exhibit B-1.)
- *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68
- *Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al*, 2004 BCSC 422
- *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* [2012] S.C.J. No. 68
- Regimbald, *Canadian Administrative Law* (2d), excerpt pp. 171-175

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[*Original signed by*]

Matthew Ghikas
Personal Law Corporation

MTG/gvm
Enclosures

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT (THE "ACT")

R.S.B.C. 1996, CHAPTER 473

Application to Exclude Employee Information from 2015 Data Order G-161-15

FortisBC Energy Inc.'s

Submission on Jurisdiction

July 27, 2018

FASKEN MARTINEAU DUMOULIN LLP
Matthew T. Ghikas
David Curtis

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PART ONE: INTRODUCTION

1. FortisBC Energy Inc. ("FEI") respectfully submits that the preliminary jurisdictional question identified in Commission Order G-125-18 (Exhibit A-2) is dispositive of this Application.

2. The 2015 Data Order[1] addresses three types of information: "Customer Information"[2], "Sensitive Information"[3] and "Employee Information"[4]. Unlike the first two categories, the use and storage of Employee Information extends beyond the Commission's jurisdiction. The provision relied upon by the Commission as the basis for the 2015 Data Order (section 44 of the *Utilities Commission Act* ("UCA")) is concerned with ensuring ready availability of accounts and records necessary to allow the Commission to fulfil its core functions of fixing just and reasonable rates and protecting the integrity of the supply system.[5] Regulating where and how copies of Employee Information can be stored reaches into areas that are the exclusive realm of utility management, acting in accordance with privacy legislation, employment contracts and collective agreements. Employee Information should be excluded from the data restrictions in the 2015 Data Order on jurisdictional grounds.

3. This Submission on Jurisdiction reiterates, and expands on, the content of Section 4 of the Application. It is organized as follows:

- Part Two sets out the binding legal principles that limit the literal application of broadly-worded provisions in the UCA and restrict implied powers to where they are necessary to give effect to the purpose of the legislation.

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1 Order G-161-15.

2 Defined as "information of or about the FEI residential, commercial, or industrial customers."

3 Defined as "financial, commercial, scientific or technical information, the disclosure of which could result in undue financial harm or prejudice to the FEI"; and "information that relates to the security of the FEI critical infrastructure and operations, the disclosure of which could pose a potential threat to the FEI operations or create or increase the risk of a debilitating impact on the safe and reliable operation of the FEI system."

4 Defined as "information of or about the FEI employees."

5 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, para. 7.

- Part Three applies the law governing statutory interpretation to the 2015 Data Order, demonstrating that the aspect of the 2015 Data Order that applies to Employee Information exceeds the Commission's jurisdiction.

- Part Four is FEI's conclusion and requested order.

PART TWO: APPLICABLE LAW GOVERNING COMMISSION JURISDICTION

A. INTRODUCTION

4. This Part of FEI's Submission on Jurisdiction sets out the following well-established legal principles governing the source of the Commission's jurisdiction and the proper approach for determining the extent of its jurisdiction:

- First, statutory bodies like the Commission derive their jurisdiction exclusively from statute, with statutory powers being either express or implied by necessary implication.

- Second, the text of a broadly-worded statutory provision like section 44 of the *Utilities Commission Act* ("UCA") must be read in light of the purpose and intent of the legislation, not in isolation.

- Third, under the doctrine of "jurisdiction by necessary implication", the power to regulate privacy or dictate the terms of employment of unionized and non-unionized utility employees could only be implied if it is necessary for the Commission to deliver on the purpose and objects of the UCA.

- Fourth, the UCA exists within a broader framework relating to privacy and labour relations. The rules of statutory interpretation require the Commission to interpret the UCA in a manner that is consistent with the provisions and purpose of those other legislative regimes.

B. COMMISSION'S JURISDICTION IS DEFINED BY THE UCA, WITH POWERS BEING EXPRESS OR IMPLIED BY NECESSARY IMPLICATION

5. The Commission is a creation of the UCA. Its powers are limited to those conferred by legislation.[6] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*[7] ("*ATCO Gas"*), the majority of the Supreme Court of Canada (per Bastarache J.) held:

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[6] *ATCO Gas*, para. 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 they cannot trespass in areas where the legislature has not assigned them authority". [Citations omitted][8]

6. The Supreme Court of Canada also articulated in *ATCO Gas* the well-established test for the interpretation of statutory jurisdiction:

> 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.
>
> 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). [Citations omitted]

7. The Commission derives its jurisdiction from the UCA. If the Commission has jurisdiction to direct how and where FEI stores copies of Employee Information, then that power would have to be found in the express wording of the UCA or implied by "necessary implication". In the next sections, FEI sets out the legal rules regarding the interpretation of express provisions, and the limits on implying "jurisdiction by necessary implication".

C. WORDING OF SECTION 44 MUST BE READ IN CONTEXT, NOT IN ISOLATION

8. In 2015, the Commission found its jurisdiction in the express wording of section 44 of the UCA, noting that section 44 "is the only section of the statute that addresses the

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[7] 2006 SCC 4.

[8] *ATCO Gas*, para. 35.

location of public utility records…".[9] FEI describes below how the principles of statutory interpretation require more than just a literal reading of section 44. The wording must be considered in the broader context of the UCA, such that the interpretation given to the words is rationally connected to the purpose of the provision and the UCA as a whole.

(a) Words Must Be Interpreted in Light of Legislative Purpose

9. Section 44 of the UCA uses relatively open-ended language. However, in *ATCO Gas*, Bastarache J. (for the majority) emphasized that reading ostensibly broad provisions in isolation, without regard to the purpose and objects of the section and the legislation as a whole, contravenes accepted principles of statutory interpretation.

10. The Supreme Court of Canada was, in the *ATCO Gas* case, addressing the broadly worded provision allowing the AUC to impose conditions on an asset sale and the AUC's general supervisory powers. Bastarache J. stated:

> 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

[9] 2015 Data Order, Recital F. See also page 4 of the Decision.

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. [Emphasis added.]

(b) The Purpose of Utility Regulation and Commission's Role Relate to Rates, Service and Integrity of System

11. The Supreme Court of Canada in *ATCO Gas* also articulated the purpose of utility regulation and the function of the utility regulator, in light of which section 44 and other broadly worded sections in the UCA must be interpreted.

12. The purpose and intent of public utility legislation, according to the Supreme Court of Canada, is "to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service."[10] The limits of the regulator's jurisdiction in the case of broadly worded powers is defined by its "main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system."[11] Bastarache J. (for the majority) contrasted that "main function" with functions such as contracting with employees that are matters in which a public utility is "like any other privately held company":

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

[10] *ATCO Gas*, para. 3.

[11] *ATCO Gas*, para. 7.

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).

…

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. [Emphasis added.]

13. Later in the *ATCO Gas* decision, Bastarache J. reiterated that the regulator's supervisory powers over public utilities are incidental to fixing rates:

> 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). … [Emphasis added.]

14. In *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, the BC Court of Appeal echoed the Supreme Court of Canada's characterization of the role of regulation and regulators in the context of this Commission:

> [9] The Commission is a regulatory agency of the provincial government which operates under and administers that Act. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)[12] [Emphasis added.]

The balance referenced by the Court of Appeal is the regulatory compact inherent in just and reasonable rates, including terms and conditions of service and service quality and reliability considerations.

15. These court decisions are binding on the Commission. FEI describes later in Part Three why, when the wording of section 44 is viewed as part of the broader context of the UCA, the provision did not provide the statutory authority for the 2015 Data Order. Briefly:

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[12] 2009 BCCA 68, para 9.

- The purpose and intent of section 44 is to ensure that records necessary to allow the Commission to fulfil its "main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system"[13] are readily accessible. The essence of the 2015 Data Order, by contrast, is to regulate dissemination of copies of data for the purpose of regulating privacy. The effect of the 2015 Data Order is to override the terms of employment that expressly allow for sending Employee Information out of the province. Regulating privacy and dictating terms of employment are rationally disconnected from the purpose of section 44 and the UCA generally.

- Second, section 44 does not apply to any and all "accounts and records" without limitation. Rather, the "accounts and records" are only those that are required for the Commission to fulfil its mandate. The Employee Information at issue is of no relevance to the Commission fulfilling its "main function" in any event.

16. Although the Commission cited only section 44 of the UCA, the same principles of statutory interpretation set out in the cases cited above would apply to other broadly worded provisions of the UCA (such as the general supervisory powers).

D. JURISDICTION CAN BE IMPLIED ONLY BY "NECESSARY IMPLICATION"

17. As FEI discusses in Part Three below, the essence of the 2015 Data Order is to regulate dissemination of copies of data for the purpose of regulating privacy. The Commission has, in effect, substituted its view of acceptable employment terms for the terms negotiated with individual employees and the bargaining agents. The 2015 Data Order renders meaningless terms of employment that expressly allow FEI to send Employee Information out of the province for the purpose of managing the employee's pension.[14] It constrains FEI's exercise of management rights reserved under FEI's collective agreements. It also interferes with FEI's ability to negotiate future employment contracts and collective agreements. There is

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[13] *ATCO Gas*, para. 7.

[14] Exhibit B-1, FEI May 23, 2018 Letter, pp. 8-10.

no provision in the UCA expressly authorizing the Commission to regulate privacy or dictate terms of employment for unionized and non-unionized public utility employees. A power of that nature could only be implied by meeting the test of "necessary implication".

18. The well-established "doctrine of jurisdiction by necessary implication (implicit powers)", referenced in *ATCO Gas*[15], restricts implied powers to those necessary to the fulfilment of the purpose and objects of the legislation. Regimbald, *Canadian Administrative Law*, emphasizes that "necessary" really does mean "necessary". The textbook states:

> The rationale is the same for both types of jurisdiction by necessary implication. A specific "narrow" power may be needed by necessary implication to enable the decision maker to implement its mandate. In other cases, a court will have to construe a "broad power" to enable the same, and it may do so if the decision maker would be paralyzed otherwise. This type of interpretation is necessary because it is always presumed that Parliament or a legislature did not intend to enact legislation that would lead to absurd consequences.[16]

19. In *ATCO Gas,* the Supreme Court of Canada prohibited implying powers that go beyond what is necessary for the statutory body to deliver on its purpose and objects:

> 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.
>
> …
>
> 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). [Emphasis added.]

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[15] *ATCO Gas*, para. 38.

[16] Regimbald, Canadian Administrative Law (2d), at p. 174.

20. As indicated above, the Supreme Court of Canada in *ATCO Gas* articulated the purpose and objects of utility legislation as being "to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service."[17] "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."[18] The question thus arises: *Is the ability to regulate privacy or dictate terms of employment for public utility employees as it relates to the use of Employee Information necessarily incidental to (a) being able to regulate monopoly natural gas service to customers, or (b) protecting the continued quality of essential natural gas service, or (c) protecting the integrity and dependability of the natural gas supply system?* The answer in all three cases is "No", for the reasons explained later in Part Three.

E. THE COMMISSION MUST HAVE REGARD TO THE EXISTENCE OF OTHER LEGAL FRAMEWORKS GOVERNING PRIVACY

21. The UCA exists within a broader framework relating to privacy and labour relations. The rules of statutory interpretation require the Commission to interpret the UCA in a manner that is consistent with the provisions and purpose of those other legislative regimes.

22. The requirement for legislation to be interpreted consistently with other statutes is evident in the Supreme Court of Canada's decision in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168 ("CRTC Reference Decision").*[19] In that case, the Supreme Court of Canada considered the CRTC's jurisdiction to issue rules under the *Broadcasting Act* relating to the rebroadcasting of program content. It held that the CRTC was precluded from exercising broadly worded, and ostensibly permissive, powers under the *Broadcasting Act* in a manner that conflicted with the *Copyright Act.*[20] It articulated the required interpretation approach as follows:

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[17] *ATCO Gas*, para. 3.

[18] *ATCO Gas*, para. 7.

[19] [2012] S.C.J. No. 68.

[20] *CRTC Reference Decision*, para 13.

> [2] The Broadcasting Act grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broad-casting policy as set out in the Broadcasting Act. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the Copyright Act, R.S.C. 1985, c. C-42: Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 44-52. As such, the CRTC, as a subordinate legislative body, cannot enact a regulation or attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute.
>
> [3] In my opinion, the value for signal regime does just that and is therefore *ultra vires*.
>
> …
>
> [37] Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter" (R. v. Ulybel Enterprises Ltd., 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.
>
> [38] Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict. Lamer C.J. wrote in Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015, at para. 61:
>
> > There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones . . . .[21] [Emphasis added.]

23. The Supreme Court of Canada's *CRTC Reference Decision* defined inconsistency not just with reference to inconsistent provisions, but as also including an interpretation of one piece of legislation that would be inconsistent with the underlying purpose of another statute. The Court stated:

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[21] *CRTC Reference Decision*, paras. 2, 3, 37 and 38. See also para. 12: "The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008), at p. 411)."

[42] In *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

> The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
>
> (P.-A. Côté, The Interpretation of Legislation in Canada (3rd ed. 2000), at p. 350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for [page 513] example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the purpose of the other (Lévis, at para. 54; Sullivan, at p. 330). [Emphasis added.]

24. As FEI elaborates in Part Three, the nature of the conflict identified in the *CRTC Reference Decision* that invalidated the CRTC's proposed regulation is notable in the present context because it was akin to the type of conflict that exists between the 2015 Data Order and (a) privacy legislation, and (b) labour relations legislation.

PART THREE: TERMS OF STORAGE OF EMPLOYEE INFORMATION IS BEYOND THE COMMISSION'S JURISDICTION

A. INTRODUCTION

25. This Part applies the law governing statutory interpretation to the current circumstances, demonstrating that the part of the 2015 Data Order that applies to Employee Information exceeds the Commission's jurisdiction. FEI makes the following points:

- First, section 44, when considered in the context of the UCA as a whole, cannot be interpreted as authorizing regulation of extra-provincial transmittal or storage of copies of data also stored in BC.

- Second, the test for implying jurisdiction - "necessary implication" - is not met where the purpose or effect of an order is to regulate privacy or constrain a public utility's ability to determine terms of employment or exercise its rights under collective agreements.

- Third, the Commission's jurisdiction to regulate Sensitive Information and Customer Information comes not from section 44, but rather from various other sections of the UCA interpreted in light of the Commission's core mandate.

B. SECTION 44, READ IN CONTEXT, DOES NOT AUTHORIZE REGULATION OF EXTRA PROVINCIAL STORAGE OF COPIES

26. The Commission observed in Recital F to the 2015 Data Order, and again on page 4 of the Decision, that "Section 44 of the *Utilities Commission Act* is the only section of the statute that addresses the location of public utility records…".[22] The statement is accurate both in the sense that section 44 addresses the location of public utility accounts and records, and that it is the only provision of the UCA to do so. While section 44 authorizes a certain degree of regulation over the location of records, the Commission has interpreted that power more broadly than is reasonable in light of that provision's purpose in the context of the UCA as a

[22] 2015 Data Order Decision: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/120358/1/document.do. See Recital F and Decision p.4.

whole. Section 44, when considered in the context of the UCA as a whole, cannot be interpreted as authorizing regulation of extra-provincial transmittal or storage of copies of data also stored in BC.

(a) Examining the Wording of Section 44 is Only the First Step

27. The starting point of the statutory interpretation analysis set out in Part Two above is to consider the wording of the provision in question; however, reviewing the wording of section 44 is insufficient.

28. Section 44 provides:

> 44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.
>
> (2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), except on conditions specified by the commission.

29. In issuing the 2015 Data Order pursuant to section 44 alone, the Commission appears to have implicitly interpreted the provision such that:

- "accounts and records" includes Employee Information, Customer Information and Sensitive Information (as those terms are defined in the 2015 Data Order); and
- it is a prohibition on transmitting and storing <u>copies</u> of electronic data outside of British Columbia, despite the information still being readily available to the Commission in British Columbia.

30. While the wording of section 44, taken in isolation, might be capable of being read in this way, the law requires the wording of section 44 to be interpreted with regard to the purpose of the legislation and intention of the Legislature. Or, to repeat the words of the Supreme Court of Canada in *ATCO Gas*, "the grammatical and ordinary sense of a section is not

determinative and does not constitute the end of the inquiry. The [Commission] is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading."[23] FEI explains next why the 2015 Data Order as it relates to Employee Information is incompatible with the purpose and intent of the UCA generally and section 44 in particular.

(b) Purpose of Section 44 is to Ensure Necessary Records are Available to the Commission

31. Section 44 only squares with the function of utility regulation and the Commission's main function as articulated by the Supreme Court of Canada if it is interpreted as being concerned with transparency and rate setting. That is, *the section facilitates the realization of the essential purpose of utility regulation and the Commission's main function by ensuring that information required to set "just and reasonable" rates and oversee service quality and dependability is both available and readily accessible to the Commission when needed.* Put another way, it ensures that a utility cannot frustrate or impede the regulatory process by placing its accounts and records outside the jurisdiction.

Section 44 Fits With Other Record Keeping / Transparency Requirements

32. Section 44 fits naturally with the obligations on public utilities under the UCA to provide information or otherwise make it accessible to the Commission. For instance, section 49 "Accounts and reports" is a requirement on public utilities to maintain "records and accounts" in the manner that the Commission specifies, including adopting a uniform system of accounting. Section 74 "Inspections" empowers the Commission to authorize a person to inspect property and records:

> 74 For the purposes of this Act, a person authorized in writing by the commission may
>
> (a) enter on and inspect property, and
>
> (a.1) inspect and make copies of records.

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[23] *ATCO Gas*, para. 48.

33. The role of section 44 is to ensure that records and accounts that a public utility must keep are readily available and on hand in an office in British Columbia in the event the Commission wants to inspect, copy or otherwise review them. Since the Commission's powers are restricted to the Province, removing the only copies would thwart effective regulation. The concern underlying section 44 does not exist in a case where the information being sent electronically outside the province is an electronic copy of information that remains readily accessible to the Commission within British Columbia.

34. Section 44 is not unlike corporate law requirements to keep a registered and records office. The records must be available, but there is no prohibition in corporate law statutes on sending a copy of minute books, the lists of directors and officers, or shareholder registers outside the province.

Legislative History Underscores that Section 44 is Intended to Ensure Commission Has Access to Necessary Information

35. Legislative history is a valid consideration in interpreting legislation, as it can illuminate the intention of the Legislature.[24] The legislative history of section 44 provides support for interpreting the section as a means of ensuring the Commission has access to information it needs to regulate utility rates, service and system integrity pursuant to other sections of the UCA.

36. The original version of section 44 is traceable to a 1919 statute titled *An Act to provide for the Regulation of Public Utilities*[25]. Section 7 of that statute mirrors the language of section 44 of the current UCA, and provided as follows:

> 7. Every public utility company shall have an office in the Province, in which it shall keep all such books, accounts, papers, and records as are required by the Commission to be kept within the Province. No company shall remove or permit to be removed from the Province any book, account, paper or record so kept, except upon such conditions as may be prescribed by the Commission.

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[24] *CRTC Reference Decision*, paras. 71 and 74. The *ATCO Gas* decision specifically requires consideration of legislative intent. See *ATCO Gas*, para. 48.

[25] S.B.C. 1919, c. 71.

37. The age of section 44 casts light on legislative intent and the purpose of the section. First, in 1919, records were paper, the ability to copy was limited, travel was slow, and transmittal was by mail.[26] The need to preserve a utility's records locally in a single office is understandable in that context. The dispersal of records and accounts required for rate setting and overseeing service throughout the province, let alone outside the province, would impede the Commission in carrying out its central mandate.

38. Second, section 44 predated by decades the widespread acceptance of the need to protect personal information and privacy, which is the only possible rationale for preventing copies of information already stored in BC from being stored outside the province. As noted by Nancy Homes in a paper entitled "Canada's Federal Privacy Laws", concerns about the protection of personal information and privacy only arose in Canada in the 1960s:

> Concerns about the protection of personal information first arose in Canada during the late 1960s and early 1970s when computers were emerging as important tools for government and big business. In response to a federal government task force report on privacy and computers,(1) Canada enacted the first federal public sector privacy protection in Part IV of the Canadian Human Rights Act in 1977. This provision established the office of the Privacy Commissioner of Canada as a member of the Canadian Human Rights Commission and provided the Privacy Commissioner with the mandate to receive complaints from the general public, conduct investigations and make recommendations to Parliament. Arguably, the anti-discrimination provisions of the Canadian Human Rights Act were not the best fit for the right to privacy, and in 1983, the current Privacy Act came into force along with the Access to Information Act. Both pieces of legislation stemmed from the same bill (Bill C-43) and from a belief in the complementary nature of data protection and freedom of information as critical components of a strong and healthy democracy.[27]

39. The fact that section 44 is not about privacy is underscored by the existence of a distinct legislative framework governing privacy, which is discussed later in this Part.

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[26] Exhibit B-1, FEI May 23, 2018 Letter, p. 10.

[27] Exhibit B-1, FEI May 23, 2018 Letter, p. 10, citing *Nancy Holmes*, "Canada's Federal Privacy Laws", PRB -07-44E, September 25, 2008, *Parliamentary Information and Research Service of the Library of Parliament.*

(c) The "Accounts and Records" Retained Under Section 44 Must Be Rationally Connected to Commission's Role

40. Section 44 refers to "accounts and records", without any express limitation on the types of accounts and records that can be subject to Commission direction. The principles of statutory interpretation discussed in Part Two require the phrase to be interpreted in light of the statutory purpose. That is, the types of records that the Commission would able to require would have to be rationally connected to the Commission's role of overseeing public utility service. The vast majority of information in the hands of a public utility could reasonably be expected to be relevant to the Commission's core mandate as articulated in *ATCO Gas*. However, there is a legitimate question about how the type of Employee Information held by Willis Towers Watson ("WTW") - individual personnel data dating back decades - would even be relevant to the regulation of FEI as a public utility. The information could have no conceivable impact on the terms and conditions of utility service provided to customers, service quality, or the integrity of the system.

C. THE 2015 DATA ORDER IMPERMISSIBLY REGULATES EMPLOYEE PRIVACY AND EMPLOYMENT TERMS

41. The essence of the 2015 Data Order as it relates to Employee Information is to regulate employee privacy, which is a matter explicitly addressed in the employment agreements between FEI and its employees. There is no express power in the UCA authorizing the Commission to regulate privacy or employment terms. There is no basis to imply jurisdiction over privacy and employment terms by "necessarily implication". Privacy is more than adequately addressed by another statutory regime and tribunal. Terms of employment are overseen either by the courts or by arbitrators appointed under collective agreements.

(a) Essence of the 2015 Data Order is to Regulate Employee Privacy and Terms of Employment

42. It is self-evident on the record of the 2015 proceeding and the 2015 Data Order itself that the impetus for the 2015 Data Order as it related to Employee Information and Customer Information was privacy concerns. The effect of the order is to interfere with the terms of employment of FEI's employees, which specifically address the treatment of employee

personal information. It impedes FEI's ability to excerise management rights under collective agreements.

2015 Data Order Was Rooted in the Regulation of Privacy

43. The Commission was explicit in the Decision accompanying the 2015 Data Order that privacy and security considerations were the key risk considerations. For instance, the Executive Summary stated:

> To arrive at this determination, the Panel focused on the differences between the status quo under the current restriction and the FEU application. The Panel considered FEU's application pursuant to section 44 of the *Utilities Commission Act* and used a benefit-risk assessment to determine whether the proposal is in the public interest.
>
> The potential benefits of storing data outside of Canada are cost savings and access to services that are not stored on servers in Canada. The potential risks are that the data is accessed by those who, for privacy and security reasons, should not have access to the data or for whom the owner of the data has not granted consent. These risks are typically unauthorized access and authorized foreign government access. Unauthorized access can occur through hacking or unauthorized employee, insider, contractor or third party vendor access. Authorized foreign government access can occur because data are subject to the laws of the jurisdiction in which they are held; a foreign government may therefore lawfully access data held on servers in its jurisdiction. [28] [Emphasis added.]

44. Similar wording emphasizing the privacy and security rationales appeared in the body of the decision. For instance:

> The task for this Panel is to identify whether security or privacy risks of storing data are increased by storing data outside Canada, and if so to what extent. The potential risks must then be weighed against potential benefits to determine if approving the application is in the public interest.[29]

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[28] 2015 Data Order Decision, p.(i): https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/120358/1/document.do

[29] 2015 Data Order Decision, p.16. See also p.8.

45. Employee Information does not give rise to security considerations. Privacy is the only possible rationale for imposing any restrictions on Employee Information in the 2015 Data Order.

Extra-Provincial Storage of Data is Addressed in Employment Agreements

46. FEI's employees have agreed, as a matter of contract, that their personal information may be stored outside of Canada.

47. FEI's Application describes how, for over a decade, all FEI employment offer letters have confirmed that the employee's term of employment will be governed by FEI's corporate policies, including the Employee Privacy Policy. The Employee Privacy Policy explains how FEI collects and manages the personal information of its employees. The current version of the Employee Privacy Policy is included with the Application as Appendix A. It has been in place since July 2012. The relevant provisions of FEI's Employee Privacy Policy are set out in detail in Section 4.1 of the Application. In summary, these provisions provide as follows:

(a) Section 2.3 describes the purposes for which FEI collects, uses and discloses personal information.

(b) Section 4.2 explains that there may be instances where FEI discloses personal information to third party service providers for various purposes.

(c) Section 6.1 confirms that personal information collected from employees will be protected using appropriate security safeguards, and further explains that FEI may store employee personal information outside of Canada.

48. Moreover, employees are given notice in the Pension Plan Handbook that their information will be disclosed to an actuary for purposes of providing services to FEI regarding the pension plans.[30]

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[30] Exhibit B-1, FEI May 23, 2018 Letter, pp. 8-10.

49. The employees benefit directly from the actuary having access to the personal data, and from using an actuary located in the US that has decades of history with FEI's pension plans.[31]

50. Although FEI's employees (i) have agreed that their personal information may be stored outside of Canada, (ii) have been given notice of the circumstances around pension data, and (iii) benefit directly from FEI engaging WTW, the 2015 Data Order prevents FEI from exercising its contractual rights under existing contracts of employment. It also constrains FEI's negotiations of future employment contracts. FEI respectfully submits that, for the reasons described below, neither outcome represents a legitimate exercise of statutory authority.

(b) No Express Authority to Make Orders to Protect Privacy or Alter Employment Terms

51. As stated in Part Two above, the starting point of the jurisdictional analysis affirmed in *ATCO Gas* requires that the Commission "examine the ordinary meaning of the sections at the centre of the dispute."[32] There are no provisions of the UCA that expressly authorize the Commission to

(a) make orders intended to protect personal privacy of employees,

(b) determine the terms of employment of public utility employees (in this case, the consents to send personal information outside of Canada), or

(c) oversee collective bargaining or resolve disputes under a collective agreement.

52. The absence of any provision expressly authorizing the Commission to determine terms of employment (whether unionized or non-unionized) or override employee contracts stands in sharp contrast with the provisions allowing the Commission to set the terms and conditions of utility service and override the provisions of a contract with a customer that is also a "rate":

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[31] Exhibit B-1, FEI May 23, 2018 Letter, p.11.

[32] *ATCO Gas*, para.41.

> 31 The commission may make rules governing conditions to be contained in agreements entered into by public utilities for their regulated services or for a class of regulated service.
>
> ….
>
> 64(1) If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may
>
> (a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
>
> (b) make any other order it considers advisable in the circumstances.
>
> (2) If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

53. The different approaches under the UCA to rate agreements and employment agreements reflects the Commission's core mandate of fixing just and reasonable rates.

(c) Regulating Employee Privacy and Union/Non-Union Employment Terms is Not Necessarily Incidental to Commission's Mandate

54. As FEI described in Part Two, *ATCO Gas* provides that "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."[33] The Supreme Court of Canada describes the object intended to be secured by legislation such as the UCA as relating to rate setting and the integrity of the system. The regulation of Employee Information and privacy is no way incidental to the statutory purpose and object of the UCA. Regulating how and where FEI stores Employee Information is unrelated to setting customer rates. It is unrelated to ensuring that the utility maintains the integrity of the system to provide reliable

[33] *ATCO Gas*, para. 51.

service. As a result, the Commission does not have jurisdiction by necessary implication to regulate Employee Information.

(d) Negotiating Employment Terms is the Mandate of Utility Management

55. The negotiation of employment terms is a matter for utility management, and the terms of employment are a private contractual matter between FEI and its employees.

56. The Supreme Court of Canada, in *ATCO Gas*, explicitly identified the function of a public utility contracting with its employees as being one that is consistent with any private company.[34] Put another way, the Commission does not acquire jurisdiction to dictate terms of employment simply by virtue of the employer being a regulated public utility.

57. The Supreme Court of Canada's reference to employment being a function like any private company echoes the dichotomy articulated in *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission).*[35] In that case, the BC Court of Appeal distinguished between the role of the Commission as a rate regulator and the role of utility management in managing the operations of the public utility. The Court of Appeal was unequivocal that, while the Commission can set rates based on the actions taken by utility management, the Commission would exceed its jurisdiction by directing management to manage the utility in a particular way. It held, for instance:

> [56] It is only under s.112 of the *Utilities Act* that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.
>
> [57] One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions. In the case at bar the effect of the Commission's directions is to place a group, whose interests are disparate, in a superior position in the sequence of planning and to require the directors to

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[34] *ATCO Gas*, para. 3.

[35] *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission),* (1996), 20 BCLR 3d 106. A copy of the decision is also appended to the Application, Exhibit B-1.

> justify a deviation from the product of the IRP process in the exercise of their responsibilities.
>
> [58] Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

58. The Commission subsequently applied the Court of Appeal's judgment in determining that it had no jurisdiction to interfere with BC Hydro's outsourcing arrangements, even by way of its general supervisory powers. Outsourcing was a decision for management to make, while the rate implications of those decisions would be considered through rate setting processes:

> In considering this request to hold a public hearing on general issues of public interest, the Commission has received direction from the Court of Appeal on the applicability of its general supervisory powers. The 1996 Judgement, *B.C. Hydro v. B.C. Utilities Commission*, made determinations about the responsibilities of the Commission to keep itself informed about the conduct of public utility business while not reasonably impinging on the responsibilities and functions of the directors of a corporation to formulate plans for a utility's future. Paragraph 58 of the Judgement stated:
>
> > "58 Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs."
>
> In considering this application, the Commission finds that it does not have adequate jurisdiction to hold public hearings on the disposition of assets which are not covered by the Utilities Commission Act, because of the [BC Hydro] exemption to Section 52 of the Act. Even if the disposition was reviewable under Section 52 of the Act, the Commission recognizes that many of the public utilities under its jurisdiction have taken actions to outsource significant components of technology, services and customer information services. <u>None of the public policy considerations raised by the OPEIU are considered to be within the jurisdiction of the Commission for review in a public hearing pursuant to the general supervisory responsibilities of the Commission. The Commission,</u>

> therefore, denies the Application for a public hearing of B.C. Hydro's initiatives under public interest requirements.[36] [Emphasis added.]

59. The Commission reaffirmed its decision on reconsideration.[37] The Commission's decision was then upheld following a judicial review proceeding commenced by the Office and Professional Employees' International Union, Local 378.[38]

> [18] The Commission also declined to conduct public hearings under its general jurisdiction to regulate utilities pursuant to Part 3 of the UCA. It noted that in *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission* (1996), 1996 CanLII 3048 (BC CA), 20 B.C.L.R. (3d) 106 (C.A.), the Court found that the UCA did not give the Utilities Commission jurisdiction to determine how the directors of a public utility should manage its affairs, or plan its future. The Commission concluded:
>
> > Even if the disposition [proposed under the RFEI] was reviewable under Section 52 of the Act, the Commission recognizes that many of the public utilities under its jurisdiction have taken actions to outsource significant components of technology, services and customer information services. None of the public policy considerations raised by the OPEIU are considered to be within the jurisdiction of the Commission for review in a public hearing pursuant to the general supervisory responsibilities of the Commission.
>
> …
>
> [63] Moreover, I am satisfied that neither the purpose nor the effect of the EMSAA interfered with the petitioners' right to freedom of expression. I find that the primary objective of the EMSAA was to implement a number of legislative changes in the energy and resource sectors in British Columbia. Insofar as the EMSAA dealt with B.C. Hydro, it provided the means to out-source support services, which was part of a long-term, comprehensive energy plan that had been evolving since 2001. The choice to out-source these services to Accenture was a management decision. As such, it fell within the purview of B.C. Hydro's directors, and did not attract the jurisdiction of the Utilities Commission: *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, supra at paras. 55-58.

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[36] Order G-28-02, p. 4. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/115173/index.do.

[37] Order No. G-48-02, p. 6. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115172/1/document.do.

[38] *Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al*, 2004 BCSC 422.

> [64] The Utilities Commission itself recognized this in its decisions on the petitioners' Applications No. 1 and No. 2, prior to the enactment of the EMSAA. In each decision, it considered the proposed arrangements with Accenture, and found it had no jurisdiction to examine them, due to the combined operation of s. 37(x) of the *Hydro Act*, ss. 52 and 53 of the UCA, and its limited jurisdiction to intrude into the management of B.C. Hydro.
>
> [65] The EMSAA amendments to s. 12 of the *Hydro Act* simply confirmed that the Utilities Commission was not engaged by the Accenture transaction, apart from retaining its jurisdiction to review the costs of the out-sourcing in establishing revenue requirements and setting rates. [Emphasis added.]

60. The Commission has acknowledged the limitations on its jurisdiction with respect to the terms and conditions of employment in other circumstances as well. In ICBC's 2006 Revenue Requirements Application Decision, the Commission stated:

> There is an extensive analysis of Performance Pay in the cross-examination by BCOAPO and it was noted that for individual employees in the executive category, the maximum performance pay was a possible 45 percent of base salary assuming that all targets had been exceeded (T7: 1342-1343). <u>It is not the Commission's role or jurisdiction to analyze the fairness or relative equity of a pay for performance plan, as between classes of employees; that would be a regulatory invasion of matters properly left to management, the Board of Directors, and the supervisory institutions that the government has put in place - namely the PSEC.</u> However, if total compensation were to begin to have any undue impact on rates, then the Commission would have to take a more detailed look. No such impact is apparent at this time.[39] [Emphasis added.]

61. The Commission is bound by the court decisions cited above and must apply the same logic in the present case. Terms of employment - whether concerned with performance pay, vacation days, hours of work, or applicability of company policies - are for utility management to negotiate with employees or their bargaining agent, as appropriate.

D. 2015 DATA ORDER IS INCONSISTENT WITH POLICY BEHIND PRIVACY LEGISLATION

62. BC's privacy legislation reflects a deliberate policy on the part of the Legislature as to how public or non-public bodies must protect personal information, including with respect

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[39] ICBC 2006 Revenue Requirements Decision, Errata revising p.48. https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/111719/1/document.do

to where data is stored. Privacy legislation imposes no restrictions on FEI regarding extra-provincial data storage. The 2015 Data Order, by imposing restrictions, contradicts the policy inherent in privacy legislation. The *CRTC Reference Decision* discussed in Part Two makes it clear that this type of conflict is impermissible. The 2015 Data Order, as it relates to Employee Information, cannot stand.

(a) Privacy Legislation Leaves FEI Unconstrained Regarding Extra-Provincial Storage

63. The *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FIPPA"), applies to a defined list of "public bodies", that includes a variety of government entities from Ministries to municipalities to crown corporations such as BC Hydro. FIPPA regulates, among other things, how public bodies collect, use, store and disclose personal information. FIPPA does not apply to private corporations such as FEI. The manner in which private corporations collect, use, store and disclose personal information is addressed under a different statute called the *Personal Information Protection Act*, S.B.C. 2003, c. 63 ("PIPA").

64. There is a fundamental difference between FIPPA and PIPA when it comes to *where* personal information may be stored. Pursuant to section 30.1 of FIPPA, personal information in the custody or control of a public body subject to that Act must be stored in Canada subject to exceptions:

> 30.1 A public body must ensure that personal information in its custody or under its control is stored only in Canada and accessed only in Canada, unless one of the following applies:
>
> > (a) if the individual the information is about has identified the information and has consented, in the prescribed manner, to it being stored in or accessed from, as applicable, another jurisdiction;
> >
> > (b) if it is stored in or accessed from another jurisdiction for the purpose of disclosure allowed under this Act;
> >
> > (c) if it was disclosed under section 33.1 (1) (i.1).

65. There is no such prohibition in PIPA. A company that is subject to PIPA, such as FEI, may store personal information outside of Canada, so long as the safeguarding requirements of the Act are met, and in particular section 34 which provides as follows:

> 34. An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

66. When read together, FIPPA and PIPA demonstrate a clear legislative intent that public bodies are required (subject to listed exceptions) to store personal information in Canada, but private corporations such as FEI are free to store personal information in any jurisdiction so long as the information is properly safeguarded. The 2015 Data Order is inconsistent with this statutory scheme because it imposes onerous restrictions on how FEI stores employee personal information outside of Canada - more onerous than those applicable to public bodies.

(b) Inconsistency With Privacy Legislation Invalidates the 2015 Data Order

67. The nature of the conflict identified above between the 2015 Data Order and privacy legislation is akin to the conflict that nullified the CRTC's regulation in the *CRTC Reference Decision*. Although the *Copyright Act* did not explicitly prevent the scheme contemplated by the CRTC, the Supreme Court of Canada identified a conflict simply by virtue of the scheme having filled a legislative gap in the *Copyright Act* in a manner that disrupted the balance between "the entitlements of copyright holders and the public interest in the dissemination of works." This is evident from the following passages:

> [62] First, the value for signal regime conflicts with s. 21(1) of the Copyright Act because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the Copyright Act.
>
> [63] Looking only at the letter of the provision, s. 21 expressly speaks only to the relationship between a broadcaster and another broadcaster and not the relationship between a broadcaster and a retransmitter. As such, it is arguable that nothing in s. 21 purports to prevent another regulator from regulating the terms for carriage of a broadcaster's television signal by the BDUs, leaving it

open to the CRTC, provided it is authorized to do so under the Broadcasting Act, to establish a value for signal regime without conflicting with s. 21.

[64] However, s. 21 cannot be considered devoid of its purpose. This Court has characterized the purpose of the Copyright Act as a balance between authors' and users' rights. The same balance applies to broadcasters and users. In Théberge, Binnie J. recognized that the Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

…

[67] In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the Copyright Act, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the Copyright Act to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (Théberge, at para. 30).

[68] Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime ultra vires, further conflict arises in my opinion between the value for signal regime and the retransmission rights in works set out in s. 31 of the Copyright Act.

[69] As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a work carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the Copyright Act. The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the Copyright Act specifically excludes it from the control of copyright owners, including broadcasters.

> [70] Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(f) communication right. It would disrupt the balance established by Parliament. [Emphasis added.]

68. Just as the *Copyright Act* reflected a policy decision as to the appropriate extent of copyright protection, the privacy legislation in BC reflects a deliberate policy decision on the part of the Legislature to determine how personal information is protected. The Legislature has established different schemes for public bodies and non-public bodies. Whereas restrictions exist on public bodies storing information outside the province, the privacy legislation avoids imposing any such restrictions on non-public bodies like FEI. The legislation still obliges FEI to protect personal information, regardless of where it is stored. The evidence demonstrates that FEI has done so. The information held by WTW remains confidential.[40] The 2015 Data Order contradicts the policy inherent in privacy legislation by purporting to impose restrictions on a non-public body that are even more onerous than the requirements applicable to public bodies.

E. THE *LABOUR RELATIONS CODE* GIVES THE LABOUR RELATIONS BOARD AND LABOUR ARBITRATORS JURISDICTION OVER COLLECTIVE AGREEMENTS

69. The services that WTW provides to FEI relate to all four FEI pension plans. One of those plans includes only unionized employees. The other three also include some unionized employees.[41] The treatment of employee data is a matter that is capable of being addressed through collective bargaining, governed by the *Labour Relations Code.*[42] Neither the UCA, nor the *Labour Relations Code* confers upon the Commission jurisdiction to specify terms and conditions of unionized employment.

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[40] Exhibit B-1, FEI May 23, 2018 Letter, pp. 6-8.

[41] Exhibit B-1, FEI May 23, 2018 Letter, p.10.

[42] R.S.B.C. c. 244. http://www.bclaws.ca/civix/document/id/complete/statreg/96244_01

70. The terms and conditions of employment for FEI's unionized employees are established through collective bargaining and are set out in collective agreements, consistent with the *Labour Relations Code*. Section 48 of the *Labour Relations Code* makes a collective agreement binding on both the employer and the bargaining agent and its employee members.[43] Section 84(2) of the *Labour Relations Code* requires that any disputes regarding the application of a collective agreement be referred to arbitration.[44] Simply put, the *Labour Relations Code* reflects a considered policy determination by the Legislature to manage the terms and conditions of unionized employment through collective bargaining and arbitration (employees still have recourse to administrative bodies like the Privacy Commissioner and the BC Human Rights Tribunal).

71. The collective agreements between FEI and employee bargaining units all include a residual "management rights" provision that, subject to any terms of the collective agreement to the contrary, reserves for FEI the right to manage and operate the business. The collective agreements place no limitations on how FEI stores employee data. The management rights provisions allow FEI to set policies (like the Employee Privacy Policy) and update them, so long as they remain consistent with the collective agreements and any other applicable legislation (e.g., privacy or human rights legislation).

72. The effect of the Commission's 2015 Data Order, to the extent that it contradicts FEI's Employee Privacy Policy, is to constrain FEI's ability to exercise residual powers under negotiated collective agreements. However, the Commission's involvement in this manner is at odds with how the legislative scheme should work. In the event that FEI's employees or their bargaining agents have concerns about the extent of management rights, or the exercise of management rights under a collective agreement, their recourse is not to the Commission

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[43] Section 48 provides: "A collective agreement is binding on (a) a trade union that has entered into it or on whose behalf a council of trade unions has entered into it, and every employee of an employer who has entered into it and who is included in or affected by the agreement, and (b) an employer who has entered into it and on whose behalf an employers' organization authorized by that employer has entered into it."

[44] Section 84(2) provides: "(2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable."

under the UCA. Rather, depending on the circumstances, they have recourse to the Labour Relations Board, labour arbitration or the Privacy Commissioner.

73. In summary, neither the UCA, nor the *Labour Relations Code* confers a role on the Commission in the determination of rights and obligations arising under a collective agreement, whether by overseeing collective bargaining or resolving disputes between the employer and bargaining agent over the exercise of management rights. The 2015 Data Order should be revised to exclude Employee Information, thereby respecting the collective bargaining scheme under the *Labour Relations Code*.

F. EMPLOYEE INFORMATION IS MORE REMOVED FROM RATES AND SERVICE THAN CUSTOMER INFORMATION AND SENSITIVE INFORMATION

74. In this Application, FEI is not challenging the Commission's jurisdiction over Sensitive Information and Customer Information. FEI explains below why, although section 44 does not provide the authority for any aspect of the 2015 Data Order, the ability to regulate Customer Information and Sensitive Information can be implied by necessary implication from other sections of the UCA.

(a) Section 44 Provides No Authority for any Aspect of the 2015 Data Order

75. Although the Commission cited only section 44 as the statutory basis for the 2015 Data Order, section 44 is not the basis for the Commission's jurisdiction to restrict extra-provincial storage of Customer Information and Sensitive Information. As explained in Part Two, section 44 is intended to ensure that the Commission has ready access to the information necessary to fulfil its mandate. This purpose does not support restrictions on extra-provincial storage of copies of information, irrespective of the type of information (i.e., Sensitive Information, Customer Information or Employee Information).

(b) Commission's Power over Sensitive Information Arises from Other Provisions

76. As stated previously, the Supreme Court of Canada has articulated the function of utility regulation as being "to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential

service."[45] The "main function" of the Commission is "fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system."[46] The regulation of Sensitive Information is linked to the Commission's mandate where that regulation is related to service and the integrity of the supply system. Leaving aside the merits of the particular restrictions in the 2015 Data Order (which are not the subject of this Application), the safety and reliability of the utility system is part of the Commission's core mandate that is reflected in a number of provisions of the UCA.[47]

(c) Commission's Power over Customer Information Arises from Other Provisions

77. The regulation of Customer Information is also necessarily incidental to the Commission's statutory role as articulated by the Supreme Court of Canada. The Commission has jurisdiction over the terms and conditions of utility service, which it exercises when setting just and reasonable rates under section sections 59-61 of the UCA. Customer Information is collected as a result of the customer taking service under FEI's Commission-approved Tariff, so there is some nexus between the 2015 Data Order as it relates to Customer Information and determining just and reasonable terms and conditions of service.

(d) Issues Not Raised by this Application Relating to Sensitive Information and Customer Information

78. FEI's position that the Commission has jurisdiction to regulate Sensitive Information and Customer should be distinguished from two issues: (1) whether the Commission's jurisdiction to determine the terms and conditions of service extends to imposing this particular type of requirement with respect to the collection and storage of Customer Information in the presence of a distinct regulatory framework related to privacy; and (2)

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[45] *ATCO Gas*, para. 7.

[46] *ATCO Gas*, para. 7.

[47] E.g., Section 23 of the UCA empowers the Commission to make orders in respect of "(g) other matters it considers necessary or advisable for (i) the safety, convenience or service of the public, …". Section 25 states: "25 If the commission, after a hearing held on its own motion or on complaint, finds that the service of a public utility is unreasonable, unsafe, inadequate or unreasonably discriminatory, the commission must (a) determine what is reasonable, safe, adequate and fair service, and (b) order the utility to provide it."

whether the Commission should be, as a matter of regulatory policy, imposing the requirements.

79. FEI expresses no position on these issues, as this Application is concerned specifically with Employee Information. However, these are potential questions for consideration in the future. For instance, FEI observed in the Application that it is difficult to reconcile the restrictions on Sensitive Information for FEI, when the Commission has ordered electric utilities in BC to send their most sensitive operational and security information to an entity located in the United States (the Western Electricity Coordinating Council or WECC) with servers in the United States using the WECC's encryption tool for which the WECC holds the key.

PART FOUR: CONCLUSION ON JURISDICTION

80. FEI respectfully submits that regulating where and how Employee Data can be stored goes beyond the Commission's jurisdiction, and reaches into areas that are the exclusive realm of utility management acting consistently with employment contracts, collective agreements and privacy legislation. The 2015 Data Order should be varied to exclude Employee Information.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[original signed by Matthew Ghikas]

Dated: July 27, 2018

Matthew Ghikas
FASKEN MARTINEAU DUMOULIN LLP
Counsel for FortisBC Energy Inc.

[original signed by David Curtis]

David Curtis
FASKEN MARTINEAU DUMOULIN LLP
Counsel for FortisBC Energy Inc.

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Neutral citation: 2006 SCC 4.

Référence neutre : 2006 CSC 4.

File No.: 30247.

N° du greffe : 30247.

2005: May 11; 2006: February 9.

2005 : 11 mai; 2006 : 9 février.

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

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ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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By Bastarache J.

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

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

Jurisprudence

Citée par le juge Bastarache

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

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

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

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

By Binnie J. (dissenting)

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

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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.

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

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

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

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

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

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

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

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

BASTARACHE J. —

1. Introduction

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

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

LE JUGE BASTARACHE —

1. Introduction

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

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

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

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

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the 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

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

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

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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.

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

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

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

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

1.1 *Overview of the Facts*

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

1.2 *Judicial History*

1.2.1 Alberta Energy and Utilities Board

1.2.1.1 *Decision 2001-78*

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

1.1 *Aperçu des faits*

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

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

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

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

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

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

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

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

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

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

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

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

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

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

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

> 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]

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

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

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

> 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.

> [TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.
>
> Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

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

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

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.

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

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.

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

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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Analysis

2.1 *Issues*

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

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

2.2 *Standard of Review*

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

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

2. Analyse

2.1 *Questions en litige*

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

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

2.2 *Norme de contrôle*

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

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

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

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

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

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

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

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

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

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

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

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

[TRADUCTION]

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

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

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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.

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

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

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

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

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

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

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

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

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

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

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.

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

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"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.1 General Principles of Statutory Interpretation

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

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

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

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

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

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

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

2.3.1 Principes généraux d'interprétation législative

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

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

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

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

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

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

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

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

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

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

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

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

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

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

GUA

26. . . .

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

. . .

(d) without the approval of the Board,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

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

[TRADUCTION]

GUA

26. . . .

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

. . .

d) sans l'autorisation de la Commission,

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

. . .

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

AEUBA

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

. . .

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

. . .

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

. . .

PUBA

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

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

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

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

PUBA

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

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

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

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

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

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

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

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

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

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

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

2.3.3 Implicit Powers: Entire Context

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

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

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

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

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

2.3.3 Pouvoir implicite : contexte global

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

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

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

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.

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

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

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

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

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

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

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

2.3.3.1 *Historical Background and Broader Context*

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

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

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

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

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

2.3.3.1 *Historique et contexte général*

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

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

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

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

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

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

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

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

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

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

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.

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

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.

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

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:

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

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

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

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

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

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

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

2.3.3.2 *Rate Setting*

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

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

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

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

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

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

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

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

2.3.3.2 *Établissement des tarifs*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.)

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

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

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

[TRADUCTION]

(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

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

(b) to necessary working capital.

b) du capital nécessaire.

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:

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

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

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

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).

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

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

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

> 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 . . . .

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

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

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

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

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

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

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

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,

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

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

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

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

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

2.3.3.3 *The Power to Attach Conditions*

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

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

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

2.3.3.3 *Le pouvoir d'imposer des conditions*

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

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

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

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

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

[TRADUCTION]

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

(Voir également Brown, p. 2-16.3.)

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

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

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

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

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

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favoritism toward investors.

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

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

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

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

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

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

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

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

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

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

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

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

2.4 *Other Considerations*

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

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

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

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

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

2.4 *Autres considérations*

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

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

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

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

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

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

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

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

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

(Decision 2002-037, at para. 54)

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

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

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

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

(Décision 2002-037, par. 54)

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

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

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

3. Conclusion

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

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

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

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

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

3. Conclusion

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

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

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

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

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

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

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.

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

I. Analysis

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

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

I. Analyse

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

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

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

(Respondent's factum, at para. 2)

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.

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

(Mémoire de l'intimée, par. 2)

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

A. *Les pouvoirs légaux de la Commission*

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

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

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

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

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

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

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

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

(Respondent's factum, at para. 38)

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

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

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

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

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

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

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

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

(Mémoire de l'intimée, par. 38)

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

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

93

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

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

B. *La décision de la Commission*

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

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 98)

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

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

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

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

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

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

(Decision 2002-037, at para. 13)

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

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

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

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

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

(Décision 2002-037, par. 13)

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

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

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

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

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

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

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

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

C. *Standard of Review*

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

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

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

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

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

C. *La norme de contrôle*

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

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

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

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

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

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

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

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

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> (This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

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

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

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

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

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

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.
>
> (Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

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

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

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

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

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

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

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

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

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

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

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

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

109 "Patent unreasonableness" is a highly deferential standard:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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.

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

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

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

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. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

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:

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

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

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

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

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

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

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

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

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

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

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]

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

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:

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

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]

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

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.*

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

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

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

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

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

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

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

F. *L'argumentation d'ATCO*

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

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

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

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

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

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

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.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

1. La question de l'effet confiscatoire

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:

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 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]

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

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

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

> 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]

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

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

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

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

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *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]

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

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

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

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.

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

2. The Regulatory Compact

2. Le pacte réglementaire

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

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

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) ratemaking exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

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

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

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

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

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

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

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

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

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

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

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

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

3. Land as a Non-Depreciable Asset

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

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

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

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

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

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

3. Le terrain en tant que bien non amortissable

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Lack of Reciprocity

4. L'absence de réciprocité

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

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

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.]

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

(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.)

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, 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:

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

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.

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

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

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

II. Conclusion

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

III. Disposition

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

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

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

II. Conclusion

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

III. Dispositif

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

APPENDIX

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

Jurisdiction

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

Powers of the Board

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

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

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

(a) make any order that the ERCB or the PUB may make under any enactment;

(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;

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

(e) make an order granting the whole or part only of the relief applied for;

(f) where it appears to the Board to be just and proper, grant partial, further or other relief in

ANNEXE

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

[TRADUCTION]

Compétence

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

Pouvoirs de la Commission

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

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

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

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

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

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

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

Appeals

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

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

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or

(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

. . .

Exclusion of prerogative writs

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

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

Supervision

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

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

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

Appel

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

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

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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Immunité de contrôle

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

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

[TRADUCTION]

Surveillance

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

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

Investigation of gas utility

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

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Designated gas utilities

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

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

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

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

Enquêtes

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

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Services de gaz désignés

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

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

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

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

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

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

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

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Prohibited share transactions

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

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Powers of Board

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

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in

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

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Incessibilité des actions

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

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Pouvoirs de la Commission

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

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

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

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

Rate base

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

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

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

(b) to necessary working capital.

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

Excess revenues or losses

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

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the

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

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

Base tarifaire

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

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

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

b) du capital nécessaire.

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

Recettes excédentaires ou insuffisantes

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

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

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

(ii) a subsequent fiscal year of the owner, or

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

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

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

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

General powers of Board

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

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

Jurisdiction and powers

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

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

(ii) un exercice ultérieur,

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

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

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

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

[TRADUCTION]

Compétence et pouvoirs

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

(a) to deal with public utilities and the owners of them as provided in this Act;

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

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

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

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or

(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

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

Investigation of utilities and rates

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

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

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

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

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

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

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

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

Enquêtes sur les services publics et les tarifs

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

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

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

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

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

Supervision by Board

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

. . .

Investigation of public utility

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

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

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

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

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

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

. . .

Enquêtes

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

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

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

Fixing of rates

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

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;

(d) repealed;

(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

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

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

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

Établissement des tarifs

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

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

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

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

the owner of the public utility, less depreciation, amortization or depletion in respect of each, and

(b) to necessary working capital.

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

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,

(ii) a subsequent fiscal year of the owner, or

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

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

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

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

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

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

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

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

(b) capitalize

(i) its right to exist as a corporation,

(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or

(d) without the approval of the Board,

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

(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

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

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

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

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

. . .

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

. . .

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

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

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

Interpretation Act, R.S.A. 2000, ch. I-8

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

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

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

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

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

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

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

1996 CarswellBC 352
British Columbia Court of Appeal

British Columbia Hydro & Power Authority
v. British Columbia (Utilities Commission)

1996 CarswellBC 352, [1996] B.C.W.L.D. 847, [1996] B.C.J. No. 379, 117 W.A.C. 271, 20 B.C.L.R. (3d) 106, 36 Admin. L.R. (2d) 249, 61 A.C.W.S. (3d) 390, 71 B.C.A.C. 271

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY v. BRITISH COLUMBIA UTILITIES COMMISSION, BRITISH COLUMBIA ENERGY COALITION, CONSUMER'S ASSOCIATION OF CANADA (B.C. BRANCH) ET AL., COUNCIL OF FOREST INDUSTRIES, WEST KOOTENAY POWER LTD., B.C. GAS UTILITY LTD., ISCA MANAGEMENT LTD. and RICK BERRY

Goldie, Prowse and Newbury JJ.A.

Heard: February 15, 1996
Judgment: February 23, 1996
Docket: Doc. Vancouver CA019726

Counsel: *Chris Sanderson, J. Christian*, and *A.M. Dobson-Mack*, for appellant.
Mark M. Moseley, for respondent British Columbia Utilities Commission.
Carol Reardon, for respondent/intervenor British Columbia Energy Coalition.
Michael P. Doherty, for respondent/intervenor Consumer's Association of Canada (B.C. Branch) et al.
D.W. Bursey, for respondent/intervenor Council of Forest Industries et al.

Subject: Public; Civil Practice and Procedure

Headnote

Public Utilities --- Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction

Practice --- Practice on appeal — Staying of proceedings pending appeal

Public utilities — Regulatory boards — Practice and procedure — Judicial review — Jurisdiction of board — Utilities commission purporting to order that appellant utility comply with resource planning guidelines issued by commission — Court finding that directions in order being beyond statutory powers of commission and accordingly unenforceable.

The appellant was a publicly owned utility generating, transmitting and distributing electrical energy. Its rates were subject to approval by the respondent commission under the provisions of the *Utilities Commission Act*. The commission issued a document entitled "Integrated Resource Planning Guidelines." The document was intended to provide guidance on the commission's expectations of the planning processes developed by utilities. The appellant applied for a rate increase. In its order denying the application, the commission ordered that the appellant comply with several directions relating to the integrated resource planning guidelines. The appellant appealed from that part of the order, objecting to the manner in which the commission purported to give the guidelines the force of a commission order.

Held:

Appeal allowed.

No section of the Act expressly enabled the commission to impose by order its chosen form of controlling planning at the stage selected by it. Taken as a whole, the Act, viewed in the purposive sense required, did not reflect any intention on the part of the legislature to confer upon the commission a jurisdiction to determine, punishable on default by sanctions, the manner in which the directors of a public utility managed its affairs. Where a regulator issues a statement or guideline that is non-binding and intended to inform and guide those subject to regulation, the statement is within the authority of the regulator. However, where the statement or guideline imposes mandatory requirements enforceable by sanction, the statement requires statutory authority. A regulator cannot issue de facto laws disguised as guidelines. The issue of non-mandatory guidelines was not a question before the court. The commission explicitly purported to enforce the application of its directions with the threat of sanctions. Thus, the appellant was entitled to a declaration that the directions in the order relating to the integrated resource planning guidelines were beyond the statutory powers of the commission and were accordingly unenforceable.

Table of Authorities

Cases considered:

Ainsley Financial Corp. v. Ontario (Securities Commission) (1994), 18 O.S.C.B. 43, 6 C.C.L.S. 241, 21 O.R. (3d) 104, 28 Admin. L.R. (2d) 1, 121 D.L.R. (4th) 79, 77 O.A.C. 155 (C.A.) — *applied*

British Columbia Electric Railway v. British Columbia Public Utilities Commission, [1960] S.C.R. 837, 33 W.W.R. 97, 82 C.R.T.C. 32, 25 D.L.R. (2d) 689 — *considered*

Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353, 13 D.L.R. (2d) 97, 76 C.R.T.C. 319 — *considered*

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, 4 C.C.L.S. 117, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 14 B.L.R. (2d) 217, 22 Admin. L.R. (2d) 1, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 168 N.R. 321, 46 B.C.A.C. 1, 75 W.A.C. 1 — *considered*

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., Local 298, (sub nom. *U.E.S., local 298 v. Bibeault*) [1988] 2 S.C.R. 1048, 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244 — *applied*

Statutes considered:

Hydro and Power Authority Act, R.S.B.C. 1979, c. 188

s. 5*considered*

Utilities Commission Act, S.B.C. 1980, c. 60

Pt. 2*referred to*

Pt. 3*referred to*

Pt. 9*considered*

s. 3.1 [en. 1989, c. 45, s. 13]*considered*

s. 28*considered*

s. 29*considered*

s. 44*considered*

s. 49*considered*

s. 51*considered*

s. 57*considered*

s. 59*considered*

s. 62(1)*referred to*

ss. 64-66*considered*

s. 66*referred to*

s. 112*considered*

s. 121*referred to*

s. 141(4)*considered*

Appeal from order of respondent British Columbia Utilities Commission.

The judgment of the court was delivered by *Goldie J.A.*:

1 This is an appeal, by leave, from Order G-89-94 of the British Columbia Utilities Commission (the "Commission") with reasons for the decision attached. I refer to these reasons as the "Decision" and to Order G-89-94 as the "Order".

2 After a public hearing the Commission released the Decision on 24 November 1994. Notice of an application for leave to appeal to this Court was filed by B.C. Hydro on 22 December 1994. Leave was granted 15 December 1995, the day the application was heard. The delay occurred when the Commission acceded to B.C. Hydro's application that it reconsider the Order and Decision. The reasons denying reconsideration were released on 17 October 1995. These proceedings accounted for much of the delay between the filing of the notice of application for leave to appeal and the granting of leave.

3 The issue, as stated by the appellant British Columbia Hydro and Power Authority ("B.C. Hydro"), is whether the Commission exceeded its jurisdiction in respect of certain directions in the Decision given the force of a Commission order. While it is common ground the standard of review in respect of jurisdiction is that the Commission must be correct in its interpretation of its constituent statute, the respondents contend the Commission acted within its jurisdiction and the appeal should be dismissed as no palpable and overriding error has been demonstrated that would permit this Court's intervention.

Background — General

4 B.C. Hydro is a publicly owned utility generating, transmitting and distributing electrical energy. With few exceptions its service area is province wide. Its rates are subject to approval by the Commission under the provisions of the *Utilities Commission Act*, S.B.C. 1980, c. 60, as amended (the "*Utilities Act*"). Under s. 3.1 of the *Utilities Act* the Lieutenant Governor in Council may issue a direction to the Commission specifying the factors, criteria and guidelines the Commission is to observe in respect of B.C. Hydro. Such a direction, Special Direction No. 8, was in force at the time material to this appeal.

5 By virtue of the *Hydro and Power Authority Act*, R.S.B.C. 1979, c. 188, as amended (the "*Authority Act*"), B.C. Hydro is for all its purposes an agent of the Queen in Right of the Province; is deemed to have been granted an energy operation certificate for the purposes of the *Utilities Act* in respect of its works existing on 11 September 1980; and is not bound by any statute or statutory provision of the Province except what is made applicable to it by Order in Council. The Minister of Finance is its fiscal agent. The *Utilities Act* is among those ordered to be applicable to B.C. Hydro except sections dealing with one aspect of reserve funds; one enforcement provision and those requiring Commission approval of security issues and property disposition.

6 Section 5 of the *Authority Act* provides that the directors of B.C. Hydro, appointed by the Lieutenant Governor in Council, shall manage its affairs. The powers of B.C. Hydro include the generation, manufacture, distribution and supply of power and the development of power sites and power plants. The exercise of these powers is subject to the approval of the Lieutenant Governor in Council. A further distinction between B.C. Hydro and investor-owned utilities is that B.C. Hydro's sole "shareholder" and not its directors determines when and in what amounts "dividends" will be paid.

7 Under s-s. 4 of s. 141 of the *Utilities Act*, which came into force 11 September 1980, the rates of B.C. Hydro then in effect became its lawful, enforceable and collectible rates.

8 Prior to 30 June 1995 Part 2 of the *Utilities Act* provided an approval process of generating and transmission facilities by the Lieutenant Governor in Council which could, at the latter's discretion, bypass the Commission. In this event the Commission might be called upon to approve rates reflecting the capital costs of large scale projects without the opportunity to pass upon the adequacy of the information justifying the construction of such projects as contemplated by the requirement under s. 51(1) of the *Utilities Act* requiring a certificate of public convenience and necessity prior to embarking upon construction. This provision is of some importance and I set it out here:

> 51. (1) Except as otherwise provided, no person shall, after this section comes into force, begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

9 This prospect has been removed by amendments, primarily to Part 2 of the *Utilities Act*, and with it any justification for concern over multi million dollar additions to the property devoted to public service without prior regulatory scrutiny.

Background — "Integrated Resource Plan Guidelines"

10 In February, 1993 the Commission issued a 12-page document, to which I will refer as the "Guidelines", entitled "Integrated Resource Planning ("IRP") Guidelines". The following is the Definition section of the Guidelines:

> **II Definition**
>
> IRP is a utility planning process which requires consideration of all known resources for meeting the demand for a utility's product, including those which focus on traditional supply sources and those which focus on conservation and the management of demand [1] . The process results in the selection of that mix of resources which yields the

> preferred [2] outcome of expected impacts and risks for society over the long run. The IRP process plays a role in defining and assessing costs, as these can be expected to include not just costs and benefits as they appear in the market but also other monetizable and non-monetizable social and environmental effects. The IRP process is associated with efforts to augment traditional regulatory review of completed utility plans with cooperative mechanisms of consensus seeking in the preparation and evaluation of utility plans. The IRP process also provides a framework that helps to focus public hearings on utility rates and energy project applications.

11 In the Purpose section the Commission stated the Guidelines were:

> ... intended to provide general guidance regarding BCUC expectations of the process and methods utilities follow in developing an IRP. It is expected that the general rather than detailed nature of the proposed guidelines will allow utilities to formulate plans which reflect their specific circumstances.

12 The Commission's identification of the objectives of this process was stated in these words:

> **1. Identification of the objectives of the plan**
>
> Objectives include but are not limited to: adequate and reliable service; economic efficiency; preservation of the financial integrity of the utility; equal consideration of DSM and supply resources; minimization of risks; consideration of environmental impacts; consideration of other social principles of ratemaking [3], coherency with government regulations and stated policies.

Footnote 3 provides in part:

> ... The general implication is that because of social and environmental objectives, the rates charged by utilities may be allowed to diverge from those that would result from a rate determination based exclusively on financial least cost. The social principles to be addressed may be identified by the utility intervenors or government.

13 In Part III of the Guidelines defining the relationship between regulated utilities and the Commission under the Integrated Resource Plan Process the following sentences occur:

> IRP does not change the fundamental regulatory relationship between the utilities and the BCUC. Thus IRP guidelines issued by the BCUC do not mandate a specific outcome to the planning process nor do they mandate specific investment decisions. ... Under IRP, utility management continues to have full responsibility for making decisions and for accepting the consequences of those decisions. ... Consistency with IRP guidelines

> and the filed IRP plan will be an additional factor that the BCUC will consider in judging the prudency of investments and rate applications, although inconsistency may be warranted by changed circumstances or new evidence.

14 We are not called upon to determine whether the Guidelines, as defined above, are an appropriate exercise of the Commission's regulatory powers under the *Utilities Act* nor is there an appeal from any part of the Order disposing of B.C. Hydro's application to vary its rates.

15 What is objected to is the manner in which the Commission has purported to give the Guidelines the force of a Commission order. It is convenient at this point to set out the substantive part of Order G-89-94:

> *NOW THEREFORE* the Commission, for reasons stated in the Decision, orders as follows;
>
> > 1. The applied for 2.8 percent increase in rates is denied and the interim increase authorized by Order No. G-18-94 effective April 1, 1994 is to be refunded, with interest calculated at the average prime rate of the principal bank with which B.C. Hydro conducts its business. B.C. Hydro is to provide the Commission with a detailed reconciliation schedule verifying the refund.
> >
> > 2. Rate design changes required by the Decision are to be implemented.
> >
> > 3. An Integrated Resource Plan and Action Plan are to be filed for approval by June 30, 1995.
> >
> > 4. The Commission will accept, subject to timely filing by B.C. Hydro, amended Electric Tariff Rate Schedules which conform to the terms of the Commission's Decision. B.C. Hydro will provide all customers, by way of an information notice and media publication, with the Executive Summary of the Commission's Decision.
> >
> > 4. (sic)*B.C. Hydro will comply with all other directions contained in the Decision accompanying this Order*.
>
> (emphasis added)

16 I shall refer to the directions identified in the last paragraph as the "Directions". And it is paragraph 4 (sic) of the Order that is in issue here. Counsel for B.C. Hydro says there are 15 Directions related to the Guidelines covered by this paragraph.

17 The principal relief sought, as stated in B.C. Hydro's factum, includes a declaration "... that the IRP related aspects of Order G-89-94 and of the November Decision are void and of no effect".

18 In my view, the Direction best illustrating the issue raised by B.C. Hydro is that which requires it to establish what is called a collaborative committee (the "Committee") together with those Directions determining the part this Committee is to play in B.C. Hydro's performance of its statutory obligation under s. 44 of the *Utilities Act* to provide service to the public.

Discussion

19 Mr. Moseley on behalf of the Commission asserted it was doing no more than obtaining information it was entitled to, in a format it could by law determine, all at a time it was authorized to stipulate.

20 There can be little doubt, from the nature of B.C. Hydro's business, the magnitude of financial resources required and the variety of other resources directly or indirectly committed or affected that virtually every person in the Province will have an interest in the management of that business.

21 The Direction in question follows a finding that B.C. Hydro had not complied with the Guidelines "... which require an explicit decision-making process which includes public involvement." B.C. Hydro had in place a public consultation program but this was considered inadequate as being "after the fact" rather than participatory in the planning process. The membership of the Committee was determined by the Commission, apparently on the principle that the planning process is enhanced by the participation of interest groups. This appears from the following observation in the Decision:

> Determination of the appropriate trade-offs between resources requires that the values the public attaches to these costs and benefits must be determined and factored into the decision in an explicit and transparent way.
>
> The Commission has made it clear that such values are best determined through the direct participation of representative interest groups.
>
> Exclusive reliance on the B.C. Hydro staff, managers and Board of Directors for resource selection is also unacceptable for another reason. A closed, in-house process has the appearance of, and real potential for, bias in decision making that favors the interests of the bureaucracy within the Utility.

The Committee as constituted following the Order and Decision consisted of two representatives of B.C. Hydro and 11 representing a variety of interests. Each of the 11 spoke for his or her group. Some were regional, others represented classes of customers. One or two represented people who wished to do business with B.C. Hydro.

22 Seven Directions state in detail what B.C. Hydro is to provide the Committee. One includes the following:

> Finally, the Commission directs B.C. Hydro to institute with the IRP consultative committee a multi-attribute trade-off analysis for the purposes of portfolio development and selection.

This process is defined in the Commission's glossary of terms:

> **Multi-Attribute Analysis**
>
> A method which allows for comparison of options in terms of all attributes which are of relevance to the decision maker(s). In IRP, common attributes are financial cost, environmental impact, social impact and risk.

23 This requires B.C. Hydro to appraise future projects which it may never implement because of, for instance, financial constraints imposed by the Minister of Finance or by virtue of a special direction under s. 3.1 of the *Utilities Act*.

24 There is evidence supporting the following assertion in the appellant's factum:

> The bulk of the IRP Directives can be characterized as requiring BCH to put BCH's resource planning initiatives and analyses to the Consultative Committee and be guided by the views and information provided by the members of the Consultative Committee in undertaking its resource planning responsibilities.

25 It cannot be seriously questioned that the Commission requires compliance with its Guidelines: at p. 66 of the reasons the Commission concludes a direction denying recovery of a portion of B.C. Hydro's Resource Planning Unit expenditures with these words:

> Should the Utility continue to fail to implement the Commission's directions respecting IRP, the Commission will consider the circumstances and may invoke its powers under Part 9 of the Act.

26 Part 9 of the *Utilities Act*, to which I will later refer, includes a list of offences under the *Utilities Act*.

27 B.C. Hydro filed with the Commission on 8 November 1996 what it called its integrated electricity plan which it asserted complied with the Directions in the Decision. The Commission has ordered a public hearing into the integrated electricity plan in February 1996.

28 I restate the question before us. It is whether there is statutory authority for the Commission's imposition of the Guidelines to the extent required by the relevant Directions in the Decision on what is essentially an internal process for which the directors of B.C. Hydro have the ultimate responsibility, both in respect of the process and for the selection of the product of the process.

29 Mr. Sanderson's first point on behalf of B.C. Hydro is that nowhere in the *Utilities Act* is reference made to planning. In answer, Mr. Mosely referred us to s. 51(3) which requires a public utility to file annually with the Commission a statement in a prescribed form "... of the extensions to its facilities that it plans to construct". This describes a result at the conclusion of the relevant planning process. In the context of s. 51(2) it refers to the construction of facilities for which separate certificates of public convenience and necessity may not be required.

30 In my view, s. 51(3) has little relevance to the case at bar. It appears B.C. Hydro routinely files the statement referred to. The amounts in question may be in the aggregate substantial but one would expect many of the expenditures for individual components would not be, as they, would relate to the routine reinforcement of transformation and distribution facilities required to meet load growth or to maintain the reliability and adequacy of service.

31 Section 28 of the *Utilities Act* is also relied upon by the respondents. In full, it provides:

> **General supervision of public utilities**
>
> *28*. (1) The commission has general supervision of all public utilities and may make orders about equipment, appliances, safety devices, extension of works or systems, filing of rate schedules, reporting and other matters it considers necessary or advisable for the safety, convenience or service of the public or for the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.
>
> (2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

32 Two observations can be made of this section: the first is that the class of matters referred to in s-s. (1) relates to the existing service provided the public as distinct from future service. The second is that s-s. (2) also refers to present service, that is to say, the conduct of operations in relation to the public. Neither of these subsections refers to the utility's plans for the future.

33 Section 29 of the *Utilities Act* has some relevance to the contention that the IRP process comprises in one bundle the exercise of individual powers granted the Commission. It directs the Commission to make examinations and conduct inquiries necessary to keep

itself informed about, amongst other things, the conduct of public utility business. It does not authorize the Commission to direct how that business is conducted.

34 The Commission is supplied with B.C. Hydro's load forecasts as is apparent from its comments in the Decision. These dictate the response a utility must make to meet its statutory obligation to provide service as well as to maintain compliance with the terms of existing certificates of public convenience and necessity. It is within this part of the process that the Commission has decided, in its words, to make the IRP the "... driving force behind the establishment of a utility action plan approved by senior management."

35 It appears reasonable to assume the purpose of the Guidelines is to look beyond a simplistic view of utility planning as one limited to selecting the resources needed to meet anticipated demand and in doing so, to reject an equally simplistic view of regulation as ensuring that service is provided at the least cost to the consumer. It has been evident for some years now that environmental considerations are important in the formulation of the opinion represented by the phrase "public convenience and necessity". To the same effect, conservation and management of energy use is now recognized in what is known as demand side management. The wisdom of all this does not appear to be an issue.

36 The Commission's order directs when and how these factors are to be taken into account in the sequence of B.C. Hydro's planning processes.

37 The Commission in its factum asserts the IRP process is designed to accomplish two objectives:

1. It provides information to the Commission as to the resource selection choice being made by a utility; and

2. Following a review of the IRP plan for the Commission "... it provides guidance to utility management in the form of an advance indication as to the approach the Commission is likely to apply when it subsequently assesses the prudency of the expenditures made by the utility."

38 It will be noted the first objective refers to choices being made while the second refers to expenditures already made.

39 This dichotomy between present planning and past expenditures is said by the Commission to require regulatory control at the planning stage to avoid the dilemma of disallowing substantial incurred expenditures at the rate review stage. The examples given by the Commission in its reconsideration reasons were a nuclear plant and a large hydro electric dam.

40 Section 51 of the *Utilities Act* avoids this Hobson's choice. It does so by requiring a certificate of public convenience and necessity before the utility begins construction. It is not suggested the Commission has been demonstrably ineffectual in discharging its responsibilities at the certification stage.

41 Other provisions in the Act relied upon by the Commission are as follows:

1. Section 49 which requires a utility to furnish information to the Commission and answer its questions. This does not require that the utility create information for the purpose of a consultative committee nor to respond to the requests of a consultative committee — both of which have been directed by the Commission.

2. Sections 64-66 which deal with the Commission's jurisdiction over rates. To the extent these are relevant I have dealt with them in my comment on s. 51 of the *Utilities Act*.

42 I am of the view no section of the *Utilities Act* expressly enables the Commission to impose by order its chosen form of controlling planning at the stage selected by it.

43 In this I rely upon the literal meaning of each of the sections in the Act which have appeared to me to have any relevant significance.

44 These are, however, to be construed in relation to the *Utilities Act* as a whole. I refer to what Mr. Justice Beetz said in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., Local 298*, *(*sub nom. *U.E.S., local 298 v. Bibeault)* [1988] 2 S.C.R. 1048 at 1088, as the initial stage in a pragmatic or functional analysis:

> At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

45 The premise of such an analysis is that it focuses on jurisdiction: did the legislature intend the question in issue to be answered by the courts or by the tribunal? It is a matter of statutory interpretation with the emphasis on purpose.

46 In this light the *Utilities Act* is a current example of the means adopted in North America, firstly in the United States, to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition. The grant of monopoly through certification of public convenience and necessity was accompanied by the correlative burden on the monopoly of supplying service at approved rates to all within the area from which competition was excluded.

47 It is self-evident this process cannot be undertaken on a day to day basis by legislature or government. Hence, the creation of public utilities commissions. In the United States a constitutionally acceptable formula was evolved to protect the grantee of a certificate of public convenience and necessity from rates so low they constituted piece-meal confiscation of property without due compensation. The form this took was adopted in Canada. A brief historical sketch, relevant to this province, is found in the concurring judgment of Mr. Justice Locke in *British Columbia Electric Railway v. British Columbia Public Utilities Commission*, [1960] S.C.R. 837 at 842-845. The *Utilities Act* contains many expressions linking it with its legislative antecedents.

48 The certification process is at the heart of the regulatory function delegated to the Commission by the legislature. In *Memorial Gardens Assn. (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, Mr. Justice Abbott, after referring to the American origin of the phrase, said at 357:

> As this Court held in the *Union Gas* case, *supra*, the 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, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

49 The other function the legislature has entrusted to the regulatory tribunal is the supervision of the utility's use of property dedicated to service as a result of the certification process. Unless so certified, or exempted from certification by the Commission, such property is not part of the appraised value of the utility company under s. 62(1) which is the basis for fixing a rate under s. 66. In respect of such property the supervisory powers of the Commission, principally found in Part 3 of the *Utilities Act*, enable it to oversee the statutory obligation in s. 44 to furnish service imposed upon every public utility, namely:

> *44*. Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

50 It is not without some significance that the Commission found in the Decision the following:

> From the evidence, the Commission recognizes that B.C. Hydro is generally maintaining a safe, secure and highly reliable generation, transmission and distribution service. Given this high level of reliability, the Commission has focused on cost control as an issue at this time.

51 The *Utilities Act* runs to over 140 sections. The administration of the jurisdiction conferred upon the Commission is amply delineated by express terms. There is no need to imply terms for this purpose.

52 I have already described the reason for the existence of the tribunal. The expertise or skills of its members vary. Experience has demonstrated skills associated with accounting, economics, finance and engineering have been frequently utilized. Unlike labour relations tribunals where past experience in the field of labour relations is a virtual prerequisite, past experience in the regulatory field is not necessary. A similar observation may be made with respect to securities commissions. Both labour relations tribunals and securities commissions are expressly conferred with policy making powers. None such are conferred on the Commission.

53 In considering the nature of the problem before the tribunal I will first deal with the *Utilities Act* as a law of general application. I will then consider whether the provisions of the *Utilities Act* which relate only to B.C. Hydro affect my conclusions.

54 I earlier referred to the characterization of the issue. Counsel for the Commission contended it merely related to the enforcement of the information gathering power conferred on the Commission.

55 I am unable to agree with that characterization as in my opinion the IRP process is specific to the planning phase of the utility's response to its statutory obligations and its enforcement by order is an exercise of management as it relates neither to the certification process as such nor to the supervision of the utility's use of its property devoted to the provision of service.

56 It is only under s. 112 of the *Utilities Act* that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

57 One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions. In the case at bar the effect of the Commission's directions is to place a group, whose interests

are disparate, in a superior position in the sequence of planning and to require the directors to justify a deviation from the product of the IRP process in the exercise of their responsibilities.

58 Taken as a whole the *Utilities Act*, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

59 When the *Utilities Act* is examined in light of the provisions applicable to B.C. Hydro alone, this conclusion is reinforced. I have mentioned s. 3.1. This authorizes the Lieutenant Governor in Council to issue a direction to the Commission specifying "factors, criteria and guidelines" to be used or not used by the Commission in regulating and fixing rates for B.C. Hydro. There is no comparable mandatory power conferred on the Commission to issue such directions to B.C. Hydro. From my examination of the *Utilities Act* this is the only reference to guidelines. A further important exclusion from the jurisdiction of the Commission is its approval of the issue of securities under s. 57. Moreover, under s. 59 B.C. Hydro may dispose of its property without obtaining the Commission's approval.

60 I have mentioned sanctions and the Commission's threat to resort to Part 9 of the *Utilities Act*. Part 9 lists as an offence on the part of individual officers directors and managers of utility in the failure to comply with a Commission order.

61 Tested in terms of general principles I am of the view the observations of the Ontario Court of Appeal in *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (C.A.), are relevant. In that case the Ontario Securities Commission ("OSC") issued a draft policy statement, subsequently adopted with minor modifications after the action in question had been commenced.

62 This policy statement purported to be a guide to those engaged in the marketing and selling of penny stocks as to business practices the OSC regarded as appropriate. As was set out in greater detail in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 [92 B.C.L.R. (2d) 145], major securities commissions such as the OSC have a policy role in the regulation of capital markets in the public interest as well as an adjudicative function in applying sanctions in specific cases. The following headnote from *Ainsley* is, I think, relevant to the point before us.

> The validity of the policy statement turned on its proper characterization. If the statement was a non-binding statement or guideline intended to inform and guide those subject to regulation, the statement was valid and within the authority of the OSC; guidelines of this nature do not require specific statutory authority and such guidelines are not invalid merely because they regulate in the sense that they affect the conduct of those at whom they, are directed. If, however, the statement imposed mandatory

requirements enforceable by sanction, then the statement required statutory authority; a regulator cannot issue *de facto* laws disguised as guidelines.

63 The issue of non-mandatory guidelines is not a question before us. Here, I repeat, the Commission has explicitly purported to enforce the application of its directions with the threat of sanctions.

64 In my view, the appellant is entitled to a declaration that the Directions in the reasons for Decision for Order G-89-94 issued 24 November 1994 which ordered the application of the Integrated Resource Plan to British Columbia Hydro and Power Authority are beyond the statutory powers of the Commission and are accordingly unenforceable.

65 I would make no order as to costs.

Pursuant to s. 121 of the *Utilities Commission Act*, the foregoing will be certified as the opinion of the Court to the Commission.

Appeal allowed.

Footnotes

1 Referred to as Demand-Side Management (DSM).

2 The term preferred is chosen to imply that society has used some process to elicit social preferences in selecting among energy resource options. Unfortunately, there is rarely agreement on the best process for eliciting social preferences. Candidate processes in a democracy include public ownership with direction from cabinet or a ministry, regulation by a public tribunal, referendum, and various alternate dispute resolution methods (e.g. consensus seeking stakeholder collaboratives).

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Kwikwetlem First Nation v. British Columbia (Utilities Commission),*** 2009 BCCA 68

Date: 20090218
Docket: CA035864; CA035928

Docket: CA035864

In the Matter of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

Between:

The Kwikwetlem First Nation

Appellant
(Applicant/Intervenor)

And

British Columbia Transmission Corporation, British Columbia Hydro and Power Authority, and British Columbia Utilities Commission

Respondents

- and -

Docket: CA035928

In the Matter of the *Utilities Commission Act,* R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Between:

Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band

Appellants
(Applicants/Intervenors)

And

British Columbia Utilities Commission, British Columbia Transmission Corporation, and British Columbia Hydro and Power Authority

Respondents

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

G. J. McDade, Q.C.	Counsel for the Appellant, The Kwikwetlem First Nation
T. Howard B. C. Stadfeld	Counsel for the Appellants, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band
K. B. Bergner A. Bespflug	Counsel for the Respondent, British Columbia Hydro and Power Authority
A. W. Carpenter	Counsel for the Respondent, British Columbia Transmission Corporation
Place and Date of Hearing:	Vancouver, British Columbia November 26 and 27, 2008
Place and Date of Judgment:	Vancouver, British Columbia February 18, 2009

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

[2] The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

[3] The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title,

requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

[4] The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

[5] The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

[6] The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

[7] The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("*VITR*") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("*Revelstoke*"). It is the reasoning in *VITR***,** amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

[8] As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and

capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

[9] The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin L.R. (2d) 249, at paras. 46 and 48.)

[10] BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for

operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

[11] It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

[12] In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

> Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[13] The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

[14] As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the

EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

[15] I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

> 45. (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
>
> …
>
> (3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
>
> …

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46. (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

…

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider

(a) the government's energy objectives,

(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and

> (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.
>
> (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
>
> …
>
> 99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.
>
> …
>
> 101. (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
>
> …
>
> (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

[16] The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

> The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.
>
> CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project

> justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

> 2. Project Description:
>
> …
>
> (iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;
>
> …
>
> 3. Project Justification
>
> …
>
> (ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;
>
> (iii) a statement identifying any significant risks to successful completion of the project;
>
> …
>
> 4. Public Consultation
>
> (i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.
>
> …

6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

8. (1) Despite any other enactment, a person must not

(a) undertake or carry on any activity that is a reviewable project,

…

unless

(c) the person first obtains an environmental assessment certificate for the project, or

…

9. (1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

(a) undertake or carry on an activity that is a reviewable project,

…

unless satisfied that

(c) the person has a valid environmental assessment certificate for the reviewable project, or

…

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10. (1) The executive director by order

…

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment .

…

11. (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

…

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

…

16. (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

…

17. (1) On completion of an assessment of a reviewable project … the executive director … must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director ...,

(b) the recommendations, if any, of the executive director, …, and

(c) reasons for the recommendations, if any, of the executive director, ….

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

…

> 30. (1) At any time during the assessment of a reviewable project under this Act , and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate …, the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that
>
> > (a) is being or will be conducted by any of the following or any combination of the following:
> >
> > > (i) the government of British Columbia, including any agency, board or commission of British Columbia;
> > >
> > > (ii) the government of Canada;
> > >
> > > (iii) a municipality or regional district in British Columbia;
> > >
> > > (iv) a jurisdiction bordering on British Columbia;
> > >
> > > (v) another organization, and
> >
> > (b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.
>
> (2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

[17] The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office (“EAO”) outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18,

> "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

[18] The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

[19] The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

[20] The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

[21] This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

[22] BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

[23] Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

[24] In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

[25] In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

> 4.1 The scope of assessment for the Project will include consideration of the potential for:
>
> > 4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,
> >
> > 4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

[26] In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

[27] The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

[28] The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In

para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

[29] On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

> In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

[30] In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the

EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

[31] On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

[32] At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

[33] Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

[34] On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of

consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

[35] The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

[36] The Commission Secretary explained (at p. 2-3):

> In both the VITR Decision and the Revelstoke Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the VITR Decision:
>
> > The government has legislated regulatory approvals that must be obtained before VITR proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for VITR. Given the Section 11 Procedural Order and the Terms of Reference for VITR, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of VITR, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).
>
> In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

> The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order … and the draft Terms of Reference … the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

[37] In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

[38] To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and

therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

> The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. … [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

[39] The Commission summarized its analysis (at p. 5):

> … The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

[40] The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis

and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

[41] After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the "CPCN decision"). At page 96 of those reasons, it concluded:

> The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

[42] The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

> … although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

[43] From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

[44] On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

[45] The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation

efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

[46] The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

[47] At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking,

BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

[48] BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

[49] On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified

project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

[50] The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

[51] Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

[52] BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

[53] The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC,

and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process**.** Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

[54] It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

[55] As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers

before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

[56] Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

[57] The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects

on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act.*

[58] Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

[59] By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

[60] In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified

BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

[61] This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

[62] The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

[63] The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade

an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

[64] If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

[65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

Summary

[66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro

acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

[67] When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices – accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

[68] Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing

interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida,* at paras. 46-47.

[69] The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

[70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

[71] For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

"The Honourable Madam Justice Huddart"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Bauman"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al***
2004 BCSC 422

Date: 20040330
Docket: L031815
Registry: Vancouver

Between:

Office and Professional Employees' International Union, Local 378 and Jerri New

Petitioners

And:

British Columbia Hydro and Power Authority

Respondent

And:

Attorney General of British Columbia

Respondent

Before: The Honourable Madam Justice Neilson

Reasons for Judgment

Counsel for the Petitioners	L. McGrady, Q.C., C. Foy & M. Koroneos
Counsel for the Respondent, B.C. Hydro and Power Authority	C.W. Sanderson, Q.C., R.A. Skolrood & J. McLean
Counsel for the Respondent, the Attorney General of British Columbia	G.H. Copley, Q.C.
Date and Place of Hearing:	December 15-19, 2003 Vancouver, B.C.

INTRODUCTION

[1] This petition has been brought to challenge steps taken by the government of British Columbia in early 2003 to out-source, or privatize, support services related to the business of the respondent, B.C. Hydro and Power Authority ("B.C. Hydro").

[2] B.C. Hydro is a Crown corporation under the ***Hydro and Power Authority Act***, R.S.B.C. 1996, c. 212 (the "***Hydro Act***"), and a public utility within the meaning of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473 (the ***"UCA"***). Under s. 12 of the ***Hydro Act***, B.C. Hydro is authorized to generate, manufacture, distribute, supply, and sell power. It provides electricity to over 90% of the population of the province.

[3] The petitioner, the Office and Professional Employees' International Union, Local 378 (the "OPEIU"), is a trade union certified under the ***Labour Relations Code***, R.S.B.C. 1996, c. 244. Prior to April 2003, it represented approximately 3000 members employed by B.C. Hydro.

[4] The petitioner, Jerri New, has been a B.C. Hydro employee since 1977, and the President of the OPEIU since 1999.

[5] On February 27, 2003, the provincial government proclaimed the ***Energy and Mines Statutes Amendment Act***, S.B.C.

2003, c. 1 (the "***EMSAA***"). This legislation included amendments to the ***Hydro Act*** and the ***UCA*** that permitted the completion of an out-sourcing arrangement negotiated between B.C. Hydro and Accenture Inc. ("Accenture") with respect to B.C. Hydro support services, many of which were performed by members of the OPEIU.

[6] On March 13, 2003, the Lieutenant Governor in Council issued Order in Council No. 0219 (the "OIC"), pursuant to the ***EMSAA*** amendments to the ***Hydro Act***. The OIC formally completed the out-sourcing arrangement by designating the agreements reached between Accenture and B.C. Hydro (the "Accenture Agreements") as relating to the provision of support services. This designation had a number of ramifications, chief of which from the petitioners' perspective was limiting the role of the B.C. Utilities Commission (the "Utilities Commission") in reviewing the Accenture Agreements under the ***UCA***.

[7] The petitioners challenge the constitutionality of the ***EMSAA***, and the validity of the OIC. They seek the following relief:

> a. a declaration that ss. 12(11)(a) through (e) of the ***Hydro Act***, as amended by the ***EMSAA***, is contrary to the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982***

(U.K.), 1982, c. 11 (the "***Charter***"), and is of no force and effect;

b. a declaration that the OIC purporting to designate the Accenture Agreements is illegal, *ultra vires*, void, and of no force and effect;

c. an order that B.C. Hydro disclose all relevant documents pertaining to the Accenture Agreements including, but not limited to, the complete versions of the Accenture Agreements;

d. an award of damages representing the legal and other costs and expenses incurred by the petitioners in initiating and carrying forward the applications before the Utilities Commission, and appeals, that were affected by the retroactive features of the ***EMSAA*** and the OIC; and

e. costs.

[8] The petitioners initially sought similar relief with respect to the ***Transmission Corporation Act***, S.B.C. 2003, c. 44, and a related Order in Council approved and ordered on November 22, 2003. Those aspects of the petition were adjourned during this hearing, however, pending my decision on the issues raised with respect to the ***EMSAA*** and the OIC.

THE FACTS

[9] Since 1997, the OPEIU has actively campaigned to raise public awareness about the benefits provided by public ownership of B.C. Hydro, and the negative consequences that it says will flow from the deregulation and privatization of B.C. Hydro and its services. It has hosted conferences, rallies,

and public meetings; organized informational campaigns; participated in the production of videos and CDs; placed articles and advertisements in the media; organized letter-writing to various levels of government; and lobbied and made presentations to politicians and other groups.

[10] In August 2001, the provincial government appointed the Task Force on Energy Policy to develop a long-term energy policy for the province. It was to provide recommendations with respect to all energy sectors on matters such as conservation and energy efficiency, alternative energy, electricity, oil and natural gas, coal, and regulation.

[11] A legislated B.C. Hydro rate freeze, in effect since 1996, was continued on August 27, 2001 pending this review.

[12] In October 2001, B.C. Hydro issued a Request For Expression of Interest (the “RFEI”), seeking proposals from parties in the private sector that were interested in an out-sourcing arrangement with B.C. Hydro in connection with its customer services, fleet services, and the computer services provided by its subsidiary, Westech Information Systems. B.C. Hydro received 19 proposals in response to the RFEI.

[13] On December 21, 2001, the OPEIU filed an application with the Utilities Commission, requesting a public hearing under

the ***UCA*** to examine B.C. Hydro's proposed out-sourcing of support services ("Application No. 1"). The OPEIU alleged that the arrangement envisaged in the RFEI would violate ss. 52 and 53 of the ***UCA***, the relevant portions of which are:

> **Restraint on disposition**
>
> 52 (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,
>
> > (a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or
> >
> > (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits, concessions, privileges or rights with those of another person.
>
> (2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.
>
> **Consolidation, amalgamation and merger**
>
> 53 (1) A public utility must not consolidate, amalgamate or merge with another person
>
> > (a) unless the Lieutenant Governor in Council
> >
> > > (i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and
> > >
> > > (ii) has, by order, consented to the consolidation, amalgamation or merger, and

> (b) except in accordance with an order made under paragraph (a).
>
> (2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.
>
> (3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.
>
> (4) The commission must inquire into the application and may for that purpose hold a hearing.
>
> (5) On conclusion of its inquiry, the commission must,
>
> > (a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or
> >
> > (b) dismiss the application. ...

[14] The OPEIU also asked the Utilities Commission to review the proposed transaction pursuant to its general jurisdiction to regulate public utilities in the public interest, under Part 3 of the ***UCA***. It argued that the sale of portions of B.C. Hydro as contemplated under the RFEI would be detrimental to all consumers of electricity in the province.

[15] On March 15, 2002, the Task Force on Energy Policy produced its final report, *Strategic Considerations for a New British Columbia Energy Policy*.

[16] In April 2002, B.C. Hydro selected Accenture as the successful proponent in the RFEI process, and commenced negotiations of the out-sourcing arrangement with it.

[17] On April 17, 2002, the Utilities Commission denied the OPEIU's request for a public hearing pursuant to Application No. 1. The Commission found that s. 32(7)(x) of the ***Hydro Act*** expressly precluded the application of s. 52 of the ***UCA*** to B.C. Hydro, and that s. 53 of the ***UCA*** did not apply to the joint venture/partnership type of arrangement described in the RFEI.

[18] The Commission also declined to conduct public hearings under its general jurisdiction to regulate utilities pursuant to Part 3 of the ***UCA***. It noted that in ***British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*** (1996), 20 B.C.L.R. (3d) 106 (C.A.), the Court found that the ***UCA*** did not give the Utilities Commission jurisdiction to determine how the directors of a public utility should manage its affairs, or plan its future. The Commission concluded:

> Even if the disposition [proposed under the RFEI] was reviewable under Section 52 of the Act, the Commission recognizes that many of the public utilities under its jurisdiction have taken actions to outsource significant components of technology, services and customer information services. None of the public policy considerations raised by the OPEIU are considered to be within the jurisdiction of the

> Commission for review in a public hearing pursuant to the general supervisory responsibilities of the Commission.

[19] On April 19, 2002, B.C. Hydro announced it was expanding the scope of the Accenture Agreements to include out-sourcing of human resources, financial services, electricity supplies, and internal computer services.

[20] On April 29, 2002, the OPEIU filed an application for leave to appeal to the B.C. Court of Appeal from the decision of the Utilities Commission dismissing Application No. 1.

[21] On June 7, 2002, the OPEIU applied to the Utilities Commission under s. 99 of the ***UCA*** for reconsideration of its denial of Application No. 1, in part because of the proposed expansion of the services to be out-sourced ("Application No. 2"). On July 12, 2002, the Commission declined to reconsider the matter, citing essentially the same grounds which had governed its decision on Application No. 1. Its reasons read in part:

> The Commission is of the view that it does not have jurisdiction under its general supervisory powers to hold public hearings on dispositions of assets which are not covered by the Act because of the exemption from Section 52 of the Act. The Commission's powers under Part 3 of the Act to supervise and regulate public utilities continue to exist for activities not exempted from the Act. The Commission will regulate B.C. Hydro to ensure that the rates charged for energy are fair, just and reasonable, and that

> B.C. Hydro provides safe, adequate and secure service to its customers. This ability will exist even if B.C. Hydro contracts out significant services to third parties. B.C. Hydro acknowledges that it will remain accountable for rates and quality of services.
>
> ...
>
> In carrying out its statutory responsibilities, the Commission will continue to use its legislative powers to ensure safe, reliable services to customers at fair, just and reasonable rates. The Commission has not created a legitimate expectation that it will hold "a full investigation and public hearing of B.C. Hydro's plans and proposals." It has, however, provided the Union with an opportunity to be heard.

[22] On July 18, 2002, B.C. Hydro and Accenture signed a Memorandum of Understanding (the "MOU") with respect to the out-sourcing of services. The MOU was made available to the public, with deletions of "commercially sensitive material". Under the MOU, the activities and resources of the affected services were to be acquired by a private entity that would then provide the services to B.C. Hydro under a service agreement. B.C. Hydro was to initially have a minority position in the private entity, and then relinquish this following a transitional period.

[23] The employment circumstances of about 1500 OPEIU members, who were employees of B.C. Hydro, were potentially affected by the out-sourcing. The MOU thus triggered s. 54 of the ***Labour***

Relations Code, which required development of an adjustment plan for these employees. B.C. Hydro, Accenture, and the OPEIU commenced negotiation of an employee transition plan to govern the terms on which the employees would transfer their employment to Accenture, or consider other options under their collective agreement. A transition agreement was ultimately reached, and ratified by the OPEIU membership in late 2002.

[24] On September 30, 2002, the petitioners decided to abandon their application for leave to appeal the Utilities Commission's dismissal of Application No. 1.

[25] On November 25, 2002, the provincial Ministry of Energy and Mines published an energy policy plan, *Energy For Our Future: A Plan for B.C.* It built on the work done by the earlier Task Force, and proposed a number of changes to the energy sector of the province, including but not limited to B.C. Hydro. The plan identified four "cornerstones": low electricity rates and public ownership of B.C. Hydro; secure, reliable supply; more private sector opportunities; and environmental responsibility and no nuclear power sources.

[26] On December 19, 2002, the OPEIU filed a new application with the Utilities Commission ("Application No. 3"). It asked the Commission to consider the applicability of ss. 52, 53,

and Part 3 of the ***UCA*** to the MOU, and to hold public hearings into the repercussions of the out-sourcing proposed in the MOU. It also asked for an order restraining B.C. Hydro from taking any further steps to carry out the MOU until the public hearings were complete, and for an order for disclosure of all documents and information associated with the MOU.

[27] On January 22, 2003, Mr. Richard Neufeld, the Minister of Energy and Mines, wrote to a representative of the "Save B.C. Hydro Petition" stating that B.C. Hydro would release the cost benefit analysis of the out-sourcing when its arrangements with Accenture were complete. He also advised that "once the deal is finalized, it will need to be approved by B.C. Hydro's Board and will be reviewed by the [Utilities Commission]".

[28] On January 31, 2003, B.C. Hydro provided its response to Application No. 3. This included a statement that the application should be dismissed because it was based on "mere speculation" as to what B.C. Hydro might do.

[29] On February 24, 2003 the ***EMSAA*** was introduced. It received second reading on February 25, 2003, and was proclaimed on February 27, 2003. The ***EMSAA*** included amendments to several statutes governing the energy sector in British Columbia. Those relevant to B.C. Hydro were set out

in ss. 2 and 25 of the ***EMSAA***, and provided the basis for implementation of the out-sourcing of support services. Section 2 expanded B.C. Hydro's statutory powers under s. 12 of the ***Hydro Act*** by adding the following subsections to that section:

> (9) The Lieutenant Governor in Council, by order, may designate any agreement entered into or to be entered into by the authority that the Lieutenant Governor in Council considers relates to the provision of support services to or on behalf of the authority.
>
> (10) For the purposes of subsection (9), "**support services**" means services that support or are ancillary to the activities of the authority from time to time, and includes services related to metering for, billing and collecting fees, charges, tariffs, rates and other compensation for electricity sold, delivered or provided by the authority, but does not include the production, generation, storage, transmission, sale, delivery or provision of electricity.
>
> (11) Despite the common law and the provisions of this or any other enactment, if an agreement is designated under subsection (9),
>
> > (a) the authority is deemed to have, and to have always had, the power and capacity to enter into the agreement,
> >
> > (b) the agreement and all actions of the authority taken in accordance with the provisions of the agreement are authorized, valid and deemed to be required for the public convenience and necessity,
> >
> > (c) the authority is deemed to have, and to have always had, the power and capacity to carry out all of the obligations imposed under, and to exercise all of the rights, powers and

> privileges granted by, the agreement according to its terms,
>
> (d) the agreement is binding on and enforceable by the authority, according to the agreement's terms, and
>
> (e) subject to subsection (12), the authority is not required to obtain any approval, authorization, permit or order under the *Utilities Commission Act* in connection with the agreement or any actions taken in accordance with the terms of the agreement, and the commission must not prohibit the authority from taking any action that the authority is entitled or required to take under the terms of the agreement.
>
> (12) Nothing in subsection (11) (e) precludes the commission from considering the costs incurred, or to be incurred, in relation to an agreement designated under subsection (9) when establishing the revenue requirements and setting the rates of the authority.
>
> (13) Subsections (3) and (5) do not apply to any partnership created by, under or in furtherance of an agreement designated under subsection (9).

[30] Section 25 of the ***EMSAA*** amended the definition of “public utility” in the ***UCA*** to specifically exclude:

> (g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12(9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement.

[31] On February 28, 2003, B.C. Hydro and Accenture entered a formal agreement by which Accenture agreed to provide services

to B.C. Hydro for a 10-year term, commencing April 1, 2003. Their arrangement consisted of eight agreements: an Amended and Restated Limited Partnership Agreement, a Master Transfer Agreement, a Master Services Agreement, a Guarantee by Accenture, a Marketing Alliance Agreement, a Master Consulting Services Agreement, an Asset Conveyance Agreement, and a Support Services Agreement (collectively referred to as the "Accenture Agreements"). All but the Master Consulting Services Agreement had been executed by the parties on January 31, 2003. The Master Consulting Services Agreement had been executed on May 30, 2001.

[32] The Accenture Agreements are voluminous. They were posted on B.C. Hydro's website in early March 2003, after B.C. Hydro redacted those parts that it said contained competitive, commercial, and personally sensitive information.

[33] On March 13, 2003, the Lieutenant Governor in Council issued the OIC designating the Accenture Agreements, with the exception of the Accenture Guarantee, as being in relation "to the provision of support services to or on behalf of the authority" pursuant to the newly enacted ss. 12(9) and (10) of the ***Hydro Act***. This, in turn, triggered the application of s. 12(11). The effect of s. 12(11)(e) was to preclude scrutiny of the Accenture Agreements by the Utilities Commission under

the ***UCA***, except in the context of considering their costs pursuant to s. 12(12).

[34] The OPEIU's Application No. 3 was the only application before the Utilities Commission at the time the OIC was issued.

[35] On April 1, 2003, about 1,300 B.C. Hydro employees who were members of the OPEIU were transferred to Accenture in connection with the out-sourcing of services. Another 200 employees and members chose other options available under the earlier transition agreement. A number of the OPEIU members expressed concern about these changes, and their potential effect on future employment security and pensions.

[36] On June 5, 2003, the Utilities Commission denied the OPEIU's Application No. 3. In its reasons, the Commission indicated it had reviewed unredacted copies of the Accenture Agreements, and it set out a brief summary of the nature of each agreement. The Commission then stated that the amendments to s. 12 of the ***Hydro Act*** in the ***EMSAA***, together with the OIC, limited its jurisdiction to approve or review the Accenture Agreements, or actions taken under them, except with respect to the costs incurred in relation to the agreements. The Commission indicated its intention to conduct

a review of those costs at the next B.C. Hydro revenue requirements proceeding.

[37] The Utilities Commission then went on to consider the OPEIU's arguments, despite the limitations placed on its jurisdiction by the amendments to s. 12 and the OIC. It stated that it found no material difference between the arrangements in the Accenture Agreements, and those set out in the RFEI, which it had considered in dealing with Application No. 1. Nor did it find any material change in circumstances since its decision on Application No. 1. It reiterated its view that s. 53 of the ***UCA*** had no application to the arrangements contemplated by the Accenture Agreements, stating:

> Even if OIC 0219 had not been issued, the Commission would not have had jurisdiction to review the Accenture Agreements, except as to the extent that those agreements impact revenue requirements and the setting of the rates of B.C. Hydro.

[38] The Commission affirmed its earlier finding that s. 52 of the ***UCA*** did not apply to the out-sourcing arrangement. It also restated its view that none of the public policy considerations raised by the OPEIU fell within its jurisdiction for review in a public hearing under Part 3 of the ***UCA***.

[39] On June 26, 2003 the petitioners commenced this proceeding.

[40] On July 4, 2003 the OPEIU filed an application for leave to appeal the Utilities Commission's denial of Application No. 3 to the B.C. Court of Appeal.

[41] The provincial government has proceeded to implement other aspects of the energy policy plan published on November 25, 2002. On November 20, 2003, it proclaimed the ***B.C. Hydro Public Power Legacy and Heritage Contract Act***, S.B.C. 2003, c. 86, which prohibits B.C. Hydro from selling "protected assets". These include generation and storage assets, and equipment or facilities for the transmission or distribution of electricity.

[42] The B.C. Hydro legislated rate freeze ended in March 2003. B.C. Hydro filed a revenue requirement application with the Utilities Commission in December 2003, to commence a public hearing before the Utilities Commission in 2004 to review B.C. Hydro's revenue requirements. A further hearing into B.C. Hydro's proposed rate structure is expected in 2005.

ANALYSIS

[43] The petitioners advanced extensive and varied arguments challenging the validity of both the ***EMSAA*** and the OIC.

Having considered all of these, I believe they are best dealt with under two main headings: a constitutional challenge of s. 12(11) of the ***Hydro Act***, as enacted by s. 2 of the ***EMSAA***, and a challenge to the validity of the OIC in the context of administrative law principles. Following consideration of these, I will deal with the application for disclosure of documents.

A. The Constitutionality of Subsection 12(11) of the *Hydro Act,* as Enacted by the *EMSAA*

[44] The petitioners say that s. 12(11) of the ***Hydro Act*** is unconstitutional, as it violates their right to freedom of expression under s. 2(b) of the ***Charter***.

[45] While they challenge the validity of the entire subsection, the focus of their argument is s. 12(11)(e), which they say removed their access to the Utilities Commission as a forum for expression of their views. They argue that, once they commenced Application No. 3, they had a substantive constitutional right to express their opposition to the Accenture Agreements in a full hearing before the Utilities Commission. The enactment of s. 12(11)(e) breached that right.

[46] The petitioners say that the core of Application No. 3 is the ownership and regulation of water and the hydro-electric

power derived from it. Both are significant natural resources, and privatization of aspects of B.C. Hydro is clearly a matter of public concern. Privatization raises political, commercial, consumer, and labour issues for the members of the OPEIU, both as employees of B.C. Hydro, and as citizens of this province. They argue that the importance of these issues to them, and to the general public, mandates a liberal interpretation of the right to freedom of expression, and demands access to the Utilities Commission for a full public hearing on the import of the arrangements between B.C. Hydro and Accenture.

[47] In support of this position, the petitioners cite a number of decisions of the Supreme Court of Canada, in which that Court has characterized freedom of expression as one of the fundamental tenets of democracy, and recognized its particular importance in the context of labour relations: ***Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.***, [1986] 2 S.C.R. 573 at para. 12; ***United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd.***, [1999] 2 S.C.R. 1083 at paras. 21-27; ***Dunmore v. Ontario (Attorney General)***, [2001] 3 S.C.R. 1016 at para. 38; and ***Retail, Wholesale and Department Store Union, Local 558 v.***

Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156 at paras. 32-33.

[48] The petitioners also maintain that the rule of law should be used as an interpretive aid in determining the constitutionality of s. 12(11). While they acknowledge that the rule of law does not represent a separate constitutional right, they say it provides a shield from arbitrary and unconstitutional government action: ***Canadian Council of Churches v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 236. The petitioners characterize the removal of their right to pursue Application No. 3 before the Utilities Commission as arbitrary government action.

[49] The respondents reply that the enactment of s. 12(11) did not constitute a breach of the petitioners' right to freedom of expression, either in law or in fact. They say that the government has no constitutional obligation to provide a particular administrative forum in which the petitioners may express their views. As well, they argue that the petitioners were not in fact deprived of a forum, as the Utilities Commission proceeded to determine Application No. 3 on its merits, despite the enactment of s. 12(11). They say that the petitioners' real complaint is not that they were denied

access to the Utilities Commission, but that the decision of the Commission was unfavourable to them.

[50] The parties agree that the petitioners bear the onus to establish a breach of s. 2(b) of the ***Charter***. They also agree that the determination of that issue is governed by the two-step analysis set out in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927 at paras. 40-58.

[51] The first step is to ask whether the activity the petitioners wish to pursue is properly characterized as falling within freedom of expression. Here, the respondents concede that participating in a hearing before the Utilities Commission is expressive behaviour.

[52] The second step involves an examination of whether the purpose or effect of the government action was to restrict that expressive behaviour. The characterization of government purpose must proceed from the standpoint of the guarantee in issue. In the context of s. 2(b), identification of the purpose of the legislation involves an examination of whether the enactment was aimed to control attempts to convey a meaning, either by restricting the content of expression, or by restricting a form of expression tied to content: ***Irwin Toy Ltd.***, *supra* at para. 51.

[53] If it is found that the legislative purpose was not to control or restrict freedom of expression, the petitioners may still succeed if they demonstrate that the effect of the legislation was to restrict their free expression. In order to do so, they must establish that s. 12(11) interfered with one of the principles and values underlying s. 2(b): the pursuit of truth, participation in social and political decision-making, or diversity of individual self-fulfillment and human flourishing: ***Irwin Toy Ltd.***, *supra* at para. 53.

[54] It is on this second step that the parties part company. The petitioners say that the purpose and effect of s. 12(11) was to restrict a form of expression - a hearing before the Utilities Commission - which they sought to use as a means of participating in social and political decision-making. Its enactment was thus a breach of their right to freedom of expression, and s. 12(11) must be declared unconstitutional.

[55] I agree that s. 12(11)(e) of the ***Hydro Act*** clearly curtailed the jurisdiction of the Utilities Commission to review Application No. 3, or any aspect of the Accenture Agreements. The petitioners have failed to convince me, however, that this legislation violates their constitutional right to freedom of expression.

[56] The law is clear that the right to freedom of expression does not include a positive obligation on the government to provide the petitioners with a specific forum for, or means of, expression. In ***Haig v. Canada***, [1993] 2 S.C.R. 995, Mr. Haig complained that he was unable to vote in a constitutional referendum because he had recently moved from Ontario to Quebec. He argued that this violated his right to freedom of expression. Justice L'Heureux-Dubé, writing for the majority, stated at page 1035:

> It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(b) of the *Charter* to provide a particular platform to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones. ... [emphasis in original]

[57] She went on to find there was no constitutionally entrenched right to vote in a referendum, stating at pages 1040 to 1041:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or

> federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [emphasis in original]

[58] As pointed out by counsel for the Attorney General during his argument, one may substitute “application before the Utilities Commission” for “referendum” in that passage, and reach the same conclusion. The petitioners thus had no constitutionally entrenched right to pursue Application No. 3 before the Utilities Commission. The fact that the enactment of s. 12(11) curtailed the Commission’s jurisdiction to hear that application does not constitute a breach of the petitioners’ rights under s. 2(b) of the ***Charter***.

[59] The more recent decisions of ***Native Women’s Assn. of Canada v. Canada***, [1994] 3 S.C.R. 627, and ***Delisle v. Canada (Deputy Attorney General)***, [1999] 2 S.C.R. 989 at paras. 25-27 reinforce the view that the rights created by s. 2(b) of the ***Charter*** do not require the government to provide citizens with a particular forum in which to express their views.

[60] The petitioners argue that those cases are distinguishable, as they dealt with situations in which the

aggrieved parties were excluded from expressing their views in an existing statutory forum. Here, the impugned legislation removed the statutory forum completely, just as the petitioners were using it to express their views. In the language of Justice L'Heureux-Dubé, the petitioners say that they had a megaphone, but it was removed in mid-speech.

[61] They also argue that, in the particular circumstances of this case, the government should not be permitted to pass legislation that silences its most effective critic. They point out that in ***Haig***, *supra* at paras. 79-81, the Court acknowledged that, while freedom of expression is generally enforced by a posture of restraint, a purposive approach may reveal cases in which positive government action is necessary to make the freedom meaningful. They say that this is such a case, due to the value and importance of the transaction, the significant element of public interest, and the fact that the timing of the ***EMSAA*** suggests it was directly aimed at silencing them. Their Application No. 3 was the only application pending before the Utilities Commission when s. 12(11) was enacted. They argue that the government should be compelled to permit that application to proceed before the Utilities Commission, unhampered by s. 12(11).

[62] I am unable to accept these arguments. Administrative bodies, such as the Utilities Commission, are creatures of the legislature. Periodic legislative changes to their jurisdiction and powers are inevitable, in order to reflect changing political, economic, and social objectives. Such amendments will necessarily affect the interests of parties who are engaged with the administrative body at the time. If those parties could successfully claim a constitutional right to continuation of their proceedings under the former legislation, the administrative framework of government would be paralyzed.

[63] Moreover, I am satisfied that neither the purpose nor the effect of the ***EMSAA*** interfered with the petitioners' right to freedom of expression. I find that the primary objective of the ***EMSAA*** was to implement a number of legislative changes in the energy and resource sectors in British Columbia. Insofar as the ***EMSAA*** dealt with B.C. Hydro, it provided the means to out-source support services, which was part of a long-term, comprehensive energy plan that had been evolving since 2001. The choice to out-source these services to Accenture was a management decision. As such, it fell within the purview of B.C. Hydro's directors, and did not attract the jurisdiction of the Utilities Commission: ***British Columbia Hydro and Power***

Authority v. British Columbia Utilities Commission, *supra* at paras. 55-58.

[64] The Utilities Commission itself recognized this in its decisions on the petitioners' Applications No. 1 and No. 2, prior to the enactment of the ***EMSAA***. In each decision, it considered the proposed arrangements with Accenture, and found it had no jurisdiction to examine them, due to the combined operation of s. 37(x) of the ***Hydro Act***, ss. 52 and 53 of the ***UCA***, and its limited jurisdiction to intrude into the management of B.C. Hydro.

[65] The ***EMSAA*** amendments to s. 12 of the ***Hydro Act*** simply confirmed that the Utilities Commission was not engaged by the Accenture transaction, apart from retaining its jurisdiction to review the costs of the out-sourcing in establishing revenue requirements and setting rates.

[66] Moreover, the petitioners' argument is significantly weakened by the fact that, despite the enactment of the ***EMSAA***, the Utilities Commission proceeded to deal with Application No. 3 on its merits, after reviewing unredacted copies of the Accenture Agreements. In its decision, the Utilities Commission acknowledged the limits imposed on its jurisdiction by s. 12(11)(e). Nevertheless, it went on to affirm its

earlier decisions saying that, even if that legislation had not been enacted, it had no jurisdiction to examine the out-sourcing arrangements covered by the Accenture Agreements.

[67] I conclude that s. 12(11) did not deprive the petitioners of a hearing before the Utilities Commission on the merits of Application No. 3.

[68] I find that the petitioners' reliance on the rule of law does not add any independent strength to their argument that s. 12(11) is unconstitutional. Nothing prevents the legislature from passing arbitrary laws, as long as they are constitutional. Thus, the petitioners' argument based on the arbitrary nature of s. 12(11) is essentially circular, and comes back to a question of its constitutionality. Protection from the passage of arbitrary legislation lies in the ballot box: ***Bacon v. Saskatchewan Crop Insurance Corp.***, [1999] 11 W.W.R. 51 (Sask. C.A.) at para. 36.

[69] The petitioners have actively pursued their right to persuade others to join them at the ballot box on the issue of privatization of B.C. Hydro. They have freely and effectively communicated their views on this matter to the public since 1997 through a variety of means, including the media, public meetings, lobbying, and informational campaigns. There is no

suggestion that the government has attempted to control the information that the petitioners seek to impart, or that it has attempted to restrict access by others to their message: ***Irwin Toy Ltd.***, *supra* at para. 51.

[70] I conclude that the petitioners' application to have ss. 12(11)(a) to (e) of the ***Hydro Act***, as amended by the ***EMSAA***, declared unconstitutional, and of no force and effect must be denied.

[71] The related claim for damages must fail as well.

B. The Validity of Order in Council No. 0219

[72] The OIC was issued by the Lieutenant Governor in Council on March 13, 2003. It ordered that the Accenture Agreements were agreements related to support services, pursuant to ss. 12(9) and (10) of the amended ***Hydro Act***, which I will set out again for ease of reference:

> (9) The Lieutenant Governor in Council, by order, may designate any agreement entered into or to be entered into by the authority that the Lieutenant Governor in Council considers relates to the provision of support services to or on behalf of the authority.
>
> (10) For the purposes of subsection (9), "**support services**" means services that support or are ancillary to the activities of the authority from time to time, and includes services related to metering for, billing and collecting fees, charges, tariffs, rates and other compensation for electricity sold, delivered or provided

> by the authority, but does not include the production, generation, storage, transmission, sale, delivery or provision of electricity.

[73] The effect of the designation was to trigger s. 12(11)(e), which curtails the jurisdiction of the Utilities Commission to review matters related to the designated agreements, except with respect to their costs under s. 12(12).

[74] The petitioners attack the validity of the OIC on two main grounds. First, they argue that the Lieutenant Governor in Council improperly exercised her discretion in deciding to designate the Accenture Agreements as agreements related to support services. Second, they say that she failed to observe requirements of procedural fairness in making the OIC. The ultimate objective of both arguments is to obtain a full hearing of Application No. 3 before the Utilities Commission.

[75] To properly understand and deal with the petitioners' arguments, it is necessary to first identify the precise action by the Lieutenant Governor in Council which forms the basis of their attack on the OIC.

[76] The petitioners' arguments envisage two potential sources of discretion in ss. 12(9) and (10). The first is embodied in the words "the Lieutenant Governor in Council may designate

any agreement". This pertains to her decision to act at all under s. 12(9). It is not specific to any particular agreements.

[77] The second source of discretion lies in her determination of whether particular agreements "relate to the provision of support services" as those are defined in s. 12(10). This will involve an examination of the particular agreements under consideration, in this case the Accenture Agreements.

[78] The petitioners do not assert that the Lieutenant Governor in Council wrongly exercised her discretion in the second sense. The petition does not allege that the Accenture Agreements were unrelated to the provision of support services, or that the Lieutenant Governor in Council wrongly construed them as such.

[79] Their arguments focus on the first, and more general, area of discretion. They say that the Lieutenant Governor in Council should not have exercised her discretion at all to designate any agreements by Order in Council, until the Utilities Commission had completed its hearing of Application No. 3.

[80] The petitioners' complaints are thus based to a large extent on the timing of the OIC, rather than its substance.

The Ambit for Judicial Review: Was the OIC an Administrative or Legislative Act?

[81] The first step in considering the petitioners' arguments must be a determination of the ambit for judicial review of the OIC. This will be governed to a large extent by whether the decision of the Lieutenant Governor in Council to pass the OIC is classified as a legislative or administrative act.

[82] The respondents argue that the decision to designate agreements by Order in Council under s. 12(9) is a legislative act. If they are correct, I agree that the decision of the Supreme Court of Canada in ***Canada (Attorney General) v. Inuit Tapirisat of Canada***, [1980] 2 S.C.R. 735 significantly restricts the ambit of judicial review of the OIC.

[83] In ***Inuit Tapirisat***, the Court dealt with the duty of fairness incumbent on the Governor General in Council in dealing with parties under the ***National Transportation Act***. That legislation gave a broad discretion to the Governor General in Council to vary a decision of the CRTC on petition of an interested party. The petitioners applied for such a variation, and the Governor General in Council ruled against them without fully disclosing the opposing material on which his ruling was based, and without giving them an opportunity to reply to that material.

[84] The Court affirmed that the actions of the Governor General in Council are not beyond review. The decision made it clear, however, that if the enactment of an Order in Council represents a legislative, as opposed to administrative, function, the ambit of judicial review will be significantly restricted, and requirements of procedural fairness will not apply. At page 757, the Court adopted the following statement from ***Bates v. Lord Hailsham***, [1972] 1 W.L.R. 1373 at page 1378:

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

[85] At pages 758 to 759, the Court commented on the restricted role for judicial review of legislative activity generally:

> Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern or a right unique to the petitioner or appellant, different

> considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

[86] Applying those principles here, if the Lieutenant Governor in Council acted in a legislative capacity in issuing the OIC, judicial review is limited to considering whether she acted within her statutory jurisdiction.

[87] During argument, each party referred to a number of cases in which the courts have characterized the actions of the Cabinet or individual Ministers as legislative or administrative. I find these decisions of limited assistance, as each is governed to a large extent by its particular legislative context and facts. They do, however, establish two general and related guidelines in undertaking such an analysis.

[88] The first is alluded to in the second quotation from ***Inuit Tapirisat*** above, and aptly summarized in Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 1998) vol. 2 at para. 7:2330.

This is the element of generality. A government action is more likely to be legislative in nature if it is of general application, and is based on broad considerations of public policy. If the action is directed at the rights or conduct of a specific person or group, it is more likely an administrative function.

[89] The second guideline is that, in determining whether the government action is general and policy-based, or particular to certain individuals or activities, it is essential to focus on the construction and application of the particular legislative scheme.

[90] In ***Canadian Union of Public Employees v. Ontario (Minister of Labour)***, [2003] 1 S.C.R. 539 at para. 106, Justice Binnie advocated a contextual approach to statutory interpretation and incorporated the approach in E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87:

> . . . 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.

I accordingly turn to a contextual analysis of the statutory framework within which the Lieutenant Governor in Council

issued the OIC. That framework includes the ***Hydro Act***, the ***UCA***, and the ***EMSAA***.

[91] The ***Hydro Act*** creates B.C. Hydro, a Crown corporation. Its business includes the generation, transmission, and delivery of electricity to the vast majority of the residents of the province, under the management of a statutorily appointed board of directors. Section 3 of the ***Hydro Act*** states that B.C. Hydro is for all purposes an agent of the government. Section 12 of that ***Act*** sets out its powers, which are subject to the approval of the Lieutenant Governor in Council.

[92] B.C. Hydro is also a public utility, which by necessary implication imports concerns of public interest. Historically, the public interest has resulted in legislative regulation of public utilities for a variety of economic and social reasons, aimed at ensuring the provision of utility services to the public safely and adequately, and at reasonable rates. In British Columbia, this regulatory function is largely performed by the Utilities Commission under the ***UCA***. The legislative purpose of the scheme is reflected in s. 38 of that ***Act***, which requires public utilities to provide “a service to the public that the

commission considers is in all respects adequate, safe, efficient, just and reasonable".

[93] Part 3 of the ***UCA*** sets out the regulatory powers of the Utilities Commission. Primary among these is setting rate levels and revenue requirements that cover allowable operating costs and allowable opportunity to earn a fair rate of return. The Commission's regulatory powers over B.C. Hydro are not, however, unrestricted. Under s. 3 of the ***UCA,*** for example, the Utilities Commission must comply with any direction of the Lieutenant Governor in Council respecting its powers. Section 32(7)(x) of the ***Hydro Act*** exempts B.C. Hydro from some aspects of the Commission's oversight. As well, management of the business of B.C. Hydro is reserved to its Board, and is not the province of the Commission: ***British Columbia Hydro and Power Authority v. British Columbia Utilities Commission***, *supra*.

[94] As previously described, in 2001 the provincial government began to develop a long-term future plan for all aspects of the energy sector of the province, including B.C. Hydro. The final plan was published by the government in November 2002, and had four cornerstones, one of which was low electricity rates and public ownership of B.C. Hydro. The plan stated that this would be accomplished in part by out-

sourcing delivery of B.C. Hydro services, in the interest of reducing the cost of electricity for consumers, while maintaining quality of service.

[95] The ***EMSAA*** was enacted to introduce some of the legislative changes required to implement the government's energy plan. Sections 2 and 25 dealt with the amendments to the ***Hydro Act*** and the ***UCA*** respectively, which were necessary to effect the out-sourcing of support services. Section 2 added ss. 12(9) to (13) to B.C. Hydro's powers under s. 12 of the ***Hydro Act***, paving the way for the Lieutenant Governor in Council to designate the Accenture Agreements by the OIC.

[96] The effect of these amendments was to add to the Lieutenant Governor in Council's pre-existing control over the powers of B.C. Hydro, as enumerated in s. 12 of the ***Hydro Act***. The amendments gave her the power to designate agreements as related to the provision of support services under ss. 12(9) and (10). They also set out the consequences of such a designation in ss. 12(11) and (12), which limited the jurisdiction of the Utilities Commission to cost and rate considerations, and provided B.C. Hydro with the power, capacity, and authority to enter and carry out any designated agreement. In particular, s. 12(11)(b) read:

> (11) Despite the common law and the provisions of this or any other enactment, if an agreement is designated under subsection (9) ...
>
> > (b) the agreement and all actions of the authority taken in accordance with the provisions of the agreement are authorized, valid and deemed to be required for the public convenience and necessity ... [emphasis added]

[97] In introducing the ***EMSAA*** for second reading, the Minister of Energy and Mines made the following statement with respect to the amendments concerning B.C. Hydro in British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard),* vol. 11, No. 14 (25 February 2003) at 5011 (Hon. R. Neufeld):

> The goal of the amendments to the Hydro and Power Authority Act is to obtain cost efficiencies and better service for B.C. Hydro customers. The definition of what constitutes support services for the purposes of outsourcing is clarified. By outsourcing administrative functions such as customer service, B.C. Hydro will be better focused on its core business: generating, transmitting and distributing electricity. It is these activities that generate revenues and benefits for all British Columbians.

[98] I find that a contextual construction of the statutory framework I have just reviewed leads to the inevitable conclusion that the OIC was the final step in implementing the government's plan to out-source support services of a Crown corporation and public utility, with the object of reducing

costs and improving service for consumers. The out-sourcing was just one segment of a comprehensive scheme to reform the energy sector of the province, which had been developed on political and public policy grounds. The effects of the out-sourcing resulting from the OIC were of general application to B.C. Hydro consumers, and the citizens of the province. All of these factors strongly suggest that the decision to issue the OIC was a legislative, rather than administrative, action.

[99] The petitioners nevertheless argue that the OIC was administrative in nature, as it was directed at them specifically, and affected their individual rights in two ways. First, their Application No. 3 was the only application pending before the Utilities Commission when the OIC designated the Accenture Agreements. Thus, they alone had their hearing subverted by s. 12(11)(e). They say that they had invested a significant amount of time and money in the proceedings before the Utilities Commission. When the OIC intervened, they were deprived of the opportunity to present their concerns about the privatization of B.C. Hydro services, and its effect on the employment of OPEIU members, in a public hearing before the Commission.

[100] Second, the petitioners argue that the OIC was directed specifically at OPEIU members. Their individual

rights and interests have been significantly and detrimentally affected by the assumption of support services by Accenture, and the resulting changes to their employment. Over 1,300 of them transferred to Accenture, and over 200 took other employment options. As well, the out-sourcing of support services has led to ongoing concerns related to pension and job security for the members.

[101] I am not persuaded that these factors alter the fundamentally general and policy-based nature of the decision to issue the OIC. It is true that because of the timing of the OIC, the petitioners' Application No. 3 was the only proceeding immediately curtailed by s. 12(11)(e). Nevertheless, the restriction on the jurisdiction of the Utilities Commission has universal application. No one may use the Commission as a forum for issues arising from the Accenture Agreements, other than in the context of rate hearings. The petitioners' argument on this point is really directed to the timing of the OIC, and not to its classification as an administrative or legislative act.

[102] With respect to the effect of the OIC on the B.C. Hydro employees who were members of the OPEIU, the terms on which the employee transfers took place were governed by a transition plan negotiated in accordance with the ***Labour***

Relations Code. B.C. Hydro, the OPEIU, and Accenture agreed to it, and it was ratified by the membership of the OPEIU. As well, it appears to me that the real focus of the petitioners' concerns about the OPEIU members is the legislation itself, and not the decision to designate the Accenture Agreements by the OIC. Their complaint is not directed at the members' transfer to Accenture in particular, but at the power provided by s. 12(9) of the ***Hydro Act***, which permits the Lieutenant Governor in Council to designate any agreements to out-source support services.

[103] I accept that the individual interests of the OPEIU members will inevitably be affected by a transfer of support services, regardless of what form it takes, or with what entity the arrangements are made. I find this concern insufficient, however, to give the OIC an administrative character. It may well be the case that some individuals will be affected more than others by a legislative action, but this does not alter the legislative character of the act: ***Wells v. Newfoundland***, [1999] 3 S.C.R. 199; ***Aasland v. British Columbia (Ministry of Environment, Lands and Parks)*** (1999), 19 Admin. L.R. (3d) 154 (B.C.S.C.) at para. 28. In ***Wells***, the plaintiff's position as a senior civil servant was removed by legislation restructuring the administrative tribunal with

which he worked. He brought an action for damages, and argued that his dismissal was unfair and arbitrary. In dismissing his claim, the Court held that, as long as a legislative act falls within its constitutional bounds, its wisdom and value is subject only to review by the electorate. It stated at para. 61:

> The respondent's loss resulted from a legitimately enacted "legislative and general" decision, not an "administrative and specific" one: see *Knight*, at p. 670. While the impact on him may be singularly severe, it did not constitute a direct and intentional attack upon his interests. His position is no different in kind than that of an unhappy tax-payer who is out-of-pocket as a result of a newly enacted budget, or an impoverished welfare recipient whose benefits are reduced as a result of a legislative change in eligibility criteria. This was not a personal matter, it was a legislative policy choice.

[104] I find that the plan to out-source support services was based on considerations of general policy and public convenience. The decision of the Lieutenant Governor in Council to issue the OIC, as the last step in that process, was rooted in those same considerations. The ramifications of the OIC were of general application. I conclude the OIC was a legislative act.

Lack of Procedural Fairness

[105] The petitioners say the Lieutenant Governor in Council was bound to give them notice and an opportunity to be heard before issuing the OIC.

[106] The law is clear that the duty of procedural fairness does not apply to legislative actions of government: ***Martineau v. Matsqui Institution***, [1978] 1 S.C.R. 118; ***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643; ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653; ***Inuit Tapirisat,*** *supra*; and ***Wells,*** *supra*.

[107] Nevertheless, the petitioners argue that classification of the OIC as a legislative act is not the end of the inquiry as to whether considerations of procedural fairness should apply. They say that Justice L'Heureux-Dubé, in ***Knight,*** *supra* at para. 24, established a tripartite analysis to determine whether a duty of fairness exists in such circumstances; the nature of the action is only the first of the three factors to be considered. The other two factors are the relationship between the government body and the individual, and the effect of the decision on the individual's rights. They say it is incumbent on the court to consider all three factors before a determination can be made as to whether

considerations of procedural fairness apply to the decision to issue the OIC.

[108] The petitioners provided no authority to support this interpretation of ***Knight***. The authorities are overwhelmingly to the contrary. Justice L'Heureux-Dubé herself, at para. 26 of ***Knight***, acknowledged that only decisions of an administrative nature attract a duty to act fairly. In my view, the finding that the decision to issue the OIC was a legislative act is fatal to the petitioners' arguments based on procedural fairness.

Legitimate Expectations

[109] The petitioners argue that they had a legitimate expectation that there would be a hearing into the Accenture arrangements before the Utilities Commission. They base this on what they say were express promises to that effect made by the Premier and by the Minister of Mines and Resources. As well, they say that the Utilities Commission had an established procedural practice of consultation, demonstrated by the fact that it previously conducted a hearing into the out-sourcing of support services by B.C. Gas.

[110] In ***Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 at page 1204 the Supreme Court of

Canada discussed the principle of legitimate expectations in these terms:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

[111] The Court more recently described the doctrine of legitimate expectations in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 26:

> The doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[112] An expectation may legitimately arise in one of two ways: by an express promise made by a public authority responsible for the decision, or by a regular course of conduct that shows a well-defined practice of consultation: ***British Columbia and Yukon Hotels' Assn. v. British Columbia (Liquor Distribution Branch)***, [1997] B.C.J. No. 305 (S.C.) (QL) at para. 14; and ***Sunshine Coast Parents for French v.***

Sunshine Coast School District No. 46 (1990), 49 B.C.L.R. (2d) 252 (S.C.) at 255.

[113] Because the doctrine of legitimate expectations is viewed as one aspect of procedural fairness, it is generally said that it does not apply to legislative action: ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 at para. 60; ***Sunshine Coast***, *supra* at 255–257; and ***Aasland***, *supra* at para. 52. I note, however, that in ***Sunshine Coast*** at page 260, Spencer J. held that legislative action may be subject to the doctrine of legitimate expectations if the legislative body has enacted procedural rules that give rise to such expectations.

[114] I am unable to find that the doctrine of legitimate expectations assists the petitioners. First, the statutory framework within which the OIC was issued contains no procedural requirements which might lead to an expectation of consultation.

[115] Second, the doctrine does not create substantive rights. Thus, even if it did apply, it would only give rise to a duty on the part of the Lieutenant Governor in Council to consult with the petitioners before issuing the OIC. It would

not provide them with a right to the hearing before the Utilities Commission which they seek.

[116] Third, I do not interpret any of the politicians' statements, which are set out in detail in Ms. New's second affidavit, as express promises that the Utilities Commission would undertake a broad public review of the arrangements made with Accenture before an Order in Council designating the agreements was made. The strongest comment was that of the Minister of Mines and Resources on January 22, 2003, when he stated that once the [Accenture] deal was finalized, it would be reviewed by the Utilities Commission. I agree with the respondents, however, that this could well refer to a review of costs by the Commission under s. 12(12) of the ***Hydro Act***, and not to the broad review sought by the petitioners.

[117] Similarly, I find that the prior practices of the Utilities Commission, including the fact that it conducted a hearing into the out-sourcing of the support services of B.C. Gas, cannot be said to have established a "well-defined practice of consultation" that would attract the doctrine of legitimate expectations, and entitle the petitioners to a public hearing with respect to the Accenture Agreements. Moreover, the decisions of the Utilities Commission on

Applications No. 1 and 2 suggest that its usual practices did not lead the petitioners to expect a public hearing before it.

[118] Finally, the doctrine applies to express promises made by the public authority responsible for the decision, in this case the Lieutenant Governor in Council. I find it difficult to understand how statements by other government representatives, or the practices of an administrative tribunal, could bind her to consult before exercising her statutory powers.

[119] I conclude that the petitioners are not able to rely on the doctrine of legitimate expectations to demonstrate that the Lieutenant Governor in Council had a duty to consult with them, or to permit a public hearing to proceed before the Utilities Commission, prior to issuing the OIC.

Improper Exercise of Discretion

[120] The petitioners say that the Lieutenant Governor in Council unreasonably exercised her discretion in passing the OIC, in that she failed to consider relevant factors, acted in bad faith, and discriminated against them.

[121] In considering these arguments, it is necessary to recall that the petition does not allege that the Accenture Agreements are unrelated to the provision of support services

as defined by s. 12(10) of the ***Hydro Act***. The attack is instead focused on the Lieutenant Governor in Council's decision to exercise her discretion at all under s. 12(9), before Application No. 3 had been fully heard before the Utilities Commission.

[122] In determining whether the Lieutenant Governor in Council properly exercised her discretion in deciding to issue the OIC, the petitioners urge judicial review on a standard of reasonableness, determined by the pragmatic and functional approach advocated in ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226. They say that this review should be governed by the factors set out in ***Baker***, *supra* at paras. 53, 56: the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the ***Charter***.

[123] The difficulty that the petitioners encounter, however, is that the cases of ***Dr. Q*** and ***Baker***, as well as the numerous other authorities on which they rely, all deal with review of administrative acts. I have found that the decision to issue the OIC was a legislative act.

[124] The petitioners concede that they have found no authority to support the application of the pragmatic and functional approach to judicial review of a legislative act. They nevertheless argue that the authorities on which they rely provide a compelling inference that such an approach should guide the court in all cases of judicial review of discretionary decisions, even if they are legislative acts.

[125] I am unable to agree that the approach set out in ***Dr. Q*** lends itself to judicial review of the decision of the Lieutenant Governor in Council to perform her delegated legislative power under s. 12(9). In my view, the appropriate ambit for review of such acts remains that established in ***Inuit Tapirisat***, *supra* at pages 758-59. The court retains a "basic jurisdictional supervisory role" to determine whether the legislative action was performed in accordance with its statutory mandate. While ***Inuit Tapirisat*** was decided in the context of the duty of procedural fairness, its principles have been held to extend to the review of substantive duties: ***Re MacMillan Bloedel Ltd. and Appeal Board under the Forest Act)*** (1984), 8 D.L.R. (4th) 33 (B.C.C.A.) at paras. 12-14.

[126] The question is thus whether, in deciding to issue the OIC, the Lieutenant Governor in Council exercised her discretion within her statutory authority. The only statutory

restriction on her power to issue an Order in Council designating agreements under s. 12(9) of the ***Hydro Act*** is that the agreements be related to the provision of support services, as defined in s. 12(10).

[127] As discussed previously, the petition does not allege that the Accenture Agreements are unrelated to support services. The only argument that the petitioners advanced on this issue was that, because portions of the Accenture Agreements have been redacted, it is not possible to be sure that they relate to support services. They did not, however, point to any specific deletions in the agreements that demonstrated this uncertainty to my satisfaction.

[128] I find nothing to support a conclusion that the Lieutenant Governor in Council acted beyond her statutory authority in exercising her discretion to issue the OIC.

[129] The petitioners also argue that the Lieutenant Governor in Council acted in bad faith in exercising her discretion to enact the OIC. This allegation is based on the concurrence of the OIC and Application No. 3. The petitioners say that representatives of B.C. Hydro and the provincial government made misleading statements, inducing them to believe that the Utilities Commission would review the out-

sourcing arrangements. At the same time, those parties were taking steps to ensure that the ***EMSAA*** and the OIC were put in place as quickly as possible, specifically to preclude a public review by the Commission into the dangers of privatizing B.C. Hydro's support services.

[130] The petitioners rely on the decisions of ***Roncarelli v. Duplessis***, [1959] S.C.R. 121, and ***Markham v. Sandwich South (Township)*** (1998), 160 D.L.R. (4th) 497 (Ont. C.A.) to support their position. In particular, they cite the definition of good faith in ***Roncarelli*** at page 143:

> "Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

[131] I find the present case differs in significant respects from both the ***Roncarelli*** and ***Markham*** decisions. Each of those dealt with arbitrary government action that extended well beyond the ambit of legitimate statutory authority. In each, the court found a gross abuse of legal power for ulterior motives.

[132] Here, I have found that the Lieutenant Governor in Council acted within her statutory jurisdiction in deciding to issue the OIC, and that the OIC conformed to the intent and purpose of its legislative framework. In such circumstances, there is a rebuttable presumption of regularity, that is, that the authority acted appropriately. Credible evidence is required to rebut that presumption. Suspicion and conjecture are not enough: ***Health Sciences Assn. of B.C. v. B.C. (A.G.)*** (1986), 6 B.C.L.R. (2d) 17 (S.C.) at 24; and ***Aasland***, *supra* at paras. 17, 23.

[133] While I appreciate that the timing of the events in this case leads the petitioners to suspect the *bona fides* of the Lieutenant Governor in Council, I am unable to find bad faith in the coincidence of time alone. Nor am I able to construe the statements made by other government representatives, or representatives of B.C. Hydro, as evidence of bad faith on her part.

[134] The Supreme Court of Canada in ***Thorne's Hardware Ltd. v. Canada***, [1983] 1 S.C.R. 106 clearly stated that it is not for the Court to examine the motives of government when performing legislative actions that fall within its statutory mandate. Dickson J., as he then was, stated at pages 112 to 113:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council...
>
> I agree with the Federal Court of Appeal that the government's reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations. . . .

[135] I conclude that the petitioners have failed to establish that the Lieutenant Governor in Council acted in bad faith in issuing the OIC.

[136] With respect to administrative law discrimination, the petitioners argue that the OIC had an unequal effect on them. They alone were deprived of a hearing before the Utilities Commission.

[137] I believe this argument is answered by my earlier finding that the OIC was of general application. While it is true that the petitioners' Application No. 3 was the only matter actually pending before the Utilities Commission when the OIC was passed, the OIC nevertheless applied equally to

all who might seek a hearing before the Commission with respect to the Accenture Agreements.

[138] Moreover, the fact that a legislative act affects some individuals more than others is not by itself enough to lead to a finding of administrative law discrimination: ***Wells,*** *supra* at para. 61.

[139] I find that the petitioners have failed to establish that the Lieutenant Governor in Council exercised her discretion improperly or unreasonably in deciding to issue the OIC.

[140] I conclude that the petitioners' attack on the OIC must fail. Their application for a declaration that the OIC is invalid is accordingly dismissed.

C. Disclosure of Documents

[141] It remains to consider the petitioners' application for disclosure of documents. The right to production of documents in a matter proceeding by petition is extremely limited. While the court may make such an order pursuant to its inherent jurisdiction, that power is to be narrowly applied, and will only be exercised where the petitioner establishes a satisfactory evidentiary basis for the order. That is particularly so where the issue is the validity of an

Order in Council to which the presumption of regularity applies: ***Nechako Environmental Coalition v. British Columbia (Minister of Environment, Lands and Parks)*** (1997), C.E.L.R. (N.S.) 79 (B.C.S.C.).

[142] The petitioners seek production of "all relevant documents" pertaining to the Accenture Agreements. They do not particularize these documents, other than to say that they include unredacted copies of those agreements. They say the latter are relevant to the determination of whether the arrangements with Accenture are a "merger, consolidation, or amalgamation" under s. 53 of the ***UCA***, and whether the Accenture Agreements are truly agreements relating to support services as defined in s. 12(9) of the ***Hydro Act***.

[143] In my view, the characterization of the agreements in the context of s. 53 of the ***UCA*** is not relevant to the issues raised by this petition. The Utilities Commission has dealt with that question in deciding the petitioners' Application No. 3, and in doing so declined their request for production of full copies of the Accenture Agreements. The correctness of those rulings will be dealt with by the Court of Appeal under s. 101 of the ***UCA***.

[144] The question of whether the Accenture Agreements are agreements related to the provision of support services under s. 12(9) is not raised by the petition. Production of documents for this purpose is thus not required.

[145] Even if these documents were relevant, in my view it would not be productive to order their disclosure at this stage, when the issues raised in the petition have been heard. If they were essential to those issues, an application for their production should have been brought before the hearing, as was done in ***Nechako Environmental Coalition v. British Columbia (Minister of Environment, Lands and Parks)***, *supra.*

[146] The petitioners' application for disclosure of documents is dismissed.

CONCLUSION

[147] The relief sought by the petitioners is denied. The claims in the petition that relate to the ***Transmission Corporation Act***, S.B.C. 2003, c. 44, and the related Order in Council issued on November 22, 2003, will remain outstanding. The parties may make arrangements to speak to costs if necessary.

"K. Neilson, J."
The Honourable Madam Justice K. Neilson

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 S.C.R. 489

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: April 17, 2012;

Judgment: December 13, 2012.

File No.: 34231.

[2012] 3 S.C.R. 489 | [2012] 3 R.C.S. 489 | [2012] S.C.J. No. 68 | [2012] A.C.S. no 68 | 2012 SCC 68

IN THE MATTER OF the Broadcasting Act, S.C. 1991, c. 11; AND IN THE MATTER OF the Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168; AND IN THE MATTER OF an application by way of a reference to the Federal Court of Appeal pursuant to ss. 18.3(1) and 28(2) of the Federal Courts Act, R.S.C. 1985, c. F-7. Cogeco Cable Inc., Rogers Communications Inc., TELUS Communications Company and Shaw Communications Inc., Appellants; v. Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc., Newfoundland Broadcasting Co. Ltd. and Canwest Television Limited Partnership, Respondents, and Canadian Radio-television and Telecommunications Commission, Intervener.

(126 paras.)

Appeal From:

[page490]

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Communications law — Broadcasting — Canadian Radio-television and Telecommunications Commission ("CRTC") adopting policy establishing market-based value for signal regulatory regime — Policy empowering private local television stations ("broadcasters") to negotiate direct compensation for retransmission of signals by cable and satellite companies ("broadcasting distribution undertakings" or "BDUs"), as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether CRTC having jurisdiction under Broadcasting Act to implement proposed regime — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10.

Legislation — Conflicting legislation — CRTC adopting policy establishing market-based value for signal regulatory regime — Policy empowering broadcasters to negotiate direct compensation for retransmission of signals by BDUs, as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether proposed regime conflicting with Copyright Act — Whether Copyright Act limiting

discretion of CRTC in exercising regulatory and licensing powers under Broadcasting Act — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10 — Copyright Act, R.S.C. 1985, c. C-42, ss. 2, 21, 31, 89.

Summary:

Responding to recent changes to the broadcasting business environment, in 2010 the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations could choose to negotiate direct compensation for the retransmission of their signals by BDUs, such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the question of its jurisdiction to the Federal Court of Appeal, which held the proposed regime was within the statutory authority of the CRTC pursuant to its broad mandate under the *Broadcasting Act* to regulate and supervise all aspects [page491] of the Canadian broadcasting system, and that no conflict existed between the regime and the *Copyright Act*.

Held (Deschamps, Abella, Cromwell and Karakatsanis JJ. dissenting): The appeal should be allowed. The proposed regulatory regime is *ultra vires* the CRTC.

Per McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime.

No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(*k*)), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" when issuing licences (s. 9(1)(*h*)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found. Here, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs or the direct economic relationship between BDUs and broadcasters. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act.

[page492]

Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*. First, the value for signal regime conflicts with s. 21(1) because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*. A broadcaster's s. 21(1)(*c*) exclusive right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not include a right to authorize or prohibit a BDU from retransmitting those communication signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in s. 21(1), specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between authors' and users' rights as expressed by Parliament in s. 21(1).

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried

in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing [page493] and regulatory jurisdiction under the *Broadcasting Act*.

Section 31(2)(*b*), which provides that in order for the exception to copyright to apply the retransmission must be "lawful under the *Broadcasting Act*", is also not sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime. A general reference to "lawful under the *Broadcasting Act*" cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*. Finally, the value for signal regime would create a new right to authorize and prevent retransmission, in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

Per Deschamps, Abella, Cromwell and Karakatsanis JJ. (dissenting): The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act.* Courts have consistently determined the validity of the CRTC's exercises of power under the *Broadcasting Act* by asking whether the power was exercised in connection with a policy objective in s. 3(1). This broad jurisdiction flows from the fact that the Act contains generally-worded powers for the CRTC to regulate and supervise all aspects of the Canadian broadcasting system, to impose licensing conditions, and to make regulations as the CRTC deems appropriate to implement the objects set out in s. 3(1).

The proposed regime is within the CRTC's regulatory jurisdiction since it is demonstrably linked to several of the basic operative broadcasting policies in s. 3. The regime is merely an extension of the current regime, which places conditions, including financial ones, on BDUs for the licence to retransmit local stations' signals. This broad mandate to set licensing conditions in furtherance of Canada's broadcasting [page494] policy is analogous to the CRTC's broad mandate to set rates, recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime. Nothing in either the definition of "broadcaster" or in s. 21(1)(*c*) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

The BDUs' argument that the proposed regime creates royalties for local signals contrary to s. 31(2)(*d*) of the *Copyright Act*, turns s. 31(2)(*d*) on its head. Section 31(2)(*d*) simply requires that BDUs pay a royalty to copyright owners for retransmitting "distant signals". This provision has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission license under the *Broadcasting Act*.

Cases Cited

By Rothstein J.

Referred to: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772; *R. v. Ulybel Enterprises Ltd.*, [page495] 2001 SCC 56, [2001] 2 S.C.R. 867; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, [2012] 2 S.C.R. 283.

By Abella and Cromwell JJ. (dissenting)

Lévis (City) v. Fraternité des policiers de Lévis Inc., 2007 SCC 14, [2007] 1 S.C.R. 591; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, aff'g (1976), 13 O.R. (2d) 156; *Canadian Radio-Television and Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3; *Assn. for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission*, [1981] 1 F.C. 524, leave to appeal refused, [1981] 1 S.C.R. v; *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada* (1996), 137 D.L.R. (4) 561; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336.

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Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65, ss. 61, 62.

Copyright Act, R.S.C. 1985, c. C-42, ss. 2 "broadcaster", "communication signal", "compilation", "copyright", "dramatic work", "telecommunication", 2.4(1)(*b*), 3(1), (1.1), 21, 23(1)(*c*), 31, 71 to 74, 76(1), (3), 89.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18.3, 28(2).

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Radiocommunication Act, R.S.C. 1985, c. R-2.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Sharlow and Layden-Stevenson JJ.A.), 2011 FCA 64, 413 N.R. 312, 91 C.P.R. (4) 389, [2011] F.C.J. No. 197 (QL), [page497] 2011 CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

Counsel

Neil Finkelstein, *Steven G. Mason* and *Daniel G. C. Glover*, for the appellant Cogeco Cable Inc.

Gerald L. Kerr-Wilson and *Ariel Thomas*, for the appellants Rogers Communications Inc. and TELUS Communications Company.

Kent E. Thomson, *James Doris* and *Sarah Weingarten*, for the appellant Shaw Communications Inc.

Benjamin Zarnett, *Robert Malcomson, Peter Ruby* and *Julie Rosenthal*, for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervener.

The judgment of McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ. was delivered by

ROTHSTEIN J.

I. Introduction

1 The Canadian Radio-television and Telecommunications Commission ("CRTC") has authority under the *Broadcasting Act*, S.C. 1991, c. 11, to regulate and supervise the Canadian broadcasting system. In 2010, the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations (referred to as such or as "broadcasters") could choose to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings ("BDUs"), such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The reference question in this appeal is [page498] whether the CRTC has jurisdiction to implement the proposed regime.

2 The *Broadcasting Act* grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broadcasting policy as set out in the *Broadcasting Act*. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the *Copyright Act*, R.S.C. 1985, c. C-42: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 44-52. As such, the CRTC, as a subordinate legislative body, cannot enact a regulation or attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute.

3 In my opinion, the value for signal regime does just that and is therefore *ultra vires*.

II. Facts and Procedural History

4 Broadcasters acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their respective signal transmitters. BDUs, such as cable or satellite television service providers, pick up the over-the-air signals of broadcasters and distribute them to the BDUs' subscribers for a fee. Even though broadcasters' signals are free to anyone equipped with a television and an antenna, more than 90 percent of Canadians receive these signals as part of their cable service (transcript, at p. 2).

[page499]

5 BDUs must be licensed by the CRTC pursuant to s. 9 of the *Broadcasting Act*. Under the current regulatory model, the CRTC requires BDUs to provide certain benefits to broadcasters, in the nature of mandatory carriage and contributions to a local programming improvement fund accessible by certain local television stations. However, the broadcasters do not receive fees directly from the BDUs for the carriage of their signals.

6 As noted by the Federal Court of Appeal ("FCA"), 2011 FCA 64, 413 N.R. 312, at para. 6, the CRTC has concluded that the existing model does not adequately deal with recent changes to the broadcasting business environment, which have caused advertising revenues for broadcasters to fall, while the revenues of BDUs have increased. As the FCA observed, the CRTC has concluded that this has resulted in a significant shift in their relative market positions and a financial crisis for broadcasters.

7 As a solution, the CRTC seeks to implement what it terms a "value for signal regime". This regime would permit broadcasters to negotiate with BDUs the terms upon which the BDUs may redistribute their signals. These are its main features:

- Broadcasters would have the right, every three years, to choose either to negotiate with BDUs for compensation for the right to retransmit the broadcaster's programming services, or to continue to operate under the existing regulatory regime;
- A broadcaster who participates in the value for signal regime would forego all existing regulatory protections, including, for example, mandatory distribution of its signals as part of the basic package of BDU television services, and the right to require a BDU to delete a [page500] non-Canadian program and substitute it with the comparable program of the broadcaster, where the two programs are simultaneously broadcast and retransmitted by the BDU;
- The CRTC would only involve itself in the negotiations for the value for signal regime if the parties do not negotiate in good faith or if they request the CRTC to arbitrate;
- If no agreement is reached between the broadcaster and the BDU on the value of the distribution of the local television's programming services, the broadcaster could require the BDU to delete any program owned by the broadcaster or for which it has acquired exclusive contractual exhibition rights from all signals distributed by the BDU in the broadcaster's market.

The proposed regime is fully described in *Broadcasting Regulatory Policy CRTC 2010-167* (2010) ("2010 Policy") (A.R., vol. II, at p. 1).

8 The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the following question to the FCA:

> Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

A. *Federal Court of Appeal - Sharlow J.A. (Layden-Stevenson J.A. Concurring)*

9 Sharlow J.A., writing for the majority, found the proposed regime to be within the statutory authority of the CRTC. She found that the *Broadcasting Act* [page501] confers a broad mandate on the CRTC to regulate and supervise all aspects of the Canadian broadcasting system. Sharlow J.A. rejected the BDUs' argument that the proposed regime conflicts with the *Copyright Act*. She found that s. 21(1) of the *Copyright Act* gives a broadcaster a copyright in the signals it broadcasts, including the sole right to authorize a BDU to retransmit those signals (para. 33). In her opinion, while s. 31(2) provides that the s. 21 copyright is not infringed by a BDU when it retransmits a station's local signal, s. 31(2)(*b*) provides that the retransmission must be "lawful under the *Broadcasting Act*" (para. 38). She concluded that "the BDUs' statutory retransmission rights in subsection 31(2) of the *Copyright Act* [are] subject to paragraph 31(2)(b), [and that] Parliament has ranked the objectives of Canada's broadcasting policy ahead of those statutory retransmission rights" (para. 40).

B. *Federal Court of Appeal - Nadon J.A. (Dissenting)*

10 In Nadon J.A.'s view, the proposed value for signal regime is *ultra vires* the powers of the CRTC because it conflicts with Parliament's "clear statement in paragraph 31(2)(*d*) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals" (para. 49). In his view, Parliament's expressed intention to treat local and distant signals differently is a limit on the CRTC's jurisdiction to impose conditions under the *Broadcasting Act* (para. 73). Given the exhaustiveness of the statutory copyright law, in Nadon J.A.'s opinion, the CRTC's regime must be *ultra vires* (para. 85).

III. Analysis

11 The scope of the CRTC's jurisdiction under the *Broadcasting Act* must be interpreted according [page502] to the modern approach to statutory interpretation. *Per* Elmer A. Driedger's formulation, adopted multiple times by this Court,

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Bell ExpressVu*, at para. 26, *per* Iacobucci J., citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

12 In addition,

> ... where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.

(*Bell ExpressVu*, at para. 27)

The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 411).

13 In my respectful opinion, for two reasons, the provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the *Broadcasting Act* themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.

A. *The CRTC's Jurisdiction Under the Broadcasting Act*

14 The reference question asks whether the CRTC has the jurisdiction to implement the [page503] proposed value for signal regime. Answering the question requires interpreting the powers granted to the CRTC under the *Broadcasting Act* and establishing whether the *Copyright Act* limits the discretion of the CRTC in the exercise of its regulatory and licensing powers. The relevant sections of the *Broadcasting Act* and of the *Copyright Act* are annexed to these reasons (see Appendix).

15 There is no doubt that the licensing and the regulation-making powers granted to the CRTC are broad. The *Broadcasting Act* describes the mission of the CRTC as regulating and supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)" (s. 5(1)).

16 The powers granted to the CRTC are found in ss. 9 and 10 of the *Broadcasting Act*. Section 9 grounds the CRTC's licensing power. Among other things, it gives the CRTC the authority to establish classes of licences, issue licences and require licensees to perform certain acts "in furtherance of its objects". Under s. 9(1)(*b*)(i), the

issuance of the licences may be subject to such terms and conditions "as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)".

17 Section 10 confers on the CRTC the power to make regulations. It allows the CRTC to make regulations "in furtherance of its objects" and enumerates 10 specific areas for regulations. On their face, these pertain mainly to such matters as setting the standards for programs, the allocation of broadcasting time for different types of content and the carriage of certain programming services by distribution undertakings. However, s. 10(1)(*k*) is a basket clause granting the CRTC the residual authority to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects".

18 Section 3(1) of the *Broadcasting Act* declares at length the broadcasting policy for Canada, [page504] which this Court summarized in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 ("*ISP Reference*"), at para. 4, as:

> ... the policy objectives listed under s. 3(1) of the Act focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.

19 In substance, the value for signal regime would regulate the economic relationships between BDUs and broadcasters. The salient feature is that the CRTC would grant individual broadcasters an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU. This program deletion right is intended to give the broadcasters the necessary leverage to require compensation from the BDUs.

20 No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime. However, the broadcasters submit that ss. 9(1)(*b*)(i) and 9(1)(*h*) empower the CRTC to dictate the terms of the carriage relationship between broadcasters and BDUs, in furtherance of Canadian broadcasting policy (R.F., at para. 65). The broadcasters submit that the power to do this also exists under s. 10(1)(*g*), which empowers the CRTC to make regulations "respecting the carriage of any foreign or other programming services by distribution undertakings" and s. 10(1)(*k*) which allows regulations to be made "respecting such other matters as [the CRTC] deems necessary for the furtherance of its objects".

21 In its 2010 Policy, the CRTC determined:

> ... in order to fulfil the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. [para. 163]

[page505]

The CRTC referred specifically only to s. 3(1)(*e*) and (*f*) of the *Broadcasting Act* (see para. 152 of the 2010 Policy). In their factum, the broadcasters add s. 3(1)(*g*), (*s*) and (*t*), 9 and 10 (R.F., at paras. 63-65, 69, 74-79 and 87). The CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10.

22 Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.

23 In my opinion, to find jurisdiction, it was not sufficient for the CRTC to refer in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. As

stated by Gonthier J., writing for the majority of this Court in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476:

> ... courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. [para. 42]

It is therefore necessary to consider the jurisdiction granted to the CRTC under ss. 9 and 10 of the Act to attach conditions to licences and to make regulations.

[page506]

24 The broadcasters argue that the test for the CRTC's jurisdiction in enacting regulations under s. 10 of the *Broadcasting Act* is whether the regulation objectively refers to one of the objectives in s. 3. They rely on this Court's decision in *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, where the majority of the Court, *per* Spence J., stated, at p. 11:

> ... the validity of any regulation enacted in reliance upon s. 16 [now s. 10] must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively.

25 In my opinion, *CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a *sufficient* test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that policy statements circumscribe the discretion granted to a subordinate legislative body.

26 The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to determine whether rates set by telecommunication companies are just and reasonable. The CRTC's jurisdiction over the setting of rates under s. 27 of the *Telecommunications Act*, S.C. 1993, c. 38, provides that rates must be just and reasonable. Under that section, the CRTC is specifically empowered to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).

[page507]

27 This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in that case. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(*k*) and a broad licensing power under s. 9(1)(*b*)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.

28 That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. Rather,

> discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation.

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 50, *per* Bastarache J.)

29 A broadly drafted basket clause, such as s. 10(1)(*k*), or an open-ended power to insert "such terms and conditions as the [regulatory body] deems appropriate" (s. 9(1)(*h*)) cannot be read in isolation: *ATCO,* at para. 46. Rather, "[t]he content of a provision 'is enriched by the rest of the section in which it is found ...'" (*Ontario v. Canadian Pacific Ltd*., [page508] [1995] 2 S.C.R. 1031, at para. 64, *per* Gonthier J., citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 647-48; see also Sullivan, at pp. 228-29). In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.

30 However, the broadcasters submit that s. 10(1)(*g*), which enables the CRTC to make regulations "respecting the carriage of any foreign or other programming services", and s. 9(1)(*h*), which empowers the CRTC to require a licensed BDU "to carry ... programming services specified by the Commission", together with the broad wording of ss. 10(1)(*k*) and 9(1)(*b*)(i), empower the CRTC to "dictate the terms of the carriage relationship between broadcasters and BDUs" (R.F., at para. 65). Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.

31 I cannot agree. On their face, ss. 9(1)(*h*) and 10(1)(*g*) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(*k*) and 9(1)(*b*)(i), they entitle the CRTC to create exclusive control rights for broadcasters.

32 This interpretation is consistent with a reading of the Act in its entire context. The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition, [page509] the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target "the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse" (*ISP Reference*, at para. 4). While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act: Sullivan, at pp. 388 and 390-91. Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.

33 In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.

B. *The Larger Statutory Scheme - Conflict with the Copyright Act*

(1) Connection Between the *Broadcasting Act* and the *Copyright Act*

34 Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, that would not resolve the question in this reference as the *Broadcasting Act* is part of a larger statutory scheme that includes the *Copyright Act* and the *Telecommunications Act*. As Sunny Handa et al. explain, the *Telecommunications Act* and the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are the main statutes governing carriage, and the *Broadcasting Act* deals with content, which is "the object of 'carriage'" (S. Handa et al., *Communications Law in Canada* (loose-leaf ed.), [page510] at s. 3.21). In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying

that "there is a connection between these two statutes". Considering that the *Broadcasting Act* and the *Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

35 Indeed, the *Broadcasting Act* regulates "program[s]" that are "broadcast" for reception by the Canadian public (see s. 2(1), definitions of "broadcasting" and of "program"), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, "[t]he *Broadcasting Act* is primarily concerned with the programmed content delivered by means of radio waves or other means of telecommunication to the public" (Handa et al., at s.5.5).

36 The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d'Art du Petit Champlain inc*., 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel*, *Inc. v. 3894207 Canada Inc*., 2006 SCC 22, [2006] 1 S.C.R. 772, [page511] at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56.) Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals (see ss. 2 "copyright" and 21 of the *Copyright Act*). In addition, "program[s]" within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely "dramatic work[s]" or "compilation[s]" thereof, under the *Copyright Act*: see, e.g., discussion in J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at para. 15: 3(a).

37 Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend "harmony, coherence, and consistency between statutes dealing with the same subject matter" (*R. v. Ulybel Enterprises Ltd*., 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

38 Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to *avoid* conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

> There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones ... .

39 In addition, "[o]rdinarily, ... an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation" (*Friends of the Oldman River Society v. Canada (Minister of [page512] Transport)*, [1992] 1 S.C.R. 3, at p. 38). Consequently, as it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.

40 It is therefore necessary to first determine if a conflict arises.

(2) Types of Conflict

41 For the purposes of statutory interpretation, conflict is defined narrowly. It has been said that overlapping

provisions will be given effect according to their terms, unless they "cannot stand together" (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J.).

42 In *Lévis (City) v. Fraternité des policiers de Lévis Inc*., 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

> The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for [page513] example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [Emphasis added.]

43 Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; Sullivan, at p. 330).

44 This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.

45 Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.

[page514]

(3) The Allocation of Rights Under the *Copyright Act*

(a) *Section 21*

46 The BDUs contend that the CRTC's proposed value for signal regime conflicts with the retransmission regimes specifically established in ss. 21(1)(*c*) and 31(2) of the *Copyright Act*.

47 It is necessary to describe the *Copyright Act*'s regimes at some length. It will become apparent from this description that, in my respectful view, the analysis of the *Copyright Act* conducted by the majority of the FCA is problematic.

48 The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

> (*a*) to fix it;
>
> (*b*) to reproduce any fixation of it that was made without the broadcaster's consent;
>
> (*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
>
> (*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,
>
> and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

49 The aspect relevant for this appeal is in para. (*c*). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal. [page515] Section 2 of the *Copyright Act* defines "broadcaster" as

> a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

50 The underlined portion of the definition refers to BDUs. BDUs are not a "broadcaster" within the meaning of the *Copyright Act* because their primary activity in relation to communication signals is their retransmission. Thus, the broadcaster's s. 21(1)(*c*) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster's exclusive right does not include a right to authorize or prohibit a BDU from retransmitting its communication signals.

(b) *Section 31*

51 In addition to their s. 21 rights in communication signals, broadcasters may hold other retransmission rights under the *Copyright Act*. As mentioned, a pre-recorded television *program* is often copyright subject matter that can be protected as an original "dramatic work" or a "compilation" thereof (s. 2 of the *Copyright Act*). The broadcaster, as a corporation, may hold copyright in the pre-recorded program or compilation of programs carried in its signals, either as the employer of the author of such a work or as an assignee of copyright from the original author.

52 The *Copyright Act* seeks to regulate the economic rights in communication signals, as well as the retransmission of works by BDUs. The BDUs contend that the value for signal regime would conflict with the retransmission regime for works [page516] set out in s. 31 of the *Copyright Act*. The proposed regime would enable broadcasters to control the simultaneous retransmission of *programs*, by granting them the right to require deletion of any *program* in which they own or control the copyright from all signals distributed by the BDU, if no agreement is reached on compensation for the simultaneous retransmission of the broadcaster's programming services.

53 The *Copyright Act* in s. 3(1)(*f*) confers on the owner of copyright in a work the exclusive right to communicate it to the public by telecommunication. Section 3(1)(*f*) provides:

> **3.** (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right ...
>
> ...

> (*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> ...

"[T]elecommunication", in s. 2 of the Act, is broadly defined to include

> any transmission of ... intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.

54 These general words would at first blush confer on the copyright owner, including a broadcaster in that capacity, the right to control the retransmission of the works in which it holds copyright. However, s. 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the *retransmission* of literary, dramatic, musical or artistic works carried in signals. "[S]ignal" is defined for the purposes of s. 31(2) to mean "a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station" (see s. 31(1)). Section 31(1) defines "retransmitter" as "a [page517] person who performs a function comparable to that of a cable retransmission system".

55 Section 31(2) provides:

> **31...** .
>
> (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if
>
> (*a*) the communication is a retransmission of a local or distant signal;
>
> (*b*) the retransmission is lawful under the *Broadcasting Act*;
>
> (*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
>
> (*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and
>
> (*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

56 Read together, ss. 31(1) and 31(2) create an *exception* to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication. The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (*a*) through (*e*) are met. Paragraph (*b*) provides that the retransmission must be lawful under the *Broadcasting Act*. I will come back to the meaning of this particular condition.

57 In the case of works carried in distant signals only, the section provides copyright owners with a right to receive royalties as payment for the simultaneous retransmission of those works by a BDU. The royalties are determined by the [page518] Copyright Board, on the basis of tariffs filed by collective societies, pursuant to the regime detailed in ss. 71 to 74 of the *Copyright Act*. Under s. 31(2), works carried in local signals attract no royalty when retransmitted in accordance with all conditions of that section. The Governor in Council has defined "local signal" as the signal of a terrestrial station reaching all or a portion of the service area of a retransmitter. A "distant signal" is a signal that is not a local signal. See ss. 1 and 2 of *Local Signal and Distant Signal Regulations*, SOR/89-254.

58 It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss.

76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(*f*), to communicate the work by telecommunication to the public. On the other hand, the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(*a*) and (*d*)). Both user rights are, subject to s. 31(2), beyond the owner's control.

[page519]

59 In sum, under the *Copyright Act*'s retransmission regimes for communication signals and for works:

- Broadcasters have a limited exclusive right in their *signals* (s. 21);
- Broadcasters do not have an exclusive right in *signals* against BDUs;
- BDUs have the right to simultaneously retransmit *works* carried in local signals without authorization and without payment to the copyright owner;
- Owners of copyright in those works, including broadcasters in that capacity, do not have the right to block retransmission of local or distant signals carrying their works;
- The Copyright Board has jurisdiction to value the compulsory licence royalty for the simultaneous retransmission of works carried in distant signals;

(4) Finding Conflict

60 The CRTC's proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of whether or not they carry copyright protected "work[s]", and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation. Importantly, contrary to the retransmission regimes of the *Copyright Act*, the value for signal regime proposed by the CRTC would grant individual broadcasters, should they elect to be governed by this regime, the *right to prohibit* the simultaneous retransmission of their programs.

[page520]

61 As mentioned, the presumption of coherence between related Acts of Parliament requires avoiding an interpretation of a provision that would introduce conflict into the statutory scheme. In this case, the presumption of coherence requires that if the CRTC's proposed regulatory regime would create such conflict with the specific expressions of Parliament's intent under the *Copyright Act*, it must be *ultra vires*. Sections 21 and 31(2) of the *Copyright Act* are relevant.

62 First, the value for signal regime conflicts with s. 21(1) of the *Copyright Act* because it would *grant* broadcasters a retransmission authorization right against BDUs that was *withheld* by the scheme of the *Copyright Act*.

63 Looking only at the letter of the provision, s. 21 expressly speaks only to the relationship between a broadcaster and another broadcaster and not the relationship between a broadcaster and a retransmitter. As such, it is arguable that nothing in s. 21 purports to prevent another regulator from regulating the terms for carriage of a broadcaster's television signal by the BDUs, leaving it open to the CRTC, provided it is authorized to do so under the *Broadcasting Act*, to establish a value for signal regime without conflicting with s. 21.

64 However, s. 21 cannot be considered devoid of its purpose. This Court has characterized the purpose of the *Copyright Act* as a balance between authors' and users' rights. The same balance applies to broadcasters and

users. In *Théberge*, Binnie J. recognized that the *Copyright Act*

> is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, [page521] to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

(See also *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC 13, [2004] 1 S.C.R. 339, at paras. 10 and 23.)

65 This point was reiterated in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427. In that case, the Court considered whether, for the purposes of the *Copyright Act*, Internet Service Providers "communicate [works] to the public" when such works are requested by their subscribers - thereby infringing copyright in such works. The Court was required to interpret s. 2.4(1)(*b*) of the *Copyright Act*, which provides that

> a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

66 In rejecting the argument that s. 2.4(1)(*b*), as an exemption, should be read narrowly, the majority, *per* Binnie J., held that

> [u]nder the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give "the fair and balanced reading that befits remedial legislation". [para. 88]

The Court recognized that "[s]ection 2.4(1)(*b*) is not a loophole but an important element of the balance struck by the statutory copyright scheme" (para. 89). The Court therefore confirmed its earlier teaching in *Théberge* that the policy balance established by the *Copyright Act* is maintained *also* by "giving due weight to [the] limited nature" of the rights of creators (*Théberge*, at para. 31).

[page522]

67 In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Théberge*, at para. 30).

68 Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime *ultra vires*, further conflict arises in my opinion between the value for signal regime and the retransmission rights in *works* set out in s. 31 of the *Copyright Act*.

69 As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a *work* carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, "program[s]" are often "work[s]" within the meaning of the *Copyright Act*. The value for signal regime would entitle broadcasters to control

the simultaneous retransmission of works, while the *Copyright Act* specifically excludes it from the [page523] control of copyright owners, including broadcasters.

70 Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works. The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(*f*) communication right. It would disrupt the balance established by Parliament.

71 The recent legislative history of the *Copyright Act* supports the view that Parliament made deliberate choices in respect of copyright and broadcasting policy. The history evidences Parliament's intent to facilitate simultaneous retransmission of television programs by cable and limit the obstacles faced by the retransmitters.

72 Leading up to the 1997 amendment to the *Copyright Act* (Bill C-32), under which s. 21 was introduced, broadcasters made submissions to the Standing Committee on Canadian Heritage seeking *signal* rights. They contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs. The broadcasters, in fact, argued expressly against the narrow right that Parliament eventually adopted as s. 21(1)(*c*). See, e.g., submissions of CTV to Standing Committee on Canadian Heritage, "Re: Bill C-32" (August 30, 1996) (A.R., [page524] vol. VII, at p. 68); submissions of WIC Western International Communications Ltd. (1996) (A.R., vol. VII, at p. 15); submissions of the British Columbia Association of Broadcasters, "Bill C-32, the Copyright Reform Legislation" (August 28, 1996) (A.R., vol. VII, at p. 20); submissions of the Canadian Association of Broadcasters, "Clause by Clause Recommendations for Amendments to Bill C-32" (November 27, 1996) (A.R., vol. VII, at p. 77). In addition, although this section has not been amended since 1997, ongoing consultations between Parliament and the broadcasters show continued requests from the latter to include the right to authorize BDU retransmissions. See, e.g., submissions of CTVglobemedia, "Re: Government's 2009 Copyright Consultations" (September 11, 2009) (A.R., vol. IX, at pp. 35-37); Canadian Association of Broadcasters, "A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act*" (September 15, 2003) (A.R., vol. IX, at p. 28).

73 Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily determinative of legislative intention. However, in the context of repeated urging from the broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by s. 21 (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, *per* Abella J.).

74 The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(*f*) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. Section 3(1)(*f*) was amended in 1988 to confer the exclusive right to "communicate the work to the public by telecommunication" to reflect the obligations entered [page525] into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61-62; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 36-37, and McKeown, at para. 3: 2(b)). The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.

75 However, at the same time, Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71-76 of the *Copyright Act*

(*Canada-United States Free Trade Agreement Implementation Act*, s. 62). Studies on the same question had preceded this enactment; there, too, a major concern was that copyright owners "should not be permitted to stop retransmission because this activity is too important to Canada's communications system" (Standing Committee on Communications and Culture. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright* (1985), at p. 80 (A.R., vol. III, at p. 118); Government Response to A Charter of Rights for Creators (February 1986) (A.R., vol. III, at p. 127)).

76 The value for signal regime would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, [page526] it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*.

77 I said earlier that I would come back to s. 31(2)(*b*) of the *Copyright Act*. The majority of the FCA concluded that there is no incoherence between the value for signal regime and the *Copyright Act* because of s. 31(2)(*b*) of the *Copyright Act*. This section provides that in order for the exception to copyright to apply, the retransmission must be "lawful under the *Broadcasting Act*". The majority appears to have thought this was sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime.

78 In my respectful opinion, this provision cannot serve to authorize the CRTC acting under the *Broadcasting Act* to effectively amend the very heart of the balance of the retransmission regime set out in s. 31(2). Section 31(2)(*b*) is not a so-called Henry VIII clause that confers jurisdiction on the CRTC to promulgate, through regulation or licensing conditions, subordinate legislative provisions that are to prevail over primary legislation (see Sullivan, at pp. 342-43). Absent specific indication, Parliament cannot have intended by s. 31(2)(*b*) to empower a subordinate regulatory body to disturb the balance struck following years of studies. The legislative history does not lend support to this argument; indeed, the history confirms Parliament's deliberate policy choice in enacting the compulsory licence and exception, or user's rights, regime under s. 31(2). A general reference to "lawful under the *Broadcasting Act*" cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*.

79 In any case, the conflict found between the value for signal regime and s. 21 is sufficient. It [page527] could not be overcome even on a different reading of s. 31(2)(*b*) of the *Copyright Act*.

80 There is one final point to be made. Section 89 of the *Copyright Act* provides:

> **89.** No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

The deliberate use of the words "this Act or any other Act of Parliament" rather than "this Act or any other enactment" means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. "Act" and "enactment" are defined in s. 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where

> "Act" means an Act of Parliament;

and

> "enactment" means an Act or regulation or any portion of an Act or regulation;

The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.

81 Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition. Sections 2 and 21 of the *Copyright Act* define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the *Copyright Act* is limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance [page528] struck in the *Copyright Act* between broadcasters and BDUs. The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

82 My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, the differences that they point to do not alter the fundamental functional equivalence between the proposed regime and a copyright. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of their signals if certain conditions are met; the value for signal regime does exactly the same thing. My colleagues are correct that the CRTC cannot, through the value for signal regime, amend s. 21 of the *Copyright Act*. However that is precisely what the proposed regime does. Parliament could have imposed conditions that are the same, or similar to the value for signal regime in s. 21 in the same way it imposed limits in s. 31 on the copyright it granted in respect of retransmission of works, had it intended broadcasters to have such a right. Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. Not calling it copyright does not remove it from the scope of s. 89. If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.

[page529]

IV. Conclusion

83 The reference question should be answered in the negative. The appeal should be allowed with costs throughout.

The reasons of Deschamps, Abella, Cromwell and Karakatsanis were delivered by

ABELLA and CROMWELL JJ. (dissenting)

84 We have had the benefit of reading the reasons of Rothstein J. but, with respect, do not agree.

85 Private local stations are licensed by the CRTC to acquire, create and produce television programming. They serve small geographic areas defined by the reach of their signals. According to the CRTC, local stations are key contributors to attaining the objectives for the Canadian broadcasting system.

86 Local stations have recently experienced a financial crisis. The stations rely on advertising revenue to fund the cost of creating, acquiring and broadcasting high quality Canadian programming. Changes in the broadcasting business environment, however, have caused advertising revenues to rapidly decline. These changes include the development of direct-to-home satellite TV services and speciality television channels, and the widespread adoption of alternative media platforms.

87 Currently, the local stations' over-the-air signals are picked up and retransmitted to a wider audience by cable service providers (known as broadcasting distribution undertakings, or "BDUs"). The BDUs retransmit these signals

to their own subscribers for a fee. Under the current broadcasting regime, BDUs are not required to negotiate compensation with the local stations for retransmitting their signals to a local market. Instead, the CRTC requires the BDUs to provide local stations with [page530] various benefits, including mandatory carriage to the station's local market, preferential channel placement, and substitution of the local stations' advertisements in place of those appearing on American stations transmitting the same program. The current regime also requires the BDUs to make financial contributions to the local stations; specifically, 1.5 percent of the BDUs' gross revenues must go to a local programming improvement fund.

88 In 2010, the CRTC issued the *Broadcasting Regulatory Policy CRTC 2010-167* ("2010 Policy"), concluding that local stations' potential revenue streams under the existing regime needed to be expanded in order to ensure the viability of local programming. The new regime would supply local stations with funds beyond advertising revenues, by giving them the option to negotiate with the BDUs for compensation for all retransmissions of their signals. Where no agreement is reached, the local station would be entitled to prevent retransmission of its signal by the BDU. The BDUs already negotiate compensation with local stations for retransmitting their signals *outside* the station's local market, known as a "distant signal".

89 The proposed regime is consistent with the market-based negotiations that increasingly prevail on other platforms, including discretionary pay and specialty services, video-on-demand and online and mobile streaming platforms. According to the CRTC, it is also consistent with its own approach of using market-based solutions when appropriate. Significantly, the CRTC has determined that the new regime is necessary to preserve local stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*, S.C. 1991, c. 11.

[page531]

90 While the CRTC concluded that the new regime was necessary to ensure the viability of local stations, it acknowledged concern in the 2010 Policy itself that the *Copyright Act*, R.S.C. 1985, c. C-42, might create a "potential impediment" to its jurisdiction to implement the regime (para. 165). Under ss. 18.3 and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, it therefore brought the following reference question to the Federal Court of Appeal:

> Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

91 We agree with the majority of the Federal Court of Appeal that this question should be answered in the affirmative, and would therefore dismiss the appeal (2011 FCA 64, 413 N.R. 312). In our view, the new regime is merely an extension of the current regime, which places several conditions - including financial ones - on BDUs for the licence to retransmit local stations' signals. We also conclude that nothing in the *Copyright Act* creates a barrier to the CRTC's authority to implement the new regime.

Analysis

92 The narrow reference question requires us to determine whether the CRTC has jurisdiction under the *Broadcasting Act* to implement the new regime. Read on its own, the *Broadcasting Act* appears to grant this jurisdiction, which raises the question of whether something in the *Copyright Act* demonstrates Parliament's intent to derogate from or attenuate this jurisdiction in order to satisfy another public interest. In other words, we must determine whether there would be an unavoidable conflict if the *Broadcasting Act* were read to confer on the CRTC the jurisdiction to implement the [page532] regime. If so, this would suggest a less expansive reading of the CRTC's jurisdiction. An unavoidable conflict only occurs when two statutes directly contradict one another, in a way that applying one excludes the application of the other, or where their concurrent application could lead to unreasonable

or absurd results: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Generally, the Court will favour an interpretation that avoids such a conflict: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. However, in our view, there is no conflict between the *Broadcasting Act* and the *Copyright Act* that would prevent reading the former as conferring on the CRTC the jurisdiction to implement the new regime.

93 Analytically, the first question is whether the CRTC has jurisdiction to implement the proposed regime under the *Broadcasting Act*. The CRTC is granted a broad, flexible mandate to implement measures that further the broadcasting policy of Canada. Section 3(1) of the *Broadcasting Act* sets out the basic operative broadcasting policies. They primarily address the need to support local content in television and other programs in order to enrich Canada's cultural, political, social and economic environments. The provisions that confer powers on the CRTC - what Rothstein J. refers to as "jurisdiction-conferring" provisions - explicitly incorporate these policy objectives. Under s. 5(1) of the Act, the CRTC "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)". The CRTC possesses the jurisdiction to issue licences to participants in the Canadian broadcasting system. It can impose any conditions on these licences that it "deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)": s. 9(1)(*b*)(i); *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; see also *Canadian Radio-Television and Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530, at p. 545. The CRTC may also make regulations [page533] under s. 10(1)(*k*) of the Act "respecting such other matters as it deems necessary for the furtherance of its objects". Section 3(2) of the Act states that the Canadian broadcasting system is a single system, and that the objectives in s. 3(1) can best be achieved by regulation and supervision through "a single independent public authority": the CRTC.

94 As "broadcasting undertaking[s]" under s. 2(1) of the Act, BDUs are part of the single broadcasting system that the CRTC must regulate and supervise pursuant to s. 5(1). BDUs do not have a freestanding right to retransmit local stations' programs: BDUs derive that right *only* from licences granted pursuant to s. 9 of the *Broadcasting Act*, subject to any conditions imposed under s. 9(1)(*b*)(i). The current conditions of the BDUs' licences to retransmit local stations' signals require them to provide the benefits noted earlier, which include payments to a fund for the local stations. The proposed regime would involve an extension or alteration of the conditions on BDUs' licences, requiring them to negotiate compensation directly with the local stations.

95 The breadth of the CRTC's discretion to determine what measures are necessary to further Canada's broadcasting policy was acknowledged by this Court in *CKOY*. The issue was whether the CRTC had jurisdiction under the *Broadcasting Act* to enact a regulation which prohibited stations or networks from broadcasting telephone interviews without the participant's consent. Spence J., writing for the majority, observed that "Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created" (at p. 12, quoting with approval the Court of Appeal: (1976), 13 O.R. (2d) 156, at p. 162). He set out the test for [page534] determining the validity of the CRTC's regulations as follows:

> ... the validity of any regulation enacted in reliance upon [the predecessor section to s. 10] must be tested by determining whether the regulation *deals with a class of subject referred to in s. 3* of the statute and ... in doing so the Court looks at the regulation objectively. [Emphasis added; p. 11.]

96 Spence J. concluded that because the particular regulation had a basis in several of the policies enumerated in s. 3 of the Act, including the need to provide a reasonably balanced opportunity for the expression of differing views, and to provide programming of a high standard, the regulation was authorized by the *Broadcasting Act*: pp. 12-14.

97 In accordance with this approach, the proposed regime is within the CRTC's regulatory jurisdiction under the *Broadcasting Act*, since it is demonstrably linked to several of the policies in s. 3. In its 2010 Policy, the CRTC determined that the new regime was necessary to ensure the fulfillment of the broadcasting policy objectives set out

in s. 3(1) of the *Broadcasting Act*. In particular, the CRTC concluded that the regime was necessary to fulfill the policies stated in ss. 3(1)(*e*) and 3(1)(*f*):

> (*e*) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
>
> (*f*) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming ... .

98 Because the proposed regime was intended to save the financially troubled local stations, it is also linked to the policy set out in s. 3(1)(*s*):

[page535]

> (*s*) private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*,
>
> (i) contribute significantly to the creation and presentation of Canadian programming, and
>
> (ii) be responsive to the evolving demands of the public... .

99 Modern statutory interpretation looks to the objectives of the statute to construe the meaning of the words and the mandate. This had led to a long and accepted line of jurisprudence which has consistently interpreted the CRTC's jurisdiction to regulate and supervise Canadian broadcasting broadly. Reference has been made to the "very broad words" of the jurisdiction-conferring provisions in the *Broadcasting Act*, as well as the "embracive objects committed to the Commission under [the predecessor to s. 5(1)], objects which extend to the supervision of 'all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act'": *CKOY* at pp. 13-14, quoting Laskin C.J. in *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

100 The Federal Court of Appeal has similarly and repeatedly indicated that the CRTC "has a very broad mandate under the *Broadcasting Act*", and "has been endowed with powers couched in the broadest of terms for 'the supervision and regulation of the Canadian broadcasting system'... with a view to implementing the broadcasting policy enunciated in section 3 of the Act": *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3 ("*T.W.U.*"), at para. 40; *Assn. for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission*, [1981] 1 F.C. 524 (C.A.), at p. 530, leave to appeal refused, [1981] 1 S.C.R. v. Because of the CRTC's specialization and expertise, "Parliament has granted extensive powers for the supervision and regulation of the [page536] Canadian broadcasting system to allow [the CRTC] to implement the broadcasting policy set out in s. 3 of the *Broadcasting Act* ... . It is settled that the CRTC has broad discretion in exercising its powers to issue or revoke licences": *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (F.C.A.), at para. 2.

101 The CRTC's broad jurisdiction derives from the fact that each of ss. 5(1), 9(1)(*b*)(i) and 10(1)(*k*) confer generally-worded powers, along with a discretion to use them as the CRTC deems appropriate to implement the objects set out in s. 3(1). Courts have consistently determined the validity of the CRTC's exercises of power under any of these provisions by applying the *CKOY* test: was the power used in connection with a policy objective in s. 3(1)? In *CKOY*, Spence J. dealt with the use of the regulation-making power, and noted that the section's "very broad words ... authorize one enactment of regulations to further any policy outlined in the whole of s. 3" (p. 13). In *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174, Le Dain J.A., when he was in the Federal Court of Appeal, held that the same principle applies to the power to attach conditions to licences:

> What was said concerning the validity of a regulation under [the predecessor to s. 10(1)] applies equally in my opinion to the validity of a condition attached to a licence under [the predecessor to s. 9(1)]. That

> section begins, like [the predecessor to s. 10(1)], with the words "In furtherance of the objects of the Commission", and *empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it "deems appropriate for the implementation of the broadcasting policy enunciated in section 3", an authority that is, if anything, even broader than that which is conferred by [the predecessor to s. 10(1)(k)]*. [Emphasis added; p. 192.]

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In *T.W.U.*, Sexton J.A. reiterated that the *CKOY* test applies to the exercise of both the regulation-making and licence-condition powers. He held that

> the CRTC has broad power to impose conditions of license. *The only limitation on the conditions that the CRTC may impose is that it must deem the conditions "appropriate for the implementation of the broadcasting policy set out in subsection 3(1)."* [Emphasis added; para. 48.]

102 Moreover, courts have thus far recognized that the mandate granted to the CRTC under the *Broadcasting Act* is both economic and cultural (*T.W.U.*, at para. 28), not "primarily cultural", as asserted by Justice Rothstein (at para. 32), and have upheld regulations and licensing conditions imposed by the CRTC in furtherance of economic objectives listed in the *Broadcasting Act*, but absent any specific grant of power.

103 In *Canadian Broadcasting League*, as in the present case, at issue was the CRTC's power to direct the economic relationship between participants in the broadcasting system and, specifically, whether the CRTC could fix the installation fees and maximum monthly fees that a BDU could charge to its subscribers. Le Dain J.A. held that the CRTC could do so under *either* its licensing power or its regulation-making power, rejecting the argument that the CRTC lacked the power to regulate rates and fees because it was not expressly granted in the *Broadcasting Act*.

104 The CRTC's jurisdiction to impose financial conditions on broadcast system participants was also upheld by the Federal Court of Appeal in *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada* (1996), 137 D.L.R. (4th) 561. The court held that the CRTC did not exceed its statutory mandate by requiring a pay-per-view licensee to share the revenues it earned [page538] from the distribution of feature films in equal parts with the copyright holder and the licensed programming undertaking that assembled the pay-per-view content. According to the court:

> The reference to the film distribution industry as "an important element of the broadcasting system" *provides a clear link* to the Commission's objects in subsection 5(1) of the *Act* and the broadcasting policy in subsection 3(1). [Emphasis added; p. 565.]

A similar "clear link" exists in this case.

105 And in *T.W.U.*, Sexton J.A. found that the CRTC could enact a regulation that essentially deregulated basic cable service rates in areas where there was sufficient competition to let market forces take over. He found that the CRTC had an obligation, based on the policy objectives in s. 3(1), to ensure that programming was provided at affordable rates, and could rely on market forces to fulfill that objective. Similarly, in this case, the CRTC seeks to implement a market-based negotiation scheme consistent with the policy objectives in s. 3(1).

106 In each of these cases, the CRTC regulated an economic aspect of the Canadian broadcasting system by requiring revenue splitting, by setting rates for services, or by deregulating them. None of these forms of regulation was tied to a specific and express grant of power in the *Broadcasting Act*. In each case, the CRTC was found to have jurisdiction under either or both of its general powers to make regulations and impose conditions on licences.

107 The conclusion that the proposed regime is within CRTC jurisdiction is consistent with this broad mandate,

most recently upheld by this [page539] Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. The issue was whether the CRTC could exercise the rate-setting authority it had under the *Telecommunications Act*, S.C. 1993, c. 38, to require local carriers to spend their deferral accounts by expanding broadband services and giving credits to consumers. This Court confirmed that the decision was entirely within the CRTC's mandate:

> ... the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, *a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake*... .
>
> ...
>
> ... it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with *considerable scope in establishing and approving the use to be made of deferral accounts*. [Emphasis added; paras. 38 and 55.]

108 This broad mandate to set rates in furtherance of Canada's telecommunications policy is analogous to the CRTC's broad mandate to set licensing conditions in furtherance of Canada's broadcasting policy as it has purported to do in the 2010 Policy. Both mandates involve "a polycentric exercise", necessitating a "considerable scope" of jurisdiction.

109 Having determined that the *Broadcasting Act* would grant authority to the CRTC to implement the new regime, the question then is whether the regime creates an "unavoidable conflict" with [page540] the *Copyright Act* in a way that would invalidate this preliminary interpretive conclusion.

110 The BDUs point to two unavoidable conflicts between the proposed regime and the provisions of the *Copyright Act*. First, they argue that the regime conflicts with s. 21(1)(*c*). This provision states that a "broadcaster" - which includes a local station - has the sole right "to authorize another broadcaster to retransmit [its signals] to the public". The definition of "broadcaster" in s. 2 of the *Copyright Act*, however, *excludes* BDUs, as entities whose "primary activity in relation to communication signals is their retransmission". Since BDUs are excluded from the definition, they argue that they need not be "authorize[d]" under s. 21(1)(*c*) at all. This provision therefore conflicts with the proposed regime, which not only gives local stations the right to authorize BDUs to retransmit their signals, but also gives them the right to block BDUs from retransmitting those signals altogether.

111 In our view, there is no unavoidable conflict with s. 21(1)(*c*). There is nothing in either the definition of "broadcaster" or in s. 21(1)(*c*) of the *Copyright Act* that purports to immunize BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime.

112 Section 21(1)(*c*) deals only with the extent to which local stations, as "broadcasters", have a copyright in their communication signals. It does not affect the licensing requirements under the *Broadcasting Act*. While BDUs do not need permission to retransmit signals under the *Copyright Act*, that does not mean they are free to retransmit [page541] signals without permission under the *Broadcasting Act*.

113 The second conflict alleged by the BDUs is with s. 31(2)(*d*) of the *Copyright Act*. The full provision states:

> **31...** .

> (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if
>
> (*a*) the communication is a retransmission of a local or distant signal;
>
> (*b*) the retransmission is lawful under the *Broadcasting Act*;
>
> (*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
>
> (*d*) in the case of the retransmission of a *distant signal, the retransmitter has paid any royalties*, and complied with any terms and conditions, fixed under this Act; and
>
> (*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

114 This section means that it is not an infringement of copyright if a retransmitter, like a BDU, is retransmitting local or distant signals, is retransmitting lawfully under the *Broadcasting Act*, and, if it is retransmitting a distant signal, has paid copyright royalties. The BDUs' main argument under this provision is that even though s. 31(2)(*a*) refers to *both* "local" and "distant" signals, s. 31(2)(*d*) limits royalty payments to distant signals only. This reference to *distant* signals in s. 31(2)(*d*), they say, conflicts with the proposed regime, which effectively creates royalties for local signals, which are generally the type of signals emitted by local stations.

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115 This argument turns s. 31(2)(*d*) on its head. Even within the context of the *Copyright Act* alone, s. 31(2)(*d*) simply requires that BDUs pay a copyright royalty to copyright owners for retransmitting "distant signal[s]". Nothing in the plain meaning of this provision actually *prevents* a copyright royalty for retransmitting "local signal[s]". If Parliament had intended to prevent such royalties for local signals under any circumstances, it would have expressly said so.

116 But, despite the plain wording of s. 31(2)(*d*), the BDUs argue that it was Parliament's implicit intention to prevent royalties for the retransmission of local signals. They point to a number of reports, committee transcripts and submissions relating to the legislative history of the *Copyright Act*, which they claim demonstrate Parliament's consistent refusal to grant such royalties. With respect, these materials are of limited assistance. The fact that Parliament may have decided not to impose royalties on the retransmission of local signals for the benefit of copyright owners has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission licence under the *Broadcasting Act*. We therefore do not accept that s. 31(2)(*d*) of the *Copyright Act* creates an unavoidable conflict with the proposed regime.

117 The lack of a conflict between the proposed regime and s. 31(2)(*d*) is highlighted by s. 31(2)(*b*), which states that BDUs are only entitled to avoid copyright infringement for retransmitting signals where "the retransmission is lawful under the *Broadcasting Act*". We agree with the majority of the Federal Court of Appeal that s. 31(2)(*b*) demonstrates Parliament's clear intention that the conditions placed on BDUs under the *Broadcasting [page543] Act* in furtherance of Canada's broadcasting policy are ranked ahead of the BDUs' statutory right to retransmit signals under s. 31(2) of the *Copyright Act*.

118 The BDUs argue, however, that the language in s. 31(2)(*b*) is too broad to override the specific language in s. 31(2)(*d*) limiting royalties to those for "distant signals". They cite two cases to support their argument: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140. Neither of these two cases deals with a conflict between statutes, and neither stands for the proposition that a single word in a provision - such as "distant" signal - can defeat an otherwise express and clear legislative intention. *Barrie Public Utilities* dealt only with whether the CRTC had jurisdiction to grant a right of access to a utility's power poles under s. 43(5) of the *Telecommunications Act*, and *ATCO* dealt with whether the Alberta Energy and Utilities Board had jurisdiction to

order that proceeds from an asset sale be allocated to a utility's customers under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17.

119 At the end of the day, the BDUs' argument is that the proposed regime somehow creates a new copyright. They argue that the exclusive right to authorize or block retransmission by BDUs, and the requirement that BDUs compensate local stations for retransmitting their signals, creates a copyright for local stations in the retransmission of their signals. According to the BDUs, this violates s. 89 of the *Copyright Act*, which states that "[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament". It also violates this Court's statement in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, that "copyright is a creature of statute and the rights [page544] and remedies provided by the *Copyright Act* are exhaustive" (para. 9).

120 We do not see the proposed regime as giving local stations a copyright in the retransmission of their television signals. Section 2 of the *Copyright Act* defines "copyright" in the case of a communication signal as "the rights described in ... section 21". The exhaustive definition of copyright in s. 21 leaves out the right to authorize retransmission by BDUs. We do not see the proposed regime as *amending* this definition, something it cannot in any event do, given s. 89, but as instituting a different type of regulation with respect to an aspect of broadcasting that is simply not included in the exhaustive statutory scheme of copyright.

121 There are significant functional differences, as well. The copyright owner does not need to forego any other entitlements to claim a copyright. Instead, copyright automatically attaches to a communication signal, lasting for 50 years after the end of the calendar year in which it was broadcast: *Copyright Act*, s. 23(1)(*c*). The proposed regime, in contrast, gives local stations a limited power, and only *vis-à-vis* BDUs. The local stations have to forego their existing entitlements under the current regime in order to participate in the new regime. Moreover, the local stations' power to prevent BDUs from retransmitting their signals is conditional on a complete breakdown of negotiations and a resulting lack of agreement with the BDUs. There are additional conditions under the proposed regime that are not placed on copyright owners: for example, local stations must spend approximately 30 percent of any negotiated compensation they receive on Canadian programming, with 5 percent dedicated to "programs of national interest". Finally, unlike copyright, the new regime is renewable every three years and subject to ongoing regulatory oversight by the CRTC: 2010 Policy, [page545] paras. 51, 74-75 and 155-164. The proposed regime, therefore, is far from "functionally equivalent", as stated by the dissent in the Federal Court of Appeal (at para. 84), to giving local stations a full copyright in the retransmission of their signals.

122 The regime aims to further the objectives found in s. 3(1)(*e*), (*f*) and (*s*), which call for each element of the Canadian broadcasting system to contribute to the creation and presentation of Canadian programming; call for broadcasting undertakings to make maximum use of Canadian creative and other resources in the creation and presentation of programming; and call for private networks, to the extent consistent with the resources available to them, to contribute to the creation and presentation of Canadian programming. The CRTC has every right to turn to market-based means of fulfilling these specific objectives of Canadian broadcasting policy. These objectives differ from the more general copyright objectives of "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator": *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30. Indeed, as discussed above, BDUs are already required to make financial contributions under the current regime, and they are already required to negotiate compensation with local stations for the retransmission of distant signals.

123 In our view, therefore, there is no unavoidable conflict with the *Copyright Act* that would eliminate the CRTC's jurisdiction to implement the proposed regime.

124 The BDUs also make policy arguments, submitting that giving local stations the ability to block their signals, as well as the extra compensation to local stations, will increase costs and [page546] signal interruptions, ultimately hurting end consumers. We do not find this argument persuasive. First, retransmitting local signals is currently the *only* instance where a BDU can distribute signals without the broadcaster's prior consent. The CRTC has

implemented mandatory negotiation-based schemes for other services, including specialty channels, pay-per-view and video-on-demand.

125 More importantly, however, the new regime's potential success in achieving the broadcasting policy objectives is completely irrelevant to determining whether the CRTC has jurisdiction to implement it. Any question as to the wisdom of the regime is a question solely for the CRTC as the single broadcasting authority in s. 3(2) of the *Broadcasting Act*. As an expert body, the CRTC, not the courts, is in the best position to decide what measures are necessary to save local stations from going bankrupt. In any event, if for any reason the proposed regime proves unworkable in the future, the CRTC has both the authority and the necessary expertise to make the appropriate changes.

126 We would therefore dismiss the appeal with costs.

* * * * *

APPENDIX

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

...

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

...

[page547]

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

...

"program" means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

"programming undertaking" means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

...

3. (1) It is hereby declared as the broadcasting policy for Canada that

...

(*e*) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(*f*) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming ...;

(*g*) the programming originated by broadcasting undertakings should be of high standard;

...

(*s*) private networks and programming undertakings should, to an extent consistent with [page548] the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(*t*) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

...

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services

...

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

5. (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(*a*) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

(*b*) takes into account regional needs and concerns;

(*c*) is readily adaptable to scientific and technological change;

[page549]

(*d*) facilitates the provision of broadcasting to Canadians;

(*e*) facilitates the provision of Canadian programs to Canadians;

(*f*) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and

(*g*) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

9. (1) Subject to this Part, the Commission may, in furtherance of its objects,

(*a*) establish classes of licences;

(*b*) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee

(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and

(ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(*l*) and (*m*);

(*c*) amend any condition of a licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission's own motion;

(*d*) issue renewals of licences for such terms not exceeding seven years and subject to such conditions as comply with paragraph (*b*);

(*e*) suspend or revoke any licence;

(*f*) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

[page550]

(*g*) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting; and

(*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

...

10. (1) The Commission may, in furtherance of its objects, make regulations

(*a*) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(*b*) prescribing what constitutes a Canadian program for the purposes of this Act;

(*c*) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(*d*) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(*e*) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(*f*) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

(*g*) respecting the carriage of any foreign or other programming services by distribution undertakings;

(*h*) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(*i*) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct [page551] and management of their affairs as the regulations may specify;

(*j*) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

(*k*) respecting such other matters as it deems necessary for the furtherance of its objects.

Copyright Act, R.S.C. 1985, c. C-42

2. In this Act,

...

"broadcaster" means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission;

...

"communication signal" means radio waves transmitted through space without any artificial guide, for reception by the public;

...

"copyright" means the rights described in

(a) section 3, in the case of a work,

(*b*) sections 15 and 26, in the case of a performer's performance,

(*c*) section 18, in the case of a sound recording, or

(*d*) section 21, in the case of a communication signal;

...

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

...

[page552]

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

...

and to authorize any such acts.

(1.1) A work that is communicated in the manner described in paragraph (1)(*f*) is fixed even if it is fixed simultaneously with its communication.

...

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*a*) to fix it,

(*b*) to reproduce any fixation of it that was made without the broadcaster's consent,

(*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

...

31. (1) In this section,

"new media retransmitter" means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

"retransmitter" means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

[page553]

"signal" means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(*a*) the communication is a retransmission of a local or distant signal;

(*b*) the retransmission is lawful under the *Broadcasting Act*;

(*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).

(3) The Governor in Council may make regulations

(*a*) defining "local signal" and "distant

signal" for the purposes of subsection (2); and

(*b*) prescribing conditions for the purposes of paragraph (2)(*e*), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

Appeal allowed with costs throughout, DESCHAMPS, ABELLA, CROMWELL *and* KARAKATSANIS JJ. *dissenting.*

Solicitors:

Solicitors for the appellant Cogeco Cable Inc.: *McCarthy Tétrault, Toronto.*

Solicitors for the appellants Rogers Communications Inc. and TELUS Communications Company: Fasken Martineau DuMoulin, Ottawa.

Solicitors for the appellant Shaw Communications Inc.: Davies Ward Phillips & Vineberg, Toronto.

[page554]

Solicitors for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc. and Newfoundland Broadcasting Co. Ltd.: Goodmans, Toronto.

Solicitors for the respondent Canwest Television Limited Partnership: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener: Canadian Radio-television and Telecommunications Commission, Gatineau.

CANADIAN ADMINISTRATIVE LAW

SECOND EDITION

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some types of remedies, and failure to properly construe its remedial powers may also lead to a "jurisdictional" error.[20]

2.1 PRINCIPLES OF INTERPRETATION OF JURISDICTION

In order to determine whether the power was indeed granted by the legislator to the administrative decision maker, and whether the administrative decision maker's determination of its jurisdiction was reasonable, the SCC indicated that the normal principles of statutory interpretation apply:

> 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.
>
> .....
>
> 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.[21]

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[20] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at paras. 35, 77-80 (S.C.C.); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, [2010] 2 S.C.R. 650 at paras. 60, 68 (S.C.C.); *R. v. Conway*, [2010] S.C.J. No. 22, [2010] 1 S.C.R. 765 at paras. 81-82 (S.C.C.); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 34-35, 53, 64 (S.C.C.); *Nolan v. Kerry (Canada) Inc.*, [2009] S.C.J. No. 39, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.).

[21] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at paras. 36-37 (S.C.C.); see also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 33 (S.C.C.); *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at para. 11 (S.C.C.); *McLean v. British Columbia (Securities Commission)*, [2013] S.C.J. No. 67, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 64 (S.C.C.); *Martin v. Alberta (Workers' Compensation Board)*, [2014] S.C.J. No. 25, 2014 SCC 25, [2014] 1 S.C.R. 546 (S.C.C.); *Dionne v. Commission scolaire des Patriotes*, [2014] S.C.J. No. 33, 2014 SCC 33, [2014] 1 S.C.R. 765 (S.C.C.); *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] S.C.J. No. 40, 2014 SCC 40 (S.C.C.).

In *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, the SCC held that in the case where the enabling statute is itself part of a broader scheme of regulations, another principle of statutory interpretation was to be applied:

> In addition,
>
> > ...where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. ...
>
> The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning ....[22]

When an enabling statute is part of an interconnected legislative scheme, Parliament or the legislature is presumed to have enacted a scheme that works in "harmony, coherence, and consistency between statutes dealing with the same subject matter".[23] This presumption of coherence requires that statutes be interpreted together in order to avoid conflict.[24]

In administrative law, two sources need to be examined in determining the specific contours of an administrative decision maker's jurisdiction. Those two sources are: (1) an express grant of jurisdiction or power by the enabling statute; and (2) an implicit power necessary for the decision maker to be able to fulfil its mandate — the common law, under the doctrine of jurisdiction by necessary implication, will fill any gap left by the legislature.[25]

The normal principles of statutory interpretation will apply to both sources of jurisdiction. First, a court must consider the grammatical and ordinary meaning of the words used in determining the powers granted by the enabling statute. Second, if the enabling statute is silent on a specific

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22 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at para. 12 (S.C.C.), citing *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27 (S.C.C.); R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008) at 411.

23 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at paras. 31, 37 (S.C.C.), citing *R. v. Ulybel Enterprises Ltd.*, [2001] S.C.J. No. 55, 2001 SCC 56, [2001] 2 S.C.R. 867 at para. 52 (S.C.C.); R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008) at 325-26.

24 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at paras. 38, 61 (S.C.C.).

25 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at para. 38 (S.C.C.).

power, or the scope of the authority or jurisdiction of the decision maker remains elusive, the court will look at the context. As held by the SCC:

> [G]rammatical 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.
>
> .....
>
> 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.
>
> .....
>
> 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.
>
> 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.[26]

In determining the scope of the jurisdiction of a decision maker, a reviewing court should always use the basic principles of statutory interpretation. The exercise is no different than in other legal contexts; the objective is to determine the intent of the legislator. This being said, when jurisdiction is expressly conferred, the inquiry may be fairly simple.

However, where the doctrine of jurisdiction by necessary implication is needed, because the authority is implicitly conferred to the decision maker, statutory interpretation will be of less help where the court must

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[26] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at paras. 48-51 (S.C.C.) [emphasis added].

include a broad power within the jurisdiction of the decision maker, as opposed to a narrowly drawn one. Purposive analysis allows a court to include any "narrow" powers, by necessary implication, to allow the decision maker to achieve its purpose. On the other hand, if a broad power must be construed, a court should only include those powers that are rationally related to the purpose of the power.[27]

The rationale is the same for both types of jurisdiction by necessary implication. A specific "narrow" power may be needed by necessary implication to enable the decision maker to implement its mandate. In other cases, a court will have to construe a "broad power" to enable the same, and it may do so if the decision maker would be paralyzed otherwise. This type of interpretation is necessary because it is always presumed that Parliament or a legislature did not intend to enact legislation that would lead to absurd consequences.[28] But for the inclusion of a power by necessary implication, the intent of the legislator would be negated.

The principles noted above were applied in *Canada (Canadian Human Rights Commission)*, where the SCC held:

> The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.[29]

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[27] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at para. 74 (S.C.C.); see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 228.

[28] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2 at para. 27, [1998] 1 S.C.R. 27 (S.C.C.).

[29] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 32-33 (S.C.C.). See also *McLean v. British Columbia (Securities Commission)*, [2013] S.C.J. No. 67, 2013 SCC 67 at para. 38 (S.C.C.); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 64 (S.C.C.); *Martin v. Alberta (Workers' Compensation Board)*, [2014] S.C.J. No. 25, 2014 SCC 25, [2014] 1 S.C.R. 546 (S.C.C.); *Dionne v. Commission scolaire des Patriotes*, [2014] S.C.J. No. 33, 2014 SCC 33, [2014] 1 S.C.R. 765 (S.C.C.); *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] S.C.J. No. 40, 2014 SCC 40 (S.C.C.).

And in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*,[30] applying an interpretation in consideration of the larger statutory scheme, the majority of the SCC held that the *Broadcasting Act*[31] did not authorize the Canadian Radio-television and Telecommunications Commission (CRTC) to introduce a market-based or value for signal regulatory regime that would have allowed private local television stations to negotiate directly with broadcasting distribution undertakings (cable and satellite companies) for compensation for the retransmission of their signals. The majority of the Court held that, since the enabling statute did not explicitly grant jurisdiction to the CRTC on that matter, a contextual reading of the Act could not support an interpretation that authorized the CRTC to create that right, especially because such interpretation was creating a conflict with the *Copyright Act*,[32] and was part of an interconnected legislative scheme.[33]

Interestingly, in that case, the SCC also held that policy statements were not jurisdiction conferring provisions and could not extend the jurisdiction of a decision maker, but merely described the objective of Parliament in enacting the enabling statute. Policy statements can therefore describe the discretion granted to the subordinate legislating body but not allow it to regulate matters that are not within its jurisdiction under a proper interpretation of its enabling statute.[34]

2.2 JURISDICTIONAL ERROR — *ULTRA VIRES*

The principle that a public authority may not act outside its powers (or act *ultra vires*) might appropriately be considered to be the central principle of administrative law.[35] Statutory bodies to which specific powers are delegated may only deal with matters over which they have authority, and may not abuse that authority. They must always demonstrate that their

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30 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 (S.C.C.).

31 *Broadcasting Act*, S.C. 1991, c. 11.

32 *Copyright Act*, R.S.C. 1985, c. C-42.

33 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at para. 31 (S.C.C.).

34 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 at para. 22 (S.C.C.).

35 Approved in *Boddington v. British Transport Police*, [1998] H.L.J. No. 13, [1999] 2 A.C. 143 at 171 (H.L., Lord Steyn); H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th ed. (New York: Oxford University Press, 2009) at 30.