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

Attention: Mr. Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Energy Inc.'s Reply Submission on Jurisdiction

We enclose for filing in the above proceeding FEI's Reply Submission on Jurisdiction, dated August 17, 2018, together with copies of the following authorities cited in the Reply Submission:

- *Lee v. Employment and Assistance Tribunal and Minister of Social Development*, 2013 BCSC 513
- *FortisBC Energy and COPE Local* 378, BCLRB 66 2017
- *Essex County Council v Essex Incorporated Congregational Church*, [1963] 1 All ER 326
- *Canadian National Railway Co. v. Canadian Transport Commission*, [1988] 2 F.C. 437

Other cases referenced in this Reply Submission are attached to either FEI's July 27, 2018 Submission on Jurisdiction (Exhibit B-2) or MoveUp's August 10, 2018 submission (Exhibit C1-2).

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[*Original signed by*]

Matthew Ghikas
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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

Reply Submission on Jurisdiction

August 17, 2018

FASKEN MARTINEAU DUMOULIN LLP
Matthew T. Ghikas
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PART ONE: INTRODUCTION

1. FortisBC Energy Inc.'s ("FEI") Reply Submission on Jurisdiction focuses on the arguments of MoveUP[1], since the Commercial Energy Consumers ("CEC") agreed with the entirety of FEI's submissions.

2. FEI addresses MoveUP's jurisdictional arguments in Part Two below. In essence, MoveUP is incorrect regarding how statutory tribunals obtain their authority, and applies the wrong test for assessing the scope of those powers. The correct legal test requires consideration of the purpose of the *Utilities Commission Act* ("UCA") and the role of utility regulation. Regulating access to information and records to ensure the Commission has the necessary information to perform its mandate is a valid exercise of the Commission's authority. However, the 2015 Data Order is intended to protect employee privacy, not maintain transparency. Regulating where and how FEI sends additional copies of Employee Information, when the same information already remains on FEI's servers in BC, is *ultra vires* the UCA. It extends 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. In Part Three, FEI addresses MoveUP's proposal to suspend the process to allow for discussions between FEI, MoveUP and the IBEW (but not CEC). The proposal, which looks very much like what would normally occur in labour relations absent the 2015 Data Order, is premature until the Commission's jurisdiction is resolved.

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[1] As this Reply Submission focusses on MoveUp's main points, silence should not be construed as agreement.

PART TWO:ANSWER TO MOVEUP'S ARGUMENTS

A. INTRODUCTION

4. In this Part, FEI makes the following points in answer to MoveUP's jurisdictional arguments:

- First, while MoveUP is correct that pensions impact rates, the Commission does not obtain jurisdiction to override management action simply because the order relates to something that has cost implications. (Section B)

- Second, the *ATCO Gas* decision, cited by FEI, remains the leading case on the test for determining a statutory tribunal's jurisdiction. The *Dunsmuir* and *Carrier Sekani* decisions cited by MoveUP address different legal issues, and MoveUP has misapplied them. (Section C)

- Third, FEI agrees that section 44, although old, should be read in light of modern circumstances. The intent of section 44, read in light of the modern purpose of utility regulation as articulated by the Supreme Court of Canada in *ATCO Gas*, is to maintain transparency. It is not intended to confer a role on the Commission in the regulation of privacy, employment contracts or labour relations. (Section D)

- Fourth, interpreting the UCA in a manner consistent with privacy and labour legislation requires more than the Commission simply avoiding ordering utilities to violate the express wording of those statutes. The 2015 Data Order as it relates to Employee Information is *ultra vires* because it is imposing privacy requirements that the Legislature has consciously avoided, and places the Commission in the position of arbiter of labour negotiations and union grievances. (Section E)

- Fifth, FEI's involvement in the development of the 2015 Data Order is legally irrelevant. Participants in a Commission proceeding cannot, by agreement, attornment or otherwise, confer jurisdiction on a statutory tribunal where none exists. (Section F)

B. MOVEUP'S OBSERVATION THAT PENSION COSTS AFFECT RATES MISSES THE POINT

5. The first section of MoveUP's Submission (Section B, pages 2 to 6) is devoted to highlighting that (a) pension costs impact rates, and (b) that the information sent to the pension actuary is used "to generate the reports that FEI and the Commission rely upon in proceedings like Revenue Requirements Applications."[2] MoveUP states: "FEI's assertion that it [the data] does not play a role in the Commission's regulatory process, even if one considers only the Commission's 'core functions' as described by FEI, is demonstrably incorrect."[3] There are three related problems with MoveUP's argument.

(a) MoveUP Has Misstated FEI's Submission

6. First, MoveUP has mischaracterized FEI's submission.

7. There is no question that the Commission's rate setting mandate requires the Commission to have access to information on pension costs. As MoveUP's Submission shows, FEI routinely provides information on pension costs in the context of Annual Reviews. These costs inform FEI's cost of service.

8. MoveUP is glossing over a critical distinction that FEI is making between:

- the power to make orders for the purpose of ensuring that information required for the regulation of FEI is accessible to the Commission in BC, and

- regulating how and where <u>additional copies</u> of already accessible information are stored for the purpose of regulating employee privacy.

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[2] MoveUp Submission on Jurisdiction, p.4.

[3] MoveUp Submission on Jurisdiction, p.2.

It would be a valid exercise of the Commission's jurisdiction to order that FEI retain a copy of Employee Information on servers in BC so that it remains accessible at all times. FEI already does this. The aspect of the 2015 Data Order that is *ultra vires* the UCA is the regulation of how and where all copies of Employee Information are stored for the sole purpose of protecting employee privacy. Simply put, section 44 is about transparency and the accessibility of information needed for regulation, not privacy regulation.

(b) FEI's Handling of Additional Copies Has No Bearing on the Commission's Ability to Fulfill its Core Mandate

9. The location of Willis Towers Watson's ("WTW") files, and more generally how FEI handles additional copies of Employee Information pursuant to the Employee Privacy Policy incorporated in employment agreements and authorized under collective agreements, has no impact on the Commission's ability to carry out its rate setting mandate. All of the information necessary for the Commission to assess pension costs, and the performance and management of the pension plans, is available on FEI's BC servers. This includes the Employee Information sent to WTW as well as WTW's final work product.

10. Employee Information generally, let alone additional copies of Employee Information already stored on BC servers, is irrelevant to other non-rate aspects of the Commission's mandate. For instance, Employee Information has no impact on safety or reliability. Employee Information is also unnecessary for the Commission to avoid ruinous competition among natural monopolies, another classic justification for utility regulation.

11. A Commission order limiting where and how additional copies of data can be sent to pension actuaries serves no purpose other than to specify how FEI protects employee privacy. The 2015 Data Order requires FEI to address privacy in a way that

- exceeds its obligations under privacy legislation, and
- differs from the Employee Privacy Policy incorporated into FEI's employment contracts and authorized under its collective agreements.

Privacy legislation requires non-public bodies to protect privacy, but leaves it to the entity to determine how that is done. Unlike for public bodies, there is no statutory limitation on the extra-provincial storage of personal information. FEI is protecting the Employee Information consistent with the *Personal Information Protection Act* ("PIPA"), and its contractual obligations to its employees and certified bargaining agents.

(c) The Extent of the Commission's Jurisdiction is Independent of Whether Management Decisions Have Rate Impacts

12. MoveUP is essentially arguing on page 5 that the Commission has jurisdiction to dictate where additional copies of Employee Information are sent, simply because pension costs affect rates and the Commission needs reliable information. The logical flaw in MoveUP's argument is highlighted by applying the same approach to other utility cost drivers. For instance:

- Employee wages, salaries, overtime pay etc., are one of FEI's largest cost drivers. Does that mean that the Commission can set wages, salaries and overtime pay, etc. for FEI's employees? The answer is plainly "no". FEI management, exercising its prerogative recognized by the BC Court of Appeal in the *BC Hydro* decision, negotiates these terms directly with management employees or certified bargaining agents.

- A public utility's commercial agreements with service providers (e.g., environmental consultants) and construction contractors all affect the utility's cost of service. Does that mean the Commission can negotiate these commercial contracts on behalf of the utility or otherwise dictate their terms? Again, the answer is plainly "no" based on the *BC Hydro* decision. This role is reserved for management.

- Insurance premiums affect rates. Does that mean the Commission can determine the appropriate level of coverage for FEI and direct which insurance provider FEI uses? Again, the answer is plainly "no".

13. MoveUP's approach of defining Commission jurisdiction according to whether the utility action has cost impacts would violate the judicially-recognized (and Commission-recognized) distinction between the role of management and the role of the Commission. The Commission's role is to approve rates that reflect objectively reasonable (i.e., prudent) costs, which may or may not differ from actual costs. When rates are set, the Commission leaves utility management to reallocate resources as they see fit. Even a specific cost disallowance is not a prohibition on the utility undertaking the action.

14. The areas where the Commission can direct FEI's non-rate commercial dealings are articulated expressly in the UCA. They include: approving, but not negotiating, the issuance of securities (but even then, only when the term is longer than a year); and, approving, but not negotiating, the sale of assets (but even then, only when the sale is outside the ordinary course of business). The examples are limited, reflecting the deliberate intention of the Legislature to reserve for utility management the role of managing the utility. This reasoning pervades the decision of the BC Court of Appeal in the *BC Hydro* case.[4]

C. MOVEUP HAS MISSTATED AND MISAPPLIED THE LAW REGARDING STATUTORY JURISDICTION

15. FEI set out the applicable law regarding how a statutory body obtains its jurisdiction in FEI's Submission on Jurisdiction. The decision of the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*[5] ("*ATCO Gas*") was central to that submission. In light of MoveUP's legal argument on pages 12-15, it is worth repeating for ease of reference the test articulated in *ATCO Gas*:

> 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".
>
> …

[4] (1996), 20 B.C.L.R. (3d) 106 (appended to FEI's Submission on Jurisdiction).

[5] 2006 SCC 4.

> 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]

MoveUP dismisses the *ATCO Gas* decision as a pet favourite of utilities that has been superseded by other cases including *Dunsmuir v. New Brunswick* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.[6] As described below, *ATCO Gas* is good and binding law. MoveUP is misapplying these subsequent cases.

(a) *ATCO Gas* is the Leading Case on Statutory Interpretation

16. *ATCO Gas*, in addition to being a mainstay in regulatory law, is the leading Supreme Court of Canada case on statutory interpretation. It is cited as authoritative in current administrative law texts and numerous decisions post-dating the two decisions that MoveUP has referenced.

17. FEI had included an excerpt from Regimbald, *Canadian Administrative Law* (2nd) with its original Submission on Jurisdiction. The edition was published in 2015, long after the courts decided *Carrier Sekani* and *Dunsmuir*. The textbook quotes extensively from *ATCO Gas,* reiterating the same principles and passages that FEI had quoted in its submissions. The authors, in setting out the appropriate test for assessing a tribunal's jurisdiction, make no reference to either *Carrier Sekani* or *Dunsmuir*, for reasons which will become apparent in a moment.[7]

18. The following commentary from *Canadian Administrative Law,* for which the authors cite *ATCO Gas* as authority, is very much aligned with FEI's submission on the applicable law:

> In determining the scope of the jurisdiction of a decision maker, a reviewing court should always use the basic principles of statutory interpretation. The

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[6] MoveUp Submission on Jurisdiction, p.13.

[7] Regimbald, Canadian Administrative Law (2d), 2015, pp. 172-175.

> 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 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. [Emphasis in original.]

19. *ATCO Gas* has been cited by Canadian courts many times since *Carrier Sekani* and *Dunsmuir* as authority for the principles quoted by FEI. An example of one BC Supreme Court decision is referenced later in this section.

(b) *Carrier Sekani* Confirms the Commission's Power to Determine Constitutional Matters as Issues of Law Relevant to the Commission's Core Mandate

20. MoveUP argues that the Commission's powers have been broadened since the *ATCO Gas* decision, citing para. 69 of *Carrier Sekani*. MoveUP suggests that in *Carrier Sekani* "the Supreme Court of Canada recognized broad powers of the Commission to decide questions of law and that this reaches beyond its parent statute". With respect, MoveUP's submission:

(a) misstates the effect of this decision, and the import of para. 69 in particular, and

(b) ignores the surrounding paragraphs of the decision, which demonstrate that the Supreme Court of Canada was applying the same test that had been articulated in *ATCO Gas*.

21. In the *Carrier Sekani* case, BC Hydro had sought approval from the Commission under section 71 of the UCA to purchase electrical power under a contract with Rio Tinto Alcan. The Commission had allowed BC Hydro's application. It determined that the duty to consult had not been triggered because the First Nation failed to establish that the proposed power

purchase contract would adversely affect any asserted Aboriginal rights. As such, a complete consideration of the adequacy of consultations was not required.

22. On appeal, the British Columbia Court of Appeal found that a more comprehensive inquiry with respect to the duty to consult was required and remitted the matter back to the Commission.

23. At the Supreme Court of Canada, the appellants BC Hydro and Rio Tinto argued that the Commission took too wide a view of its role in deciding consultation issues and that the Commission had correctly concluded that the duty to consult had not been triggered. The Carrier Sekani Tribal Council supported the Court of Appeal's decision to remit the consultation issue back to the Commission for further submissions on that issue. As a result, an issue before the Supreme Court of Canada in the appeal was the role of tribunals in respect of the duty to consult. In particular, the Supreme Court of Canada considered whether the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place in the context of a section 71 application.

24. In allowing the appeal, the Supreme Court of Canada determined that the Commission had been correct in finding that it had the power to make determinations regarding the duty to consult. At paragraphs 55 to 62 (not referenced by MoveUP), the Court described the law with respect to the role of tribunals in respect of consultation. The description of the law provided by the court is entirely consistent with the *ATCO Gas* decision. In these paragraphs the Court states:

> [55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
>
> [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in Haida Nation, it is open to governments to set up regulatory

schemes to address the procedural requirements of consultation at different stages of the decision‑making process with respect to a resource.

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

[59] The decisions below and the arguments before us at times appear to merge the different duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides…

[60] This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

…

> [62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult. [Emphasis added.]

25. As these passages from the decision demonstrate, the *Carrier Sekani* decision is not a case that "broadened" the Commission's powers as suggested by MoveUP, or somehow changed the law from the *ATCO Gas* decision. On the contrary, the *Carrier Sekani* decision applies the law from *ATCO Gas* and confirms that a tribunal has only those powers that are expressly or implicitly conferred on it by statute. In the particular circumstances of the *Carrier Sekani* case, the Court found that the Constitutional matter of the duty to consult was an issue of law related to the Commission's mandate under section 71.

26. MoveUP quotes only from paragraph 69.[8] Even then, it glosses over the provisos in paragraph 69 that tie back to the preceding paragraphs (quoted above). The provisos have been underlined below:

> 69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 sec 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6. [Emphasis added.]

The underlined passages are significant. The Court was careful not to suggest that a tribunal with the power to consider questions of law can consider and adjudicate any matter of law regardless of its subject matter. The qualifications made by the Court in paragraph 69 are

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[8] MoveUP Submission on Jurisdiction, pp. 12-13.

implicit references to the statutory interpretation principles addressed in *ATCO Gas* and reiterated in preceding paragraphs of the *Carrier Sekani* decision. Statutory tribunals obtain their jurisdiction only by statute. A tribunal with the power to consider questions of law can consider a constitutional issue such as the duty of consult, but only if the issue relates to the statutory mandate of the Commission. The Court was not suggesting that the power to consider questions of law is carte blanche authority to assert jurisdiction over every and any legal issue (e.g., a decision on the Constitutional validity of a provision of the *Criminal Code of Canada*); there must be a relationship between the issue of law and the tribunal's core mandate. Absent that relationship or nexus, jurisdiction cannot arise.

27. The required nexus is absent when it comes to Employee Information in the 2015 Data Order.

(c) *Dunsmuir* Addresses How Courts Review Tribunal Decisions, Not the Scope of a Tribunal's Jurisdiction

28. *Dunsmuir*, cited by MoveUP on page 13, is an important decision on the issue of the level of deference applied by the courts when reviewing determinations made by statutory tribunals, which is referred to as the "standard of review". The effect of the *Dunsmuir* decision, simply put, was to require reviewing courts to afford greater deference than they had in the past to certain determinations of expert tribunals. The standard of review applied by courts is a different issue than the test to be applied by a statutory tribunal in the first instance to determine the scope of its statutory authority.

29. In *Dunsmuir,* the Supreme Court of Canada summarized the standard of review issue being addressed in that case as follows:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

> [29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: Crevier v. Attorney General of Quebec, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at p. 234; also Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19 (CanLII), at para. 21. [Emphasis added.]

30. Two points should be evident from the above quoted passage.

- First, *Dunsmuir* is about how the courts supervise tribunal decision making. Accordingly, *Dunsmuir* is not relevant to the issue before the Commission on this application. *Dunsmuir* will only come into play in this matter if it is appealed to the Court of Appeal, in which case that Court, and not the Commission, must apply the law regarding the standard of review described in the decision.

- Second, *Dunsmuir* confirms that tribunals must act within their statutory mandates, consistent with *ATCO Gas*. Contrary to MoveUP's contention, *Dunsmuir* did not give tribunals "wider scope to determine the extent of their powers under their home statutes".

31. FEI has included with this Reply Submission on Jurisdiction *Lee v. Employment and Assistance Tribunal and Minister of Social Development*[9], a 2013 decision of the BC Supreme Court that illustrates how the *Dunsmuir* test interacts with the principles articulated in *ATCO Gas*. The reviewing judge first identified the appropriate standard of review (applying *Dunsmuir* at para. 47), determining how much deference to give to the tribunal's assessment of its jurisdiction. The judge then examined, using the appropriate standard of review, whether

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[9] *Lee v Employment and Assistance Tribunal and Minister of Social Development*, 2013 BCSC 513.

the tribunal had reasonably applied the principles in the *ATCO Gas* case (see para. 60 of the decision).

32. The fact that the Court of Appeal, hearing an appeal from the Commission's decision in this proceeding, might owe deference to a reasonable Commission decision does not relieve the Commission of the obligation to try to make the correct decision in the first instance based on the principles of statutory interpretation outlined in *ATCO Gas*. The Commission must still read the words of the UCA "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."[10]

33. The Commission's determination in the first instance (i.e., this proceeding) should be that the 2015 Data Order was too broad. The provision relied upon by the Commission as the basis for the 2015 Data Order (section 44 of the 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.[11] Regulating where and how additional 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.

D. SECTION 44, READ IN LIGHT OF MODERN CIRCUMSTANCES, IS CONCERNED WITH TRANSPARENCY

34. On pages 15 to 17, MoveUP labels FEI's submissions on the interpretation of section 44 as an "originalist" argument that "seeks to confine the scope of section 44 to the conditions and concerns that were in place when its ancestral provision was enacted in 1919."[12] This is an incorrect characterization of FEI's position. FEI's submission is that section 44, read in light of the modern purpose of utility regulation, is concerned with transparency. It is not addressing privacy or the regulation of employment contracts or labour relations.

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[10] ATCO Gas, para. 37.

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

[12] MoveUp Submission on Jurisdiction, p.15.

(a) FEI Has Applied the Modern Purpose of Utility Regulation in Interpreting Section 44

35. Section 44 should be considered in light of current circumstances, and FEI has done so.

36. FEI's attention to the modern purpose of utility regulation, as articulated by the Supreme Court of Canada in *ATCO Gas*, is evident in the following passage from FEI's Submissions on Jurisdiction:

> 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.

FEI also noted that section 44 "fits naturally with the obligations on public utilities under the UCA to provide information or otherwise make it accessible to the Commission." FEI compared its purpose to that of a corporate law requirements to keep a registered and records office.

37. FEI referenced legislative history as additional support for the point that section 44 addresses transparency for facilitating regulation of a public utility, not privacy. The notion of legislation to protect privacy did not exist at the time the section was created. There were, by contrast, various complementary provisions in the original legislation to ensure that the regulator had access to information necessary for the regulation of the utilities.

38. A truly "originalist" interpretation of section 44, which FEI does not advocate, would be one where the section only applied to paper records because electronic records post-dated 1919. Section 44 clearly applies to records, regardless of how they are formatted (paper, electronic etc.). FEI takes no issue with the fact that section 44 thus provides the Commission with the legal authority to require company servers containing relevant information be located

in BC so that information in them is accessible and compellable for the proper regulation of a public utility.[13]

39. The portion of the 2015 Data Order under consideration in this Application goes well beyond reflecting an updated view of the purpose and intent of section 44. The interpretation of section 44 underlying the 2015 Data Order is of a fundamentally different nature, i.e.:

- That section 44 is intended to allow the Commission to regulate employee privacy - not as incidental to its mandate, but for its own sake - despite the existence of a separate legislative framework governing privacy;
- That, in furtherance of regulating employee privacy, section 44 extends to allowing the Commission to dictate how additional copies of information still available to the Commission in BC are disseminated and stored; and
- That, in furtherance of regulating employee privacy, section 44 authorizes the Commission to mandate or override terms of employment or collective agreements.

40. In FEI's respectful submission, such an expansive interpretation of section 44 goes beyond what can be sustained by the wording and purpose of the UCA.

(b) FEI's Submissions on Section 44 Are Internally Consistent

41. MoveUP, on pages 17 and 18, has characterized FEI as being "inconsistent and contradictory" in its argument regarding the proper interpretation of section 44. MoveUP has misstated FEI's submission. FEI's position is both internally consistent and logical.

42. MoveUP's argument in this regard is based on the incorrect premise that FEI accepts the role of section 44 in the regulation of <u>customer</u> privacy. MoveUP states:

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[13] FEI reserves comment on whether such orders make sense from a policy perspective, as the subject goes beyond the scope of this Application.

> First, it is important to note that FEI does not challenge the jurisdiction of the Commission to make orders under section 44 for the explicit purposes of privacy protection when it comes to customer data. To the extent that FEI's argument is that the protection of personal privacy is a subject-matter beyond the authority of the Commission, and specifically that section 44 does not provide that authority, by isolating employee data from the broader privacy protection aspects of the 2015 order but retaining the rest, the utility's argument is inconsistent and contradictory.

43. In fact, FEI's submission was (and is) that section 44 does not provide the authority for any aspect of the 2015 Data Order. Rather, the Commission's ability to regulate Customer Information and Sensitive Information in the manner specified by the 2015 Data Order can be implied by necessary implication from other sections of the UCA. FEI stated:

> 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). [Emphasis added.]

FEI elaborated in paragraphs 75 to 77 of its Submission on Jurisdiction.

44. FEI notes that the 2015 Data Order as it relates to Customer Information and Sensitive Information would not be invalid merely by virtue of the Commission having cited section 44 rather than another section. The UCA cures technical issues of that nature.[14] FEI's Application is based on a substantive challenge to whether the Commission has jurisdiction to issue the portion of the 2015 Data Order relating to Employee Information, not a technical shortcoming of the order.

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[14] Section 111: "Substantial compliance with this Act is sufficient to give effect to the orders, rules, regulations and acts of the commission, and they must not be declared inoperative, illegal or void for want of form or an error or omission of a technical or clerical nature."

E. INTERPRETATION OF THE UCA MUST BE CONSISTENT WITH THE PRIVACY AND LABOUR RELATIONS FRAMEWORKS

45. On pages 19 and 20, MoveUP addresses FEI's submission that the rules of statutory interpretation require the Commission to interpret the UCA in a manner that is consistent with the provisions and purpose of other legislative regimes governing privacy and labour relations.[15] MoveUP's arguments are variations on three themes - (i) that FEI's submission is somehow nullified by *Dunsmuir*, (ii) that a conflict between the 2015 Data Order and privacy and labour relations frameworks cannot exist because the latter are minimum requirements, and (iii) that the Commission already regulates employment. FEI demonstrates below why MoveUP's arguments are without merit.

(a) MoveUP Again Conflates the Standard of Review Applied by Courts with Scope of Jurisdiction

46. MoveUP maintains that, in making its argument about consistency with privacy and labour relations legislation, "FEI contradicts its premise that the Commission did not have jurisdiction to make the impugned order. Here it is not saying that the Commission did not have 'the authority to make the inquiry' (as per the *Dunsmuir* decision, above), but that it came to the wrong answer to the question." As FEI has previously stated, *Dunsmuir* addresses the standard to be applied by the courts in reviewing a tribunal's decision. It did not change the test to be applied by the tribunal in the first instance when assessing the scope of its powers.

47. MoveUP is making a non-controversial point in respect of the standard of review to be applied when courts review tribunal decisions. Under *Dunsmuir*, the question of whether the tribunal was *even able to decide a matter* (or "make the inquiry") is a different question from whether, when a tribunal has been tasked by statute to decide issues of law, it has the authority to make the specific order being challenged. While cases can arise where the ability of a tribunal to decide questions of law (i.e., to interpret its own statute) is in doubt, this is not one of those cases. FEI has brought this preliminary objection on jurisdiction to the Commission because the UCA is clear regarding the Commission's ability to determine

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[15] See FEI Submission on Jurisdiction, paras. 62 to 73.

questions of law.[16] The Commission, having properly asked itself a question of law in this Application, is now at the stage where it must determine the extent of its statutory authority over Employee Information.

48. In the context of making this *Dunsmuir* argument, MoveUP also states that "FEI's remedy, if the decision was wrong or inconsistent with legal principles, was to apply for reconsideration or to apply for leave to appeal to the Court of Appeal." The Commission had not considered the issue of its jurisdiction when it issued the 2015 Data Order, as jurisdiction had not been raised as an issue. FEI has now applied under section 99, which is the section addressing reconsideration and variance.[17] The Commission has already decided to hear the Application, including the issue of jurisdiction.[18] This proceeding is an appropriate avenue to address a legal issue that had not been raised and, if the second phase of this hearing is still necessary, to consider the new facts presented by FEI.

(b) 2015 Data Order Conflicts With the Intention of Privacy Legislation

49. MoveUP dismisses FEI's submission that there is inconsistency between the 2015 Data Order and privacy legislation on the basis that the other regimes "are permissive only in this respect, only setting minimum standards."[19] MoveUP is interpreting the *CRTC Reference Decision* too narrowly by defining a conflict in this way.

50. As stated in FEI's Submission on Jurisdiction[20], the Supreme Court of Canada 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

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[16] Section 105 provides: "105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court."

[17] Section 99 states: "The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

[18] Exhibit A-2, Order G-125-18.

[19] MoveUp Submission on Jurisdiction, p.20.

[20] FEI Submission on Jurisdiction, para. 23.

purpose of another statute and the intention of the Legislature. Part Three of FEI's Submission on Jurisdiction explained that the nature of the conflict identified in the *CRTC Reference Decision* was akin to the type of conflict that exists between the 2015 Data Order and privacy legislation. In essence:

- The Legislature has enacted two separate privacy regimes, one applicable to public bodies (*FIPPA*) and one applicable to non-public bodies (*PIPA*).

- The Legislature's intention behind establishing two different statutory schemes applicable to public and non-public bodies is to recognize the propriety of non-public bodies having additional discretion to determine how they protect information.

- Unlike public bodies, non-public bodies are unconstrained in their ability to store data outside BC.

- The 2015 Data Order contradicts the policy inherent in the Legislature creating two distinct privacy regimes by purporting to impose restrictions on a non-public body that are even more onerous than the requirements applicable to public bodies. In the case of public bodies, sections 30.1 and 33 of FIPPA have various carve-outs to make privacy requirements workable, avoiding some of the far reaching consequences of a broad and general restriction akin to the one in the 2015 Data Order.

51. In characterizing privacy legislation as being just "minimum standards", MoveUP is really saying that a non-public body has the freedom to contract with those individuals providing personal information about how the data will be handled, so long as the information is protected. This is just another way of saying that the intent of treating non-public bodies separately under PIPA is to preserve freedom of contract for non-public bodies in ways that a public body does not have. The intent of PIPA in preserving freedom of contract is neutered if

the Commission directs how the public utilities within its jurisdiction must exercise their rights under privacy legislation - to the point where even public bodies have more flexibility.

52. MoveUP states "If the Commission makes an order that FEI thinks contradicts or violates PIPA, or any other law, the remedy is appeal."[21] FEI also has recourse to section 99, and has taken that approach in bringing this Application.

(c) Employment Contracts With Management Employees Address Privacy Consistent with Privacy Legislation

53. MoveUP states on page 18, quoting FEI, that "it is not the case that 'extra-provincial storage of data is addressed in employment agreements'". It then goes on to discuss "trite law" regarding the role of a certified bargaining agent and the absence of individual employment contracts with unionized employees. While MoveUP is understandably focussed on collective agreements given its position as bargaining agent, the pension plans affected by the 2015 Data Order include both unionized and non-unionized employees.[22] FEI has individual contracts of employment with management employees. FEI's Employee Privacy Policy is incorporated in each contract of employment.[23] As for the collective agreements, they expressly recognize and affirm FEI's residual management rights to manage its business. FEI's management rights include the right to implement reasonable policies like FEI's Employee Privacy Policy. FEI's Employee Privacy Policy is applicable to both unionized and non-unionized employees.

(d) 2015 Data Order is at Odds with the Labour Relations Scheme

54. With respect to unionized employees, labour legislation confers the ability of employers and certified bargaining agents to negotiate collective agreements. It provides a mechanism for resolving disputes during the term of a collective agreement, i.e. grievance and arbitration procedure. In extending the 2015 Data Order to Employee Information, the Commission effectively took on the role of arbiter of an issue between the union and FEI over

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[21] MoveUP Submission on Jurisdiction, p.21.

[22] Exhibit B-1, Cover Letter to Application, p.10.

[23] Exhibit B-1, Cover Letter to Application, p.8.

how employee privacy should be protected in the context of the collective agreements. The fact that the treatment of information used by pension actuaries is, in reality, a labour relations issue is underscored by MoveUP's proposal to pause the process and negotiate a solution with FEI bilaterally (to the exclusion of CEC).

55. FEI disagrees with MoveUP's characterization of FEI's Employee Privacy Policy as a "pre-employment instrument" with no application to unionized employees.[24] The Employee Privacy Policy has ongoing relevance as an exercise of the rights that management has reserved under the collective agreements. Nevertheless, resolving the debate between FEI and MoveUP in these submissions about the meaning of the "management rights" clause and the legal significance under the collective agreement of the Employee Privacy Policy that authorizes sending data to WTW is not essential to the resolution of the jurisdictional question. It would have relevance to phase two of this process (if necessary), since the ability of parties to address issues through collective bargaining, negotiation or the grievance and arbitration procedure removes the impetus for the Commission to serve as arbiter of a labour relations issue.

56. On page 21, MoveUP argues that the "management rights" provision does not excuse FEI from complying with laws. FEI agrees. FEI has been compliant with privacy legislation throughout, since privacy legislation preserves freedom of contract from non-public bodies. The problem with MoveUP's argument is that it is circular. It presupposes the Commission's jurisdiction to impose more onerous privacy requirements *vis a vis* employees.

(e) MoveUP's Analogies to Other Commission Orders that Affect Employees Are Inapt

57. MoveUP says that "perfectly valid orders and determinations by the Commission may have a direct or indirect impact on the terms of employment of FEI staff."[25] It cites the examples of outsourcing, codes of conduct and performance measures governing employee safety. These examples of the valid exercise of the Commission's authority are distinguishable

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[24] MoveUp Submission on Jurisdiction, p.18.

[25] MoveUp Submission on Jurisdiction, p.19.

from the impugned provision of the 2015 Data Order, in that they relate to the Commission's core mandate.

- ***Outsourcing:*** MoveUP states that "the Commission made orders authorizing the jobs of all Terasen customer service staff to be contracted out, and subsequently repatriated to the company's own workforce. Order G-23-10 was no more "about" employee terms of employment than is Order G-161-15, but had a far greater impact on those terms of employment than these rules about storing data."[26] Order G-23-10 was the CPCN for the $122 million Customer Care Enhancement Project.[27] The application, while associated with a decision to in-source customer care work, was an application for approval of the a significant capital outlay for call centres. Labour relations issues were addressed through negotiation and by the Labour Relations Board, not the Commission.[28]

  As FEI noted in paragraph 58 of its July 27, 2018 Submission on Jurisdiction, the Commission has previously rejected the argument that outsourcing *per se* is within the Commission's jurisdiction, stating: "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."[29]

- ***Codes of conduct:*** MoveUP states, accurately, that "Commission orders governing the (sic) FortisBC's codes of conduct over the years have many direct and clear impacts on the workforce, how it is managed, and the way its work is recorded and performed."[30] The codes of conduct to which MoveUP refers are distinct from the corporate codes of conduct governing employee standards of conduct generally, which exist entirely outside the purview of the Commission.

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[26] MoveUp Submission on Jurisdiction, p.19.

[27] https://www.ordersdecisions.bcuc.com/bcuc/orders/en/117690/1/document.do

[28] Labour Relations Board Order B66/2017.

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

[30] MoveUp Submission on Jurisdiction, p.19.

Commission-approved codes of conduct have a very specific purpose that is directly related to the Commission's core mandate - *they are to ensure that customer rates are just and reasonable and avoid cross-subsidization that might hinder the development of a competitive market.*[31] The purpose is not to regulate terms of employment. Employee conduct can affect the fairness of a customer's interaction with the utility. Sharing employee services also necessitates cost allocation; there is a need to ensure that employee costs are being charged to the correct entity, particularly in a cost of service regime where those costs are passed on to customers.

- ***Performance measures:*** MoveUP also refers to the All Injury Frequency Rate (AIFR) Performance Measure under FEI's Performance Based Ratemaking Plan.[32] This is also a poor analogy. The Commission has express jurisdiction over the safety of the public in the context of regulating utility operations, and has the express authority to require reporting on injuries.

    - Section 23(1) states, for instance: "The commission has general supervision of all public utilities and may make orders about … (g) other matters it considers necessary or advisable for … (i) the safety, convenience or service of the public".

    - Section 25 states "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."

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[31] See the Commission's decision in *Code of Conduct and Transfer Pricing Policy for Affiliated Regulated Businesses Operating in a Non-Natural Monopoly Environment*, p.8: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/111599/1/document.do

[32] MoveUp Submission on Jurisdiction, p.19.

- Section 38 provides "A public utility must (a) provide, and (b) maintain its property and equipment in a condition to enable it to provide, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable."

- Section 49 provides in part: "The commission may, by order, require every public utility to do one or more of the following: … (c) file with the commission, at the times and in the form and manner the commission specifies, a report of every accident occurring to or on the plant, equipment or other property of the utility, if the accident is of such nature as to endanger the safety, health or property of any person;"

Moreover, the purpose of the performance measures are to determine whether the PBR - a rate-setting mechanism - is functioning appropriately, i.e., ensuring that the utility is not cutting costs to generate short-term earnings at the expense of safety, reliability and service. Ensuring that safety, reliability and quality of service is not compromised by virtue of the adoption of a PBR plan is central to the Commission's mandate.

- ***Compliance with other laws:*** MoveUP states "A host of statutes, regulations, bylaws, boards and regulatory agencies impact the work of FEI employees and their terms of employment. The fact of such an impact does not deprive public agencies, boards and tribunals of jurisdiction."[33] This is true. However, the Commission does not routinely make orders dictating FEI's response to those statutes, regulations, bylaws, boards and regulatory agencies. The Commission, taking guidance from the courts[34], has distinguished between the role of management and the role of the Commission. The Commission sets rates based on its assessment of objectively prudent conduct, but it does not dictate how FEI runs its business.

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[33] MoveUp Submission on Jurisdiction, p.19.

[34] In particular, the *BC Hydro* decision.

58. There is no question that valid Commission orders can impact how FEI conducts its business and, as a consequence, impacts employees. The crux of the problem with the impugned element of the 2015 Data Order is that its objective is to regulate privacy by stipulating how employee information is treated under a contract of employment or collective agreement. The Commission has placed itself, by design, in the position of arbiter in the relationships between FEI and its management employees and certified bargaining agents.

F. COMMISSION'S JURISDICTION COMES FROM STATUTE, NOT AGREEMENT OR ATTORNMENT

59. Section E of MoveUP's Submission on Jurisdiction argues that FEI had attorned to the Commission's jurisdiction to make the 2015 Data Order. However, as explained below, participants in a Commission proceeding cannot, by agreement, consent or participation, confer jurisdiction on a statutory tribunal.

60. The applicable principle was articulated by Lord Reid as follows in the often-quoted decision of the House of Lords in *Essex Incorporated Congregational Church Union v. Essex County Council:*

> But the appellants say that the respondents cannot be allowed to maintain this point now because they consented to the matter being dealt with by the tribunal. What in fact happened was that the appellants requested the tribunal to deal with this point as a preliminary point of law; this request was intimated to the respondents and they did not object; then the respondents appeared before the tribunal and argued the point but, not being then alive to their rights, they did not protest. I need not consider whether this amounted to a consent to widening the reference to the tribunal, because, in my judgement, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.
>
> If the High Court, having general jurisdiction, proceeds in an unauthorised manner by consent there may well be estoppel. And an arbitrator, or other tribunal deriving its jurisdiction from the consent of parties, may well have his jurisdiction extended by consent of parties. But there is no analogy between such cases and the present case. The tribunal in the present case had no power to state a case except with regard to some matter arising out of the exercise of

> its limited statutory jurisdiction, and this stated case does not deal with any such matter. I am, therefore, of opinion that the stated case was not properly before the Court of Appeal and is not properly before Your Lordships. [Emphasis added.][35]

61. The Federal Court of Canada, itself a statutory body, has cited and quoted from the *Essex County* case and a previous Supreme Court of Canada case in concluding:

> The law is clear that the consent or agreement of the parties cannot confer jurisdiction on a court where none in fact exists. This is especially so in the case of a court like the Federal Court, which is a creature of statute whose jurisdiction is defined and limited by the instrument of its creation.[36]

62. The principle that parties cannot confer jurisdiction by consent or estoppel or attornment is a corollary of the long-established rule, reaffirmed in *ATCO Gas*, that administrative tribunals must adhere to the confines of their statutory authority.

63. Every one of the legal authorities cited by MoveUP in support of its attornment argument involved attornment to the jurisdiction of a superior court. They are "conflicts of laws" cases, in which parties are fighting about the province or country where a case should be heard. None involved the determination of the jurisdiction of a statutory body. This distinction is fundamental, as is evident from the above-quoted passage from *Essex County*[37]. The superior courts of Canadian provinces have "inherent jurisdiction", and do not derive their authority to act from statute. MoveUP's attempt to equate principles of attornment in conflicts of laws cases to the determination of a statutory body's jurisdiction is incongruous. In the words of Lord Reid, "there is no analogy between such cases and the present case."

64. FEI acknowledged in its cover letter for the Application that, ideally, the jurisdictional issue would have been raised and addressed in 2014. However, the fact that neither FEI, nor any other party had raised the issue in 2014 has no impact on the Commission's jurisdiction. The Commission's powers are defined by the UCA, interpreted consistently with

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[35] [1963] 2 W.L.R. at 808, per Lord Reid.

[36] *Canadian National Railway Co. v. Canadian Transport Commission*, [1987] F.C.J. No. 626 (F.C.T.D.)

[37] Lord Reid contrasted a statutory tribunal to an arbitrator or a court of general (or inherent) jurisdiction.

accepted principles of statutory interpretation. The aspect of the 2015 Data Order relating to Employee Information extends beyond those powers.

PART THREE: NEXT STEPS

G. MOVEUP'S PROPOSAL TO SUSPEND THE PROCESS IS PREMATURE

65. MoveUP has proposed to suspend the Commission process briefly "to afford FEI an opportunity to consult with MoveUP (and the International Brotherhood of Electrical Workers should they choose to participate) and explore the possibility of finding an adequate resolution of the underlying issue of employee information protection."[38] FEI makes three points in response.

66. First, holding discussions at this point would be premature. So long as the 2015 Data Order remains in place, the outcome of any negotiations or discussions between FEI and its bargaining agents would still have to be presented to the Commission for approval. The problem with pursuing that approach now is that it presupposes the Commission has jurisdiction to bless any negotiated outcome. A more logical time to hold those discussions would be after the Commission's determination on this preliminary issue of jurisdiction. At that point, the purpose of those discussions will be clear. If FEI and CEC's position on jurisdiction prevails, FEI and its bargaining agents will be free to discuss and resolve such issues in the normal course. If MoveUP's view on the Commission's jurisdiction prevails, then the parties to this proceeding (CEC is also a party) could discuss whether there is a more practical alternative to the 2015 Data Order as it relates to Employee Information.

67. Second, MoveUP's proposal highlights that the 2015 Data Order is really addressing labour relations. The discussions proposed by MoveUP look very much like the type of discussions that routinely occur between FEI and MoveUP when an issue arises during the term of a collective agreement. In the absence of the 2015 Data Order, the type of discussions that MoveUP envisions is exactly what would occur. The practical impediments to MoveUP's proposal to reach a negotiated outcome between FEI and the certified bargaining agents for its unionized employees exemplifies the problems that could arise more routinely if the

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[38] MoveUp Submission on Jurisdiction, p.1.

Commission were to take on, contrary to the *BC Hydro* decision, the role as the arbiter of labour relations issues and employment terms.

68. Third, MoveUP rationalizes the exclusion of CEC from its proposed discussions as follows: "The projected cost of compliance with the current order is of a scale that would have a negligible impact on customer rates."[39] While cost is not relevant to defining the scope of the Commission's jurisdiction, MoveUP appears to be under the mistaken impression that the cost of de-identifying and encrypting years' worth of data held by WTW is negligible. The cost would be significant, estimated to be at least $1 million.[40] Moreover, the current requirement in the 2015 Data Order regarding de-identification and retention of encryption keys in the province is an impediment to the actuaries being able to undertake their work. Maintaining this requirement would preclude FEI from using WTW, the actuarial firm best-qualified to perform the pension services.[41] It could also exclude other industry-leading actuarial firms.[42] Since this issue only arises if the Commission determines it has jurisdiction, FEI will reserve further comment.

H. MORE PENSION ANALYSIS, AND MORE DATA, WILL BE REQUIRED IN NEAR FUTURE

69. FEI is under some time constraints when it comes to the administration of the pension plans, of which the Commission should be aware.

70. WTW prepares pension financial information that is required for compliance with pension legislation for the three FEI company sponsored plans, and that is required for compliance with securities legislation for the preparation of FEI's 2018 year-end audited

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[39] MoveUp Submission on Jurisdiction, p.1.

[40] Exhibit B-1, Application Cover Letter, p.12.

[41] Exhibit B-1, Application Cover Letter, p.11. FEI states that WTW "have been providing services to FEI since the 1980s and throughout the history of our relationship have provided services of the highest caliber. In other words, there is no other firm with the same exposure to the evolution that our organization and pension plans have undertaken over the past 40 years."

[42] Exhibit B-1, Cover Letter to Application, p. 11. FEI stated: "Further, it is important to note that there are only a small handful of pension actuarial firms worldwide who can provide the type of pension advising services required, many of which are US or internationally based."

external financial statements.[43] The next round of work must be completed by December 2018. That timeline will require FEI to deliver additional personal information to WTW before the end of September 2018. If this process remains unresolved by the end of September, then FEI may have to seek an interim/temporary exemption from the 2015 Data Order (without prejudice to its position on jurisdiction) on short notice.

71. It would not be practical to conduct a procurement process for a Canadian actuarial firm to complete the work this year[44], and it is questionable whether a suitable candidate could be identified that only backs-up data in Canada, is independent from actuaries already engaged by IBEW, MoveUP and three sets of Trustees, and is among the limited number of specialized firms that has the reputation expected for a company and plans of this size.[45] Another actuarial firm would not have ready access to past data held by WTW, which would delay the work and add to FEI's cost.[46]

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[43] Exhibit B-1, Application Cover Letter, p.5.

[44] Exhibit B-1, Cover Letter to Application, p. 11. FEI elaborates on why "moving our business to another actuary would come with significant transition costs and the time necessary to get familiarized with our business organization, pension plans and the previous work completed by WTW."

[45] Exhibit B-1, Cover Letter to Application, p. 11. FEI stated: "Further, it is important to note that there are only a small handful of pension actuarial firms worldwide who can provide the type of pension advising services required, many of which are US or internationally based."

[46] Exhibit B-1, Cover Letter to Application, p. 12. FEI explains why "if FEI were to cease its relationship with WTW it would need to get a complete copy of all records and transition this to another provider."

PART FOUR:CONCLUSION ON JURISDICTION

72. FEI respectfully submits that regulating where and how additional copies of Employee Data can be stored for privacy reasons 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. The Commission will continue to have access to the same information on FEI's own servers in BC. FEI and the bargaining agents representing its unionized employees can discuss the treatment of pension data in the normal course of their relationship, as they would with any other labour relations issues that arise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[original signed by Matthew Ghikas]

Dated: August 17, 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.

BOOK OF AUTHORITIES

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lee v. Employment and Assistance Tribunal and Minister of Social Development,* 2013 BCSC 513

Date: 20130325
Docket: 117064
Registry: Vancouver

Between:

Susanna Lee

Petitioner

And

Employment and Assistance Tribunal and Minister of Social Development

Respondents

Before: The Honourable Madam Justice Fisher

On judicial review from the decision of the Employment and Assistance Tribunal dated August 17, 2011, Appeal Number 2011-00376

Reasons for Judgment

Counsel for the Petitioner:	D.W. Mossop, QC
Counsel for the Respondent Employment and Assistance Tribunal:	A.R. Westmacott
Counsel for the Minister of Social Development and the Attorney General	J. Walters
Place and Date of Hearing:	Vancouver, B.C. February 12, 13, 2013
Place and Date of Judgment:	Vancouver, B.C. March 25, 2013

[1] This is a judicial review of a decision of the Employment and Assistance Appeal Tribunal. The main issue involves the authority of the Minister or the Tribunal to make orders back-dating the eligibility date for disability benefits. The petitioner also challenges the validity of the regulation that prescribes eligibility dates.

The facts

[2] On August 13, 2010, the petitioner applied for designation as a person with disabilities (PWD) and for disability benefits under the *Employment and Assistance for Persons with Disabilities Act* (the *EAPWD Act)*. Her application was denied. On November 30, 2010, she made a request to the Minister of Social Development for a reconsideration of the decision. On January 21, 2011,[1] the Minister's delegate decided in the petitioner's favour and she was designated PWD and awarded disability assistance benefits commencing February 1, 2011.

[3] Section 72 of the *Employment and Assistance for Persons with Disabilities Regulation* (the *EAPWD Regulation*) requires the Minister to complete a reconsideration decision within 10 business days from the date of the request. In this case, the Minister did not comply with this time requirement. The petitioner's eligibility date was determined under s. 23(1) of the *EAPWD Regulation*, which provides that a person is not eligible for disability assistance until the first day of the month after the month in which the Minister designates the person as a PWD. As a result of the Minister's failure to comply with the 10 day time requirement, her eligibility for disability assistance commenced one month later than it would have if the decision had been made within the time limit.

[4] The petitioner then requested a reconsideration of the eligibility date. She asked the Minister to backdate her disability assistance payments for one month on the basis that the reconsideration decision should have been made by December 14, 2010. The Minister's delegate refused to do so on the basis that the legislation does not authorize eligibility to be backdated. The petitioner appealed this decision

[1] There are references in the records to the reconsideration date being either January 20, 21 or 22, 2011.

to the Employment and Assistance Appeal Tribunal. The Tribunal dismissed the appeal. She now seeks judicial review of the Tribunal's decision. She also seeks, in the alternative, a declaration that s. 23 of the *EAPWD Regulation* is *ultra vires*.

The legislative scheme

[5] The Tribunal is established under s. 19 of the *Employment and Assistance Act* (the *EA Act*) and it hears appeals of decisions made under that Act as well as the *EAPWD Act*. The *EA Act*, the *EAPWD Act* and their regulations create a comprehensive legislative scheme governing the administration of income and disability assistance.

[6] Under the *EAPWD Act*, the Minister may provide disability assistance to a person designated under s. 2 as a PWD. To be designated as a PWD, the Minister must be satisfied, based on expert opinion, that the person has a severe mental or physical impairment that is likely to continue for at least two years, which restricts the person's ability to independently perform daily living activities. A family unit is eligible for disability assistance provided it includes a person designated as a PWD.

[7] The process for applying for PWD designation is separate from the process for applying for disability assistance. Sections 4.1 and 4.2 of the *EAPWD Regulation* set out a two-stage process for assessing the eligibility of a family unit for disability assistance and s. 23 prescribes the effective date of eligibility. The pertinent parts of s. 23 provide:

> (1) Subject to subsection (1.1), the family unit of an applicant for designation as a person with disabilities or for both that designation and disability assistance
>
> > (a) is not eligible for disability assistance until the first day of the month after the month in which the minister designates the applicant as a person with disabilities
>
> ...
>
> (4) If a family unit that includes an applicant who has been designated as a person with disabilities does not receive disability assistance from the date the family unit became eligible for it, the minister may backdate payment but only to whichever of the following results in the shorter payment period:
>
> > (a) the date the family unit became eligible for disability assistance;

> (b) 12 calendar months before the date of payment.

[8] The decisions are made by Ministry employees exercising delegated powers. The *EAPWD Act* provides for reconsideration and appeal rights. Under s. 16(1)(a), a person may request the Minister to reconsider "a decision that results in a refusal to provide disability assistance". Under s. 16(2), the request must be made, and the decision reconsidered, within time limits specified by regulation. Section 72 of the *EAPWD Regulation* specifies the 10 day time limit for the Minister to reconsider a decision:

> The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) *[how a request to reconsider a decision is made]*,
>
> (a) within 10 business days after receiving the request, or
>
> (b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

[9] There is a further right of appeal to the Tribunal under s. 16(3) of the *EAPWD Act*. Under s. 22 of the *EA Act,* an appeal is heard by a panel of up to three members of the Tribunal. The hearings are oral or, where the parties consent, in writing. The appeal is based on the record and "oral or written testimony in support of the information and records" that were before the Minister.

[10] Section 19.1 of the *EA Act* provides that certain sections of the *Administrative Tribunals Act,* SBC 2004, c 45 (*ATA*) apply to the Tribunal; one of those is s. 44, which specifies that the Tribunal has no authority to consider constitutional questions. A panel's decision-making authority on an appeal is set out in s. 24 of the *EA Act*:

> (1) After holding the hearing required under section 22 (3) *[panels of the tribunal to conduct appeals]*, the panel must determine whether the decision being appealed is, as applicable,
>
> (a) reasonably supported by the evidence, or
>
> (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.
>
> (2) For a decision referred to in subsection (1), the panel must

> (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
>
> (b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

[11] The Tribunal is protected by a privative clause in ss. 24(6) and (7):

> (6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.
>
> (7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

The Tribunal's decision

[12] The Tribunal confirmed the Minister's decision that there was no authority to backdate the petitioner's eligibility date for disability benefits.

[13] The petitioner's position before the Tribunal was that s. 23(4) of the *EAPWD Regulation* permitted the Minister to backdate payments for up to a year, and because this is benefits-conferring legislation, the regulation should be given a large and liberal construction. She argued that the Ministry's position resulted in absurd consequences, as it would not be able to rectify its own breach of the legislation.

[14] The Ministry's position was that the time limits in s. 72 of the *EAPWD Regulation* are directory, not prescriptive, and as there are no consequences for non-compliance, there is no authority to change the effective date of a PWD designation that is made out of time.

[15] The Tribunal concluded that s. 23(4) is clear in its language and applies when an applicant does not receive disability assistance from the date the family unit became eligible to receive it. It allows the Minister to backdate payment only to the date the family unit became eligible or 12 months before, whichever results in the shorter payment period. The Tribunal also concluded that s. 23(1) clearly states that

that a family unit is not eligible for disability assistance until the first of the month following the month the applicant is designated a PWD. It found that the designation in this case was made on January 21, 2011, the date of the Minister's reconsideration decision. The essence of its decision is as follows:

> The panel finds that the wording of the legislation provides a defined time of "eligibility" for disability assistance and that it is not open to the ministry to "deem" eligibility at any other time. Since the appellant received disability assistance from the date the family unit became "eligible" for it, on February 1, 2011, the provisions of 23(4) do not apply to the appellant's circumstances. Even if Section 23(4) were applied to the appellant's circumstances, the result would be no different for the appellant as the shorter payment period would be the date the family unit became "eligible" for disability assistance which, pursuant to Section 23(1), is February 1, 2011. Therefore, the panel finds that the ministry's determination that it had no authority to backdate the appellant's disability assistance payments was a reasonable application of the applicable enactment, being Section 23(1) of the [*EAPWD Regulation*], in the circumstances of the appellant and confirms the ministry's decision.

The standing of the Tribunal

[16] The Tribunal made submissions on the nature of the legislative scheme, the record of the proceeding, whether the petitioner should be permitted to raise a new issue in the judicial review, and the standard of review. Ms. Westmacott also sought leave to make submissions on the application of the doctrine of necessary implication in the event the Court considered the new issue. No objection was taken to leave being granted. She made no submissions on the substance of the Tribunal's decision or the validity of the *Regulation* in issue.

[17] I found all of the Tribunal's submissions helpful and granted leave as requested. Ms. Westmacott took care to respect the limits of the Tribunal's role in judicial review as set out in numerous authorities on this issue, such as *Northwestern Utilities Ltd. v Edmonton (City)*, [1979] 1 SCR 684; *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v Paccar of Canada Ltd.*, [1989] 2 SCR 983; *Timberwolf Log Trading Ltd. v Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70; *Henthorne v British Columbia Ferry Services Inc.,* 2011 BCCA 476.

The issues

[18] As in most judicial reviews, the first issue is what standard of review applies to the decision of the Tribunal. Closely related to this is the issue of what is properly before the Court in this proceeding.

[19] The petitioner's position is that the Tribunal erred in jurisdiction by failing to consider whether it had the implied power to make remedial orders that would allow it to backdate the effective date of eligibility to "correct the Ministry's error". This position is founded on the proposition that a statutory tribunal has implied ancillary powers in addition to explicit powers. Mr. Mossop raised three points of law in respect of this: (1) administrative appeals are substantive rights, (2) the doctrine of necessary implication permits or requires that an appeal tribunal should have the power to make remedial orders, and (3) ambiguities in benefits-conferring legislation should be interpreted in favour of the applicant. He also submitted that the standard of review for such a decision is correctness, as the Tribunal's expertise does not extend to determining its own jurisdiction.

[20] The petitioner raises a second, alternative position: if the Tribunal correctly interpreted ss. 23(1), (3.2) and (4) of the *EAPWD Regulation*, the *Regulation* is in whole or in part *ultra vires* the *EAPWD Act*.

[21] The position of both respondents is that the petitioner has reformulated the substantive issue and is putting before this Court a new position and new arguments that were not considered by the Tribunal. This new position centers on the question of the doctrine of necessary implication in respect of the Tribunal's powers. They submit that this Court should not consider an argument that could have been but was not put before the Tribunal. They also submit that the standard of review of the Tribunal's decision is patent unreasonableness under s. 58(2)(a) of the *ATA*.

[22] The respondents do not dispute the petitioner's right to challenge the *vires* of the *Regulation* for the first time, as the Tribunal does not have jurisdiction to consider this, but this is a matter separate from the judicial review.

[23] For the following reasons, I have concluded that it is not appropriate to consider the new issue in the judicial review. However, I have considered it in general terms so far as it is relevant to my assessment of the Tribunal's decision and I have also considered it in relation to the petitioner's alternative challenge to the validity of the *EAPWD Regulation*. Addressing the issue in this way does not offend the principles on which courts exercise supervisory jurisdiction over administrative tribunals.

New issues on judicial review

[24] The petitioner's entire argument on judicial review is premised on a position that was neither taken before nor considered by the Tribunal. The issue before the Tribunal was whether the Minister has the authority to backdate eligibility under s. 23(1) or (4) of the *EAPWD Regulation*. The issue before this Court is whether the Tribunal failed to consider whether the Tribunal itself has an implied remedial power to backdate.

[25] The Court on a judicial review should be very reluctant to consider a new issue that was not raised before the tribunal, absent exceptional circumstances. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, Rothstein J. for the majority held that a litigant does not have the right to require a reviewing court to consider a new issue and the court has the discretion not to do so where inappropriate. He cautioned that generally, a court's discretion to consider an issue for the first time on judicial review should not be exercised where the issue could have been but was not raised before the tribunal. He explained the rationales for this at paras. 24-25:

> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal. As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.

> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised.
>
> [citations omitted]

[26] Rothstein J. also pointed out that raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue.

[27] In *Alberta Teachers*, the new issue involved compliance with statutory timelines and whether the Information and Privacy Commissioner lost jurisdiction for his failure to extend a 90 day period for completion of an inquiry. This was an issue that the Commissioner had decided in other cases. The reviewing judge's decision to consider the issue was upheld on appeal on the basis that it was implicitly decided by the Commissioner, there was no evidentiary inadequacy, and there was no prejudice to the parties.

[28] The respondents submitted that here, the Tribunal has not had occasion to express its views on the doctrine of necessary implication in respect of its powers and the petitioner should not be able to undermine the deference owed to it by failing to raise the issue in her appeal.

[29] The petitioner submitted that the Court should exercise its discretion to consider this issue because no additional evidence is required, there is no prejudice to the respondents, and her argument is consistent with the argument made to the Tribunal which sought a remedy for the Ministry's failure to adhere to the time limit for reconsideration. In addition, she submitted that because she is also seeking a declaration that the *Regulation* is *ultra vires*, the Court should be able to consider the issue of implied remedial powers in the judicial review. Mr. Mossop says that all of this constitutes exceptional circumstances, similar to those found to apply in *Vandale v British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCSC 831. He also referred to *Grace v British Columbia (Lieutenant Governor in Council)*, 2000 BCSC 923, where the court considered an *ultra vires* argument.

[30] I have considerable difficulty with the petitioner's submissions on this point. I do not find the circumstances comparable to those in *Vandale* or *Grace*. In *Vandale*, the new argument was raised by the court. It related to whether the tribunal's finding that the petitioner's injury was reversible was inconsistent with a prior appeal decision. The judge considered the issue to be consistent with the constant theme of the petitioner's complaint that his work-related injury entitled him to a pension and the only issue was the size of that pension. In *Grace*, the court did not decide whether the impugned regulations were invalid in the context of a judicial review.

[31] The issue now raised here is fundamentally different from that raised before the Tribunal, as it deals not with the Minister's statutory authority to backdate eligibility but with the Tribunal's own statutory authority to grant a remedy to do the same thing. It is an issue that the Tribunal has not considered before and because of that, there is no basis on which this Court can determine an implicit decision. It is also an issue that relates to the Tribunal's interpretation of regulations under its home statute, which may require deference on review.

[32] In cases where new issues have been considered, the court was able to determine an implicit decision based either on prior decisions (as in *Alberta Teachers*) or the nature of the inquiry itself (as in *Vandale*, where the issue turned on the tribunal's interpretation of prior findings of fact). This is important in my opinion, because without at least an implicit decision, there nothing to review and no decision on which to apply any standard of review.

[33] This in itself creates ambiguity as to the status of the Tribunal's decision and the nature of any decision this Court would make. In this regard, see *Actton Transport Ltd. v British Columbia (Employment Standards)*, 2010 BCCA 272, where the court was critical of the reviewing judge hearing new evidence that was not before the tribunal and in effect conducting a *de novo* analysis of the issue. At paras. 22 and 23, Donald J.A. stated:

> [22] If the reviewing judge effectively turned the petition into a declaratory action and conducted a trial, what is the status of the Tribunal's decision? Is

> the judge's determination an original decision or an affirmation of what the Tribunal decided? How does this Court approach the appellate function?
>
> [23] While the Tribunal had to be correct in deciding the division of powers question, normally its decision would be reviewed on the record before it. The reviewing court usurps the role of the tribunal when it embarks upon a *de novo* hearing. The procedure adopted here was wrong and should not be repeated.

[34] While this case does not involve new evidence, it does involve an issue that should properly be considered by the Tribunal before this Court reviews it on judicial review.

[35] Clearly, this issue could and should have been raised before the Tribunal. To consider it now in a judicial review would effectively and inappropriately change the nature of this proceeding. Accordingly, I am not satisfied that this is an appropriate case in which to exercise my discretion in favour of the petitioner.

[36] All that said, the petitioner does raise the same issue in relation to her alternative submission that s. 23 of the *EAPWD Regulation* is *ultra vires* the *EAPWD Act*. This submission is based on two grounds: (a) the *Regulation* is not authorized by the enabling legislation, or (b) it is discriminatory or otherwise unreasonable. In relation to the first ground, the petitioner argues that the *EAPWD Act* does not take away the Tribunal's implied power to grant a remedial remedy to backdate eligibility dates and the *Regulation* cannot take away this implied power. In addition, as I explain below, the nature of the Tribunal's power on appeal is relevant to an assessment of its decision in the judicial review.

[37] Therefore, I will address much of this argument in the context of these issues only.

Issues to be determined

[38] The Minister submitted that the issue properly before this Court in the judicial review is whether the Tribunal's decision, that the Ministry's determination that it had no authority to backdate the petitioner's disability assistance payments was a

reasonable application of s. 23 of the *EAPWD Regulation*, was itself patently unreasonable.

[39] In my view, subject to determining the correct standard of review, this is an accurate statement of the issue that should be before me in this judicial review.

[40] First, the Tribunal's decision-making authority on the appeal is limited in s. 24(1)(b) of the *EA Act* to determining whether the Minister's decision was a reasonable application of the *Regulation* in the circumstances of the petitioner. Second, this was the main focus of the grounds on which the petition was brought (as set out in the petition):

> a. The Tribunal erred in jurisdiction or made a patently unreasonable decision in deciding that s. 23(4) of the [*EAPWD Regulation*] did not give discretion to the Minister to backdate PWD status.
>
> b. The Tribunal erred in jurisdiction or made a patently unreasonable decision in deciding the Minister on reconsideration, or the Tribunal, could not backdate PWD status.
>
> [Emphasis added]

[41] However, at the hearing, the petitioner abandoned the grounds pertaining to the Minister's authority and made submissions only on the issue of the Tribunal's power to backdate. Given this, and without the benefit of any argument from the petitioner on the proper issue, the Court is in a difficult position. Because her alternative position is predicated upon the Tribunal having correctly or reasonably interpreted s. 23 of the *Regulation,* it is necessary for me to decide that issue in the context of the judicial review. I have done my best to interpret the petitioner's submissions as they apply to the issues as I have framed them.

[42] I have determined the issues to be as follows:

> 1. What standard of review applies to decisions of the Tribunal regarding the Minister's authority to backdate eligibility for disability assistance?
>
> 2. Is the Tribunal's decision that the Ministry's reconsideration decision was a reasonable application of s. 23(1) and (4) of the *EAPWD Regulation* either incorrect or patently unreasonable?

3. If the Tribunal's decision stands, is s. 23 of the *EAPWD Regulation ultra vires* the *EAPWD Act* on the basis that it is (a) not authorized by the enabling legislation, or (b) discriminatory or otherwise unreasonable?

[43] This latter issue was not addressed by the Tribunal as it has no authority to do so, and it will be addressed here as a matter of first instance.

1. What is the applicable standard of review?

[44] The standard of review for decisions of the Tribunal is, by s. 19.1 of the *EA Act*, governed by s. 58 of the *ATA*, which applies where a Tribunal's enabling Act contains a privative clause. The pertinent parts of s. 58 of the *ATA* provide:

> (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[45] This provision makes it clear that the patently unreasonable standard applies to questions of law. It is only where the question of law is a matter of "true jurisdiction" that the correctness standard would apply.

[46] In my opinion, the issue before the Tribunal was not a true question of jurisdiction requiring a correctness standard of review. "True" questions of jurisdiction are the exception and not the norm, particularly where a tribunal is interpreting its home statute. On this issue, the jurisprudence on common law standards of review is relevant.

[47] In *Dunsmuir v New Brunswick*, 2008 SCC 9, the court took "a robust view of jurisdiction", stating that it did not intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence for many years. It defined jurisdiction "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (at para. 59). Decisions after *Dunsmuir* have emphasized that a reasonableness standard applies where a tribunal is interpreting its own statute and does not involve issues of general legal importance: *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53; *Alberta Teachers*.

[48] In *Alberta Teachers*, Rothstein J., for the majority, took this issue further. He held that the category of true questions of jurisdiction should be interpreted narrowly, particularly when a tribunal is interpreting its home statute. It was his view that unless the situation is exceptional, "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (at para. 34). He proposed "a natural extension of the approach to simplification set out in *Dunsmuir*" (at para. 39):

> When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[49] He did not rule out the existence of a true question of jurisdiction and stated (at para. 43) that a correctness review of decisions of tribunals interpreting their home statute would still be undertaken "where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals."

[50] This decision was considered in *MacNeil v British Columbia (Superintendent of Motor Vehicles)*, 2012 BCCA 360, where the Court concluded that the question of

whether the Superintendent of Motor Vehicles had the authority to extend time to apply for a review was a matter to be reviewed on a standard of reasonableness (at para. 32):

> The adjudicator, as delegate of the Superintendent, was reviewing the home statute. The Superintendent is responsible for the administration of a complex and specialized administrative scheme designed to protect the public interest. The determination of whether there can be an extension was made with knowledge of the manner in which the broader specialized scheme operates. The issue involves a discrete question involving a single procedural step within that specific scheme and is not one of central importance to the legal system as a whole.

[51] In this case, the issue before the Tribunal was whether the legislation authorized the Minister to change the eligibility date for disability assistance to a date before the PWD designation was made in circumstances where the Ministry did not comply with the established time limits. In my view, this issue clearly involved the Tribunal's interpretation of regulations enacted under its home statute, it applied its expertise, and did not involve a question of law of central importance to the legal system. Accordingly, the standard of review, as governed by s. 58(2)(a) of the *ATA*, is patent unreasonableness.

[52] Patent unreasonableness is the most deferential standard of review. It was defined by common law before *Dunsmuir*, and *Dunsmuir* did not change its meaning: *Manz v Sundher*, 2009 BCCA 92 at para. 36. An inquiry under the patent unreasonableness standard will consider a number of factors, such as whether the decision has rational support or falls within a range of outcomes defensible in respect of the facts and the law, but will demand less of the tribunal's reasons than under the reasonableness standard: *Viking Logistics Ltd. v British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340 at paras. 60-61. I agree with the respondent Tribunal's submission that a reviewing court should not closely parse the decision-maker's "chain of analysis" or put undue emphasis on the precise articulation of the decision if the underlying logic is sound. If there is a rational basis for a decision it should not be disturbed because of defects in reasoning: *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paras. 51-56; *Kovach v. British Columbia (Workers' Compensation Board)*, 2000

SCC 3, affirming the dissenting reasons of Donald J.A. (1998), 52 BCLR (3d) 98 (CA) at para. 26.

[53] In *Viking Logistics Ltd.* the court described the patently unreasonable standard at para. 63:

> ... "patently unreasonable", in s. 58(2)(a) of the *ATA*, is not to be simply replaced by "reasonable", because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the "reasonableness" spectrum, the "patently unreasonable" standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so "defensible" that the decision will enjoy the high degree of deference the legislator intended.

[54] The standard has also been described as whether the decision is "clearly irrational", "not in accordance with reason", or "openly, evidently and clearly unreasonable": *Arbic v British Columbia (Ministry of Housing and Social Development)*, 2011 BCSC 410 at para. 23 and the cases cited therein; *Manz* at para. 39; *Sahyoun v British Columba (Employment and Assistance Appeal Tribunal)*, 2012 BCSC 1306 at para. 35.

2. Was the Tribunal's decision patently unreasonable?

[55] The Tribunal found that s. 23(1) of the *EAPWD Regulation* provided a defined time of "eligibility" for disability assistance and it was not open to the Ministry to "deem" eligibility at any other time. It also found that s. 24(4) did not apply in the petitioner's circumstances because she had received disability assistance from the date the family unit became "eligible" for it. On that basis, it concluded that the Ministry's determination that it had no authority to backdate the petitioner's disability assistance payments was a reasonable application of s. 23(1) in the circumstances of the petitioner and it confirmed the decision under s. 24(2)(a) of the *EA Act*.

[56] The Tribunal did not address the consequences, if any, of the Ministry's non-compliance with the time limits in s. 72 of the *EAPWD Regulation.* However, it outlined the Ministry's position that the time limits are directory, not prescriptive, and because there are no consequences for non-compliance there is no authority for it to

change the effective date of PWD status. Implicit in its decision is an acceptance that non-compliance with the time limits did not change its view that the Minister did not have statutory authority to backdate eligibility to receive disability assistance.

The powers of the Tribunal

[57] It is important to assess whether or not the Tribunal's decision was patently unreasonable in the context of the powers of the Tribunal on an appeal. These are defined in s. 24 of the *EA Act.* Section 24(1) provides that the panel must determine whether the decision being appealed is either

> (a) reasonably supported by the evidence, or
>
> (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

[58] Section 24(2) provides that the panel must either confirm the decision if it finds either of the circumstances in subsection (1), or rescind the decision. If it rescinds the decision, it must refer it back to the Minister if the decision cannot be implemented without a further decision as to amount.

[59] The plain words of these provisions indicate that the Tribunal is not empowered to determine if the Minister's decision is right or wrong, but only whether it is reasonably supported by the evidence or is a reasonable application of the legislation in issue; nor is the Tribunal empowered to make a new decision but is limited to either confirming or rescinding the decision of the Minister. However, it is necessary to assess the legislative framework established in the *EA Act*, the *EAPWD Act* and their *Regulations* in order to properly determine what the Tribunal is empowered to do on an appeal.

[60] It is a well known principle that an administrative tribunal cannot exceed the powers granted to it by its enabling statute, either expressly or impliedly: *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at paras. 35-36; *Canada (Human Rights Commission)* at para. 33; *R v 974649 Ontario Inc.*, 2001 SCC 81 at para. 26. In *ATCO*, Bastarache J. for the majority described the nature of the powers of administrative tribunals at para. 38:

> ... 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) ...

[61] The petitioner submitted that both the *EA Act* and the *EAPWD Act* are benefits-conferring social welfare legislation and as such require a fair, large and liberal interpretation, and any ambiguity in the language should be resolved in favour of a claimant. Mr. Mossop argued that the *EA Act* is ambiguous in that it does not expressly preclude the Tribunal from exercising remedial powers. He pointed out that s. 24(2) directs the Tribunal, where it has rescinded a decision, to refer a decision back to the Minister in certain circumstances, and s. 24(6) allows the Tribunal to make any order permitted to be made. He submitted that this language suggests a broad power to make remedial orders.

[62] I agree that the legislative scheme is benefits-conferring legislation that should be considered remedial and should be given a fair, large and liberal interpretation. This principle is reflected in s. 8 of the *Interpretation Act*, RSBC 1996, c 238, and in authorities such as *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2 (which involved unemployment insurance legislation), and *Hudson v British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 (which involved this legislation). However, it is also important to conduct an analysis of the words and context of the legislation in order to give effect to its purpose; a fair, large and liberal interpretation cannot supplant such an analysis if to do so gives effect to a policy or purpose different from that made by the legislature: see *Canada (Human Rights Commission)* at para. 62. This approach allows judges to interpret words as required by the context but it does not generally allow words to be read in or added to the statute: *R. v McIntosh*, [1995] 1 SCR 686 at para. 26.

[63] I do not agree, however, that a power exists in a statute simply because it is not expressly excluded: see, for example, *MacNeil* at para. 41. Nor do I agree that the powers granted to the Tribunal in the *EA Act* are ambiguous. As I read s. 24, it expressly limits the Tribunal's function on appeal to assessing the reasonableness of

the Minister's reconsideration decisions and it limits its remedial authority to confirming or rescinding those decisions.[2] Section 24(6) does not confer any decision-making power; it simply describes the matters over which the Tribunal has exclusive jurisdiction and refers to orders that are permitted to be made. The orders that are permitted to be made are described in s. 24(2). On this point, I accept the submissions of the respondents.

[64] The petitioner also submitted that the Tribunal has, in addition to powers expressly conferred on it, powers that are implied as being necessary to accomplish its intended function. She relies on the principles enunciated in *R v 974649 Ontario Inc.,* particularly those outlined at paras. 70-71:

> [70] It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions.
>
> [71] Consequently, the function of a statutory body is of principal importance in assessing whether it is vested with an implied power to grant the remedy sought. Such implied powers are found only where they are required as a matter of practical necessity for the court or tribunal to accomplish its purpose. While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose.
>
> [citations omitted]

[65] In the petitioner's submission, the Tribunal's powers must include, in addition to those expressly provided in the *EA Act*, additional remedial powers to grant remedies to correct mistakes made by the Minister:

> The Tribunal constitutes a formal review process at which a reconsideration decision might be challenged. The Tribunal serves to resolve disputes between recipients of disability benefits ... and the Ministry in an efficient and

[2] I do agree with the petitioner, however, that the power to rescind may be somewhat broader than simply setting aside the Minister's decision. It appears to me that a rescission in the context of s. 24(2) is in effect a reversal. Otherwise there would be no purpose in referring the matter back for a further decision as to amount. Moreover, s. 23(3.2) of the *EAPWD Regulation*, which establishes eligibility on the date of the reconsideration decision where the Tribunal rescinds the Minister's determination that the applicant did not qualify as a PWD, implies that the effect of a rescission is that the person did qualify. However, this power of rescission does not change my view of the nature of the Tribunal's authority in an appeal.

> cost-effective manner. We submit that the Tribunal must have power to remedy Ministry errors with appropriate orders if it is to be effective and efficient. Within the broader legal system, the Tribunal serves as the primary forum of appeal with regard to the [*EAPWD Act*] and the *Regulations*. It is essential that the Tribunal has the power to order remedies. Otherwise, disabled appellants would be required to appear before this court to remedy Ministry errors by way of the *Judicial Review Procedure Act*. The court has more complex procedures, and petitioners may face greater risk and expense, exacerbated by the barriers faced by many people with disabilities. Therefore the functional analysis militates for an implied power to remedy.

[66] In conjunction with this submission, the petitioner argued that an administrative appeal process is a substantive statutory right and the Tribunal must have the power to give effect to this right by having the power to make remedial orders.

[67] I cannot accept the petitioner's submission that the Tribunal has additional implied powers to make remedial orders to correct Ministry errors. While it is true that the appeal process in the legislative scheme here is a statutory right, the nature of the appeal is that prescribed in the legislation. Section 16(3) of the *EAPWD Act* establishes the right of appeal to the Tribunal for applicants who are dissatisfied with the outcome of a reconsideration decision and s. 16(4) provides that this right is subject to the requirements in the *EA Act* and *Regulation*. The *EA Act* prescribes the nature of an appeal to the Tribunal and the powers granted to it to carry out its function. It does not grant a broadly based appeal process but rather a process limited to an assessment of the reasonableness of the Minister's decisions. More specifically, it does not grant the Tribunal the power to make its own decision on the issues before it or to otherwise correct errors.

[68] The nature of the implied powers sought by the petitioner is quite different from the kinds of powers administrative tribunals need to control their process, as was the case, for example, in *Pugliese v Clark*, 2008 BCCA 130. There it was determined that the Registrar of Mortgage Brokers had an implied power to stipulate a period of time before an unsuccessful applicant could re-apply for registration, as this was essential "to enable the Registrar to carry out his duties in an effective and efficient manner in accordance with his licensing role" (para. 36). Here, the petitioner

seeks an implied power to grant a substantive remedy that is beyond the nature of the Tribunal's role on appeals.

[69] When this legislation was introduced in the Legislature in 2002, the Minister responsible described the appeal system as more streamlined with faster decisions than that which existed under the previous legislation (Hansard, 2002 Legislative Session: 3rd Session, 37th Parliament, Monday April 16, 2002, Vol. 6, No. 8). Under this scheme, both the *EA Act* and the *EAPWD Act* are administered by the Minister, who makes decisions relating to eligibility for benefits, with the first review to be a reconsideration decision by the Minister, and the second an appeal to the Tribunal that is limited in the manner I have described. It is apparent to me that the object of the appeal process in this legislation is to provide fairly quick reviews of the Minister's decisions, while at the same time preserving the Minister's authority to administer the legislation and make decisions. I do not see that further implied powers are necessary for the Tribunal to effectively and efficiently carry out its purpose.

[70] It is in this context that the Tribunal's decision is to be assessed under the standard of patent unreasonableness.

Assessment of the Tribunal's decision

[71] The petitioner submitted that the Tribunal failed to consider the proper question, which is whether the Ministry, when it does not comply with the 10 day time limit, has the authority to designate a person with PWD status on the day it should have done so. She says that the Tribunal failed to recognize the ambiguity in her circumstances and ought to have interpreted the date of PWD designation in s. 23 of the *EAPWD Regulation* in light of the Ministry's non-compliance with s. 72. Mr. Mossop argued that the Tribunal's decision was patently unreasonable because it gives rise to absurd results in the petitioner's circumstances, as backdating of eligibility is contemplated in s. 23(3.2) and (4) in the circumstances outlined in those subsections.

[72] I do share the concerns of the petitioner about the Minister's non-compliance with the time limits in s. 72 of the *EAPWD Regulation*. The failure to comply clearly has consequences for persons waiting for the Minister's decision whether or not to designate a person as a PWD, as this case shows. The Tribunal did not address this issue in its reasons but it outlined the Ministry's position, which was based on the assumption that s. 72 was directory only.

[73] The words used in s. 72 are not directory. Section 72 provides that the Minister must reconsider a decision and mail a written determination to the applicant within 10 days after receiving the request. Section 29 of the *Interpretation Act*, which defines expressions in enactments, provides that "must" is to be considered as imperative. Nevertheless, it is also the case that there are no consequences in the legislation for the Minister's failure to comply.

[74] As I stated above, implicit in the Tribunal's decision is an acceptance that non-compliance with s. 72 did not change its view that s. 23 did not authorize the Minister to backdate eligibility in circumstances where the time limit was not met.

[75] Despite my concerns about the Minister's non-compliance with s. 72, given the legislative scheme and the Tribunal's mandate to assess the reasonableness of the Minister's decisions, I cannot say that its decision was patently unreasonable.

[76] Nothing in the wording of either s. 23 or s. 72 of the *EAPWD Regulation* suggests an intention to grant to the Minister any discretion to change the date on which a person becomes eligible to receive disability assistance in the event the PWD designation is not made within the time limit. Section 23(1) establishes that a person is not eligible for disability assistance "until the first day of the month after the month" in which the Minister designates the applicant as a PWD. The only authority to backdate in relation to disability assistance is found in ss. 23 (3.2) and (4). Section 23(4) permits the Minister to backdate payments, but only to the date the person became eligible or 12 months before, whichever is the shorter payment period. Section 23(3.2) establishes eligibility on the date of the reconsideration decision where the Minister determined that the applicant did not qualify as a PWD and the

Tribunal rescinds that decision. In my view, neither of these provisions suggests that there is authority to backdate a PWD designation or eligibility for benefits further than the date the reconsideration decision was actually made. Rather they suggest that all eligibility dates are predicated upon the Minister's determination of PWD status.

[77] It is clear that the intention of this legislative scheme is to provide a quick and efficient review and appeal system. The time limits established in s. 72 of the *Regulation* are part of that process. However, the legislation is silent on the consequences of non-compliance and no discretion is given to the Minister to deem eligibility for PWD status on a date other than the actual date the designation was made. I can certainly appreciate the frustration of applicants caught in the middle of what they reasonably perceive to be a bureaucratic gap. While it may be fair to draw a connection between the eligibility date in s. 23(1) and the time limit in s. 72, this is really a gap that should be remedied by the Lieutenant Governor in Council or the Legislature. I cannot find that the Ministry's interpretation of its authority was unreasonable, as the Tribunal determined.

[78] Accordingly, I have concluded that the Tribunal's decision to confirm the Ministry's determination that it had no authority to backdate the petitioner's eligibility for disability assistance was not patently unreasonable.

3. Is s. 23 of the *EAPWD Regulation ultra vires*?

[79] The petitioner also challenges the validity of the provisions in s. 23 of the *EAPWD Regulation* on the basis that (a) they are not authorized by the grant of authority in the *EAPWD Act*, or (b) they are discriminatory or otherwise unreasonable.

[80] It is well established that regulations must be authorized by statute and must also be consistent with the purpose of the enabling Act. This principle is reflected in s. 41(1)(a) of the *Interpretation Act*:

> (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as

> empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
>
> > (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it

[81] Additionally, regulations must not unreasonably discriminate on the basis of distinctions that are irrelevant or inconsistent with the purpose of the enabling statute. These principles stem from municipal law. In *Montréal (City) v Arcade Amusements Inc.*, [1985] 1 SCR 368 at 405-406, the court held that by-laws will be *ultra vires* where

> (1) they are partial and unequal in operation between different classes; (2) they are manifestly unjust; (3) they disclose bad faith; and (4) they involve such oppressive or gratuitous interference with the rights of those subject to them as can find no justification in the minds of reasonable men.

[82] It also confirmed the long standing principle that the power to make by-laws does not include that of enacting discriminatory provisions unless the enabling legislation provides the contrary.

[83] The same principles apply to regulations, although it has been held that the standard of review is less stringent in respect of regulations made by the Lieutenant Governor in Council due to the Crown's residual common law powers: see *Brown v British Columbia (Attorney General)* (1997), 41 BCLR (3d) 265 (SC).

[84] In *Federated Anti-Poverty Groups of British Columbia v British Columbia (Ministry of Social Services)* (1996), 41 Admin. L.R. (2d) 158 (BCSC), the court found invalid a regulation which imposed a residency requirement for eligibility to receive social assistance on the basis that such a requirement was contrary to the purposes of the enabling legislation (then the *GAIN Act*, RSBC 1979, c 158). Spencer J. found those purposes to be the relief of poverty, neglect and suffering within the financial parameters set by the Legislature. In *Grace*, the court struck down a regulation that disqualified otherwise eligible recipients from receiving income assistance where they were subject to unexecuted arrest warrants. Baker J. found that the enabling Acts did not authorize a regulation that disqualified a person on that basis. At para. 71 she explained:

> [71] Although s.24(4)(c) appears to give the Lieutenant Governor in Council broad discretion to make different regulations for different groups, the power is not unlimited. Distinctions cannot be drawn that discriminate unreasonably. A distinction will be unreasonable where it draws lines between groups or classes, or members of a class, arbitrarily, or for purposes unrelated to the objects and purposes of the *Act*.

[85] She agreed that the purposes of the enabling Acts were the same as the predecessor *GAIN Act*, as described in *Federated Anti-Poverty Groups*.

[86] The legislation considered in *Grace* was the predecessor legislation to the current regime under the *EA Act* and the *EAPWD Act*. I see no basis to depart from the conclusions expressed in both *Grace* and *Federated Anti-Poverty Groups* that the purpose of this legislative regime is the relief of poverty, neglect and suffering within the financial parameters set by the Legislature. The Ministry pointed out that the current legislation has a shift in focus towards a culture of responsibility, self-reliance and employment, which is similar to the emphasis on self-sufficiency in the prior legislation as described in *Grace*. I would characterize the purpose more specifically to the *EA Act* and the *EAPWD Act* as the provision of income and disability assistance and other benefits to persons in need, and good stewardship of the expenditure of public funds required for these programs.

(a) Is the *Regulation* authorized by its enabling *Act*?

[87] As I understand the petitioner's submission, it is predicated upon two premises: (1) that the Tribunal has an implied power to grant remedial orders that includes orders to backdate eligibility for disability assistance where necessary to correct the Ministry's "mistake" or "error", and (2) s. 23 of the *EAPWD Regulation* binds the Tribunal's power to grant such a remedy and as such falls outside the explicit grant of regulatory authority provided in s. 26 of the *EAPWD Act*. In essence, she says that the *Act* does not authorize regulations that infringe on the Tribunal's core purpose of correcting the Ministry's breaches of the *Act* or the *Regulation*.

[88] I have already determined that the Tribunal's authority on an appeal is limited to assessing the reasonableness of the Minister's decisions and it does not have an implied power to make remedial orders generally. It follows that it does not have the

power to grant the specific kind of order to backdate suggested by the petitioner. I cannot accept her submission that the Tribunal must have the power to make orders to retroactively correct the Ministry's mistakes or errors given the legislative scheme and the Tribunal's role as I have described.

[89] In my view, there is no basis to conclude that s. 23 of the *EAPWD Regulation* is not authorized by its enabling statute. Section 26 of the *EAPWD Act* provides a long list of matters over which the Lieutenant Governor in Council may make regulations, including eligibility for disability assistance in s. 26(2)(f). Section 26(2)(i) specifically authorizes regulations to be made which regulate the time and manner of providing disability assistance. Section 23 of the *Regulation* establishes when a person is eligible for disability assistance, a matter clearly authorized by s. 26(2)(i) of the *Act*.

(b) Is the *Regulation* discriminatory or otherwise unreasonable?

[90] In the petitioner's submission, s. 23 of the *EAPWD Regulation* is discriminatory because, by tying the date of eligibility to the date the Minister designates a person as a PWD, it creates impermissible distinctions between applicants who obtain PWD designations within the time limits established in s. 72 and those who obtain designations outside the time limits. More specifically, she says that s. 23(3.2) discriminates between applicants who have suffered substantive errors (those denied PWD status by the Minister) and applicants who have suffered procedural errors (those granted PWD status by the Minister after a delay); and s. 23(4) discriminates between applicants who suffered errors before the date of the reconsideration decision (where there is no power to backdate eligibility) and applicants who suffered errors after that date (where there is power to backdate payments).

[91] The respondent Ministry submitted that s. 23 does not create distinctions between classes of disability recipients:

> Each of the subsections of section 23 of the Regulation refers to a date of eligibility after the Minister's last decision on the matter. The Minister is the person who must be "satisfied" the conditions of s. 2 of the Act are met. The

> Minister may make that final determination either on the initial application or after reconsideration... It is only when the Minister is satisfied that statutory conditions for disability assistance are met that the effective date for eligibility may be set. The various subsections of s. 23 ... reflect that requirement under the Act; there are no distinctions as between classes of people as to the date of eligibility.
>
> [Emphasis in original]

[92] I agree with the Ministry. The *Regulation* does not create distinctions between classes of recipients. Eligibility for all recipients is based on when the Minister designates the applicant as a PWD; the earliest date occurs when the designation is made on the initial application and the latest date occurs when it is made on the reconsideration. Timing of eligibility necessarily depends on when eligibility is established.

[93] The petitioner's position assumes, improperly in my view, that applicants who are not found to be qualified for PWD status initially have "suffered substantive errors". As she acknowledges in her submissions, applicants for disability assistance face multiple barriers to completing their applications correctly and providing sufficient information. Reconsideration provides an opportunity to correct errors or omissions made by either the applicants or the Ministry. I also do not see that there is a proper distinction between those who do not receive payment after becoming eligible and those who become eligible after a delay that is outside the time limits. Everything is based on an eligibility date that is consistently tied to the time of PWD designation.

[94] None of the provisions in s. 23 are inconsistent with the purpose of both the *EA Act* and the *EAPWD Act* to provide income and disability assistance to persons in need and good stewardship of the expenditure of public funds required for these programs. Nor are the provisions inconsistent with the *Acts* themselves.

[95] I do not need to address the petitioner's final submission that s. 23 is also unreasonable because it is based on the premise that the Tribunal has implied powers to make remedial orders to correct Ministry errors, a matter I have already addressed.

[96] For these reasons, I have concluded that s. 23 of the *EAPWD Regulation* is consistent with the purpose of and is authorized by its enabling Act, is not discriminatory or otherwise unreasonable, and is therefore valid.

Conclusion

[97] The petition is dismissed. Costs as between the petitioner and the respondent Ministry may be spoken to.

"Fisher, J."

BRITISH COLUMBIA LABOUR RELATIONS BOARD

FORTISBC ENERGY INC.

(the "Employer")

-and-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378

(the "Union")

PANEL:	Bruce R. Wilkins Associate Chair, Adjudication
APPEARANCES:	Stephanie, Gutierrez, for the Employer James L. Quail and Rachel Roy, for the Union
CASE NO.:	70242
DATE OF HEARING:	March 10, 2017
DATE OF DECISION:	April 20, 2017

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Section 18(4) of the *Labour Relations Code* (the "Code") to certify a voluntary recognition agreement. The Board's Notice reads as follows:

> The parties are advised that the Canadian Office and Professional Employees Union, Local 378 has applied to be certified for a unit of employees employed by FortisBC Energy Inc., 16705 Fraser Highway, Surrey, BC, V4N 0E8 described as:
>
> Employees in customer service centres located in British Columbia, excluding the Vancouver Island and Whistler areas, in any phase of office, clerical technical, administrative or related work.

2 The parties dispute how the Employer should be described in the certification description. The Union says the certification should reflect FortisBC Energy Inc. (FEI) as the Employer. The Employer says the employer description should reflect both FEI and FortisBC Inc. ("FBC").

3 This is an expedited matter under Section 18(4) of the Code. The parties made extensive arguments which I have read and considered, but I have only included those arguments which I feel are essential to the disposition of this matter.

II. BACKGROUND FACTS

4 Both FEI, which is a gas facility, and FBC, which is an electric utility, are wholly owned by Fortis Inc. FEI and FBC are separately regulated by the British Columbia Utilities Commission which sets rates for each.

5 The voluntarily recognized bargaining unit performs work within the Employer's customer service centres ("CSC"). Previously, the CSC bargaining unit was composed of employees of FEI performing customer service in Burnaby and Prince George. The Employer and the Union had a collective agreement that covered these employees known as the "CSC Collective Agreement".

6 Customer service work now performed by employees of FBC in Trail and Kelowna had been contracted out between 2002 and January 1, 2012. FBC made the decision to bring the customer service centre work back in house. When it did so, it sought a voluntary recognition agreement with the Union in order to ensure cost certainty. The Union and the Employer negotiated a collective agreement with a term which ran from January 1, 2011 to March 31, 2014.

7 Having achieved a collective agreement for FBC employees the parties then agreed to amalgamate employees working in the Trail and Kelowna locations with the Burnaby and Prince George locations under the CSC Collective Agreement. This was achieved through a letter of understanding (hereinafter "LOU 2") executed by the parties on January 13, 2012. LOU 2 contained the following terms among others:

Letter of Understanding

(Hereinafter “LOU 2”)

Between:

Canadian Office and Professional Employees’ Union, Local 378 (“COPE”)

And:

FortisBC Inc. (“FBC” or “Electric Division”)

And:

FortisBC Energy Inc. (*formerly Terasen Gas Inc.*) (“FEI” or “Gas Division”)

Respecting the amalgamation of certain employees from FBC into the FEI - Customer Service Centres (“CSC”) collective agreement and bargaining unit structure

The Parties do hereby agree to the terms and conditions as contained in this LOU 2 subject to the following conditions:

1. The Parties agree that this letter is subject to ratification by the Parties’ respective principals.

2. The Parties will unanimously recommend this Letter of Understanding to their principals.

3. FBC and FEI expressly agree that the Union shall not be required to release the results of the ratification vote with respect to this Letter of Understanding unless and until FBC and FEI have ratified this Letter of Understanding and advised the Union in writing of its acceptance.

4. This LOU shall be deemed to be incorporated into the collective agreement between the Parties as if set forth in full therein in writing, and shall so apply.

Preamble and Purpose:

The purpose of LOU 2 is to establish the process for transferring employees from the FBC collective agreement and bargaining structure to the CSC collective agreement and bargaining structure, with certain transition or grand-parented rights.

This LOU will supersede and supplement the rights and entitlements that flow from the COPE-CSC collective agreement and sections 35, 37, 38 and 54 of the Labour Relations Code

This LOU constitutes an adjustment plan between FBC and COPE, fulfilling the requirements of section 35, 37, 38 and 54 of the Labour Relations code.

All matters outstanding under the COPE-FBC collective agreement on the date of ratification that concern grand-parented employees shall be resolved under the terms of, and by the parties to, the CSC collective agreement, including this LOU. Any liability flowing from the resolution of adjudication of such shall be borne by FBC or FEI as appropriate to the particular circumstances of each matter.

Definitions:

A "new hire CSC employee" is a FBC or FEI employee, who is hired into the new amalgamated CSC bargaining unit after the date of ratification.

A "grand-parented customer services employee" is a FBC employee, covered under the FBC collective agreement, who works for the electric utility in the Trail contact centre of the billing group in Kelowna, at the date of ratification of this agreement, and as such they will have exceptional terms and conditions ("grand-parented customer services rights") as specific under this LOU. FBC and CSC will provide COPE with a complete list of grand-parented customer services employees who will be transferring to the CSC bargaining unit after the date of ratification. The list shall be provided and shall be included in this LOU as Appendix A.

Grand-parented customer services rights are extinguished upon leaving the Trail Contact Centre and billing group in Kelowna.

Application:

All new hire CSC employees shall be subject to all the terms and conditions of the CSC collective agreement. This includes joining the "Pension Plan for Employees of FortisBC Energy Inc.", as it applies to employees of the CSC bargaining unit.

Effective the 1st of the month following the date of ratification, the grand-parented customer service employees, as specific in the attached Appendix A, shall be amalgamated into the CSC bargaining unit and shall become subject to the terms and conditions of the CSC collective agreement, except as specifically outlined below.

8 Recently, a new collective agreement was reached for the CSC bargaining unit with a term of April 1, 2017 until March 31, 2022. On the front page both FBC and FEI are named as employers.

9 Within the CSC bargaining unit there are now 209 employees on the FEI payroll working out of Prince George and Burnaby and 44 FBC employees on the FBC payroll working in Trail and Kelowna.

10 There is some sharing of services between FBC and FEI; each cross charges the other for services rendered.

11 There is a common management team between FBC and FEI, but employees within the CSC bargaining unit generally report on a day to day basis to managers who are on the payroll of FBC or FEI.

III. POSITIONS OF THE PARTIES

I. The Employer

12 The Employer argues the Union has incorrectly named the employer in its certification application under Section 18(4). It says the Union has named only FEI as the employer when both FEI and FBC are both employers of employees in the CSC bargaining unit. It says the Union's application is fatally flawed and should be dismissed.

13 The Employer relies on LOU 2, which it says identifies two employers, FBC and FEI. It says LOU 2 amalgamated FBC customer service employees into the CSC bargaining unit and the CSC Collective Agreement, creating a single, voluntarily recognized unit covering both FBC and FEI customer service employees.

14 The Employer says the voluntary recognition agreement encompasses two employers, FBC and FEI, and the CSC Collective Agreement covers employees who are on the payrolls of either FBC or FEI and who work at FBC or FEI customer service centres under the direction of FBC or FEI managers.

15 The Employer says the Union has made representations to the effect that FBC and FEI are both employers of employees in the CSC bargaining unit, and is estopped from now asserting they are not.

16 The Employer says the Union and the Employer recently executed a newly ratified collective agreement which specifically names both FBC and FEI as employers.

17 The Employer says FBC and FEI are both willing to concede they are a common employer for the purposes of the application in order to convert the existing, voluntarily recognized CSC bargaining unit into a certified bargaining unit under the Code. It says the Board may, on its own motion, declare FEI and FBC to be a common employer for the purpose of the application. The Employer says the Union recognizes in its application that the Board has jurisdiction to certify a multi-employer bargaining unit where the employers are a common employer.

II. The Union

18 The Union takes issue with the Employer's interpretation of LOU 2, and says that what really happened is that Trail and Kelowna employees were brought into the existing FEI bargaining unit, and that FEI continues to be the employer for all of the employees in the CSC bargaining unit. It says that FBC was not added as an employer through LOU 2. It says the unit that was created as a unit of employees employed by FEI and that fundamental character has not changed.

19 The Union says the Code does not permit a two employer unit with FBC and FEI, and the only format that can see more than one employer named in a certification is under Section 38, the common employer provision of the Code.

20 The Union says Section 18(4) does not create a new species of bargaining unit but provides a procedure to obtain a certification.

21 The Union says LOU 2 achieved a transfer of employees. It says LOU 2 incorporated employees who had worked under the FBC collective agreement and in that bargaining unit into the FEI CSC Collective Agreement and bargaining unit and did not purport to transform the CSC bargaining unit into a two employer unit.

22 The Union says had the parties wanted to change the bargaining relationship to one of two employers it would have been a simple matter to make that clear and explicit. It says the Employer's interpretation contradicts LOU 2, which moves employees of out of the FBC bargaining unit into the pre-existing CSC bargaining unit that had been voluntarily recognized by FEI.

23 The Union says LOU 2 is highly ambiguous. It says the provision which references Sections 35, 37, 38 and 54 of the Code are virtually unintelligible. The Union says given the ambiguity in LOU 2 it cannot be taken to clearly transform the FEI bargaining unit to a unit with two employers.

24 The Union says there is no clear understanding that would reasonably emerge from the correspondence and actions of the parties to suggest the Union had agreed that the impact of LOU 2 was to change the employment status of all the pre-existing employees in the CSC bargaining unit such that they now had two employers. It says the estoppel the Employer claims exists has not been created.

25 The Union says if the Board decides in the Employer's favour that the Union has no objection to the Board making a common employer declaration. It says the Board has jurisdiction to do so under Sections 139 and 143 of the Code. It says if the Board concludes that the employer entity consists of the two companies the appropriate outcome is that the certification be issued naming FortisBC Energy Inc. and FortisBC Inc. as a common employer under Section 38 of the Code as the employer.

26 The Union says the newly ratified collective agreement should not be given weight in the dispute because the Union felt it would be improper to bargain to impasse the names that appeared on the cover sheet.

IV. ANALYSIS AND DECISION

27 The issue before me is whether the certification description should reflect FEI as the sole employer or if it should reflect both FBC and FEI as a common employer. I find that the question before me is best answered through an analysis of LOU 2. This is the document which represents the agreement between the parties to consolidate two groups of employees with separate terms and conditions into one CSC bargaining unit and one collective agreement. I find there are two employers of employees in the CSC bargaining unit.

28 The parties do not dispute that employees working out of Trail and Kelowna are on the payroll of FBC, and employees working out of Burnaby and Prince George are on the payroll of FEI. The parties do not dispute that while there is a common overarching management structure, employees of FEI generally report to FEI managers and FBC employees generally report to FBC managers.

29 The definitions section of LOU 2 defines a new hire employee as "a FBC or FEI employee who is hired into the new amalgamated CSC bargaining unit after the date of ratification". There is no reference in LOU 2 to FBC employees being transferred to FEI as their employer. Trail and Kelowna employees were employees of FBC prior to LOU 2 and no term in LOU 2 changes that. I therefore find that LOU 2 does not change any CSC employee's employer; the employees remain employees of either FEI or FBC under LOU 2. The effect of LOU 2 is to change the structure of the CSC bargaining unit by adding FBC employees to that structure. While it is true that the established labour relations structure of the FEI CSC bargaining unit is what FBC employees are being folded into, this did not include a transfer of FBC employees to FEI as their employer; rather, those FBC employees retain their relationship with FBC as their employer.

30 The Employer indicated that it would have no objection to being declared a common employer in an application under Section 18(4) of the Code. The Union agrees and says that if I found in the Employer's favour it would have no objection to this. The Union says the Board may do so pursuant to Sections 139 and 143 of the Code.

V. CONCLUSION AND DECLARATION

31 I declare that FEI and FBC are a common employer of employees in the CSC bargaining unit under Section 38 of the Code. As all other outstanding issues are resolved, I order that the vote taken pursuant to the Union's Section 18(4) application be counted. Should the Union win the vote, the certification should name FortisBC Energy Inc. and FortisBC Inc. as a common employer of employees in the bargaining unit applied for.

LABOUR RELATIONS BOARD

"BRUCE R. WILKINS"

BRUCE R. WILKINS
ASSOCIATE CHAIR, ADJUDICATION

Overview | [1963] AC 808 | **[1963] 1 All ER 326** | [1963] 2 WLR 802 | 14 P & CR 237 | 127 JP 182 | 107 Sol Jo 112 | [1963] RVR 151 | 185 EG 453

Essex County Council v Essex Incorporated Congregational Church Union [1963] 1 All ER 326

HOUSE OF LORDS

LORD REID, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON AND LORD DEVLIN

29 NOVEMBER, 3 DECEMBER 196217 JANUARY 1963

Lands Tribunal — Jurisdiction — Consent — Statutory tribunal — Jurisdiction not conferred by consent without statutory authority — Purchase notice under Town and Country Planning Act, 1959, s 39 — Counter-notice stating only grounds within s 40(1)(f) — Preliminary point of law raised later by consent — Point of law a ground of objection under s 40(1) (e), but had not been specified in the counter-notice — Tribunal had no jurisdiction to determine point of law, nor had appellate court on appeal from it — Town and Country Planning Act, 1959 (7 & 8 Eliz 2 c 53), s 41(2).

Town and Country Planning — Purchase notice — Interest qualifying for protection — Hereditament exempt from rating and specified as exempt in valuation list — Whether interest in such a hereditament a qualifying interest — Whether annual value did not exceed £250 for the purposes of Town and Country Planning Act, 1959 (7 & 8 Eliz 2 c 53), s 39(4) (a).

A church and church hall was exempt from rating, and was shown in the valuation list as "exempt"[a] without mention of a nil or other value. In pursuance of s 39 + of the Town and Country Planning Act, 1959, the respondent owners served notice on the appellant council requiring the council to purchase their interest. The council served a counter-notice under s 40 objecting to the notice on the ground (s 40(1)(f)) that the owners had not made reasonable endeavours to sell their interest. This objection was referred to the Lands Tribunal. After the time for serving counter-notices had expired, the council requested the tribunal, the owners concurring, to decide as a preliminary point of law whether the owners had an interest qualifying for protection under s 39, in view of their property

[a] By virtue of s 7 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. See p 328, letter *f*, post

*[*327]*

being exempt from rates and of s 39(4) and the Town and Country Planning (Limit of Annual Value) Order, 1959, whereby a qualifying interest must be an interest in a hereditaments whose annual value "does not exceed" £250 per annum. The tribunal decided this preliminary point of law and the Court of Appeal upheld its decision. The question raised as a preliminary point could have been made, under s 40(2)(e), a ground of objection in a counter-notice.

Held – The ground of objection that the owners' interest was not qualified for protection under s 39 of the Town and Country Planning Act, 1959, not having been raised in the council's counter-notice had not been referred to the Lands Tribunal which, being a statutory tribunal (whose jurisdiction could not be enlarged by consent), had not, therefore, jurisdiction to adjudicate on it; accordingly, neither the Court of Appeal nor the House of Lords had

had or had jurisdiction to give an effective decision on the preliminary point of law (see p 330, letters *f* and *h*, p 333, letters *e* and *f*, p 335, letters *e* to *h*, and p 340, letter *e*, post).

Per Curiam: a hereditament which is exempt from rating is not a hereditament whose "annual value does not exceed" £250, within s 39(4)(a) of the Town and Country Planning Act, 1959 (see p 331, letters *d* and *e*, p 334, letters *d* and *e*, p 335, letter *i*, p 337, letter *d*, and p 340, letter *h*, post).

Decision of the Court Of Appeal (sub nom Essex Incorporated Congregational Church Union v Essex County Council [1962] 2 All ER 518) not sustained and, obiter, disapproved.

NotesAs to counter-notices and reference of objections, see Supplement to 10 *Halsbury's Laws* (3rd Edn), para 40A (4, 5).
As to the jurisdiction of the Lands Tribunal under town planning legislation, see 10 *Halsbury's Laws* (3rd Edn) 232, 233, para 430; and as to appeals and the jurisdiction of tribunals generally, see 9 *Halsbury's Laws* (3rd Edn) 580, 581, para 1352.
For the Town and Country Planning Act, 1959, s 39(4), s 40, s 41, see 39 *Halsbury's Statutes* (2nd Edn) 1217, 1219, 1220; and for a summary of the Town and Country Planning (Limit of Annual Value) Order, 1959, see 21 *Halsbury's Statutory Instruments* (1st Re-issue) 178.

Cases referred to in opinionAndrews v Elliott (1855), 5 E & B 502, 25 LJQB 1, 26 LTOS 57, 119 ER 567, *affd* ExCh, (1856), 6 E & B 338, 119 ER 891, 21 *Digest* (Repl) 467, *1636*.
Colonial Bank of Australasia v Willan (1874), LR 5PC 417, 43 LJPC 39, 30 LT 237, 16 *Digest* (Repl) 142, *245*.
R v Nat Bell Liquors Ltd [1922] All ER Rep 335, [1922] 2 AC 128, 91 LJPC 146, 127 LT 437, 16 *Digest* (Repl) 469, *2897*.

AppealThis was an appeal against a decision of the Court of Appeal (Lord Evershed MR, Upjohn and Diplock LJJ) given on 3 April 1962 (reported sub nom Essex Incorporated Congregational Church Union v Essex County Council [1962] 2 All ER 518), upholding a decision of the Lands Tribunal (Sir William Fitzgerald QC President), given on 3 February 1961, by which the tribunal had held, on a preliminary point of law raised by consent, that a notice under s 39(2) of the Town and Country Planning Act, 1959, requiring a compensating authority to purchase land was a valid notice.
The cases noted below[b] were cited during the argument in addition to those referred to in the opinions

[b] Farquharson v Morgan [1894] 1 QB 552, Westminster Bank, Ltd v Edwards [1942] 1 All ER 470, [1942] AC 529, Horace Plunkett Foundation v St Pancras BC [1958] 1 All ER 122, British Transport Commission v Hingley [1961] 1 All ER 837, [1961] 2 QB 16

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D G Widdicombe for the appellants.

L J Davies for the respondents.

Their Lordships took time for consideration

17 January 1963. The following opinions were delivered.

LORD REID.
My Lords, in this case the Lands Tribunal on 26 June 1961, stated a Case at the request of the present appellants for the decision of the court. It was stated in the Case that the question on which the decision of the court was desired was a preliminary point of law arising in a reference by the present respondents, and was

> "the question whether or not the provisions of Part 4 of the Town and Country Planning Act, 1959, enable a purchase notice to be served under s. 39 of that Act in respect of land part of which (being a church) is exempt from rates and has no rateable value, and whether or not the purchase notice served by the claimants in the case is valid."

The Court of Appeal did not give effect to a preliminary objection by the present respondents, but proceeded to answer the question in the case in their favour. Your Lordships, being inclined to take a different view about the proper answer to this question, heard a fuller argument on the preliminary objection. For reasons, which I shall state in a moment, I am of opinion that the Lands Tribunal had no jurisdiction to entertain or decide this preliminary point of law, and that accordingly this case should never have been stated and the question in it should not have been answered by the Court of Appeal, and should not now be answered by your Lordships.
The matter arose in this way. Part 4 of the Act of 1959 enables owner-occupiers of, inter alia, land proposed to be taken for road widening to require the appropriate authority to purchase the whole of any hereditament of which part is proposed to be taken. The respondents own a site in High Street, Wickford, on which there are a church and hall. Part of this site is shown on an approved plan for road widening and is land coming within the scope of s 39(1)(f) of this Act. Section 39(2) provides that:

> "Where the whole or part of a hereditament or agricultural unit is comprised in land of any of the specified descriptions, and a person claims that—(a) he is entitled to an interest in that hereditament or unit, and (b) the interest is one which qualifies for protection under this Part of this Act, and (c) since the relevant date he has made reasonable endeavours to sell that interest, and (d) he has been unable to sell it except at a price substantially lower than that for which it might reasonably have been expected to sell if no part of the hereditament or unit were comprised in land of any of the specified descriptions, he may serve on the appropriate authority a notice in the prescribed form requiring that authority to purchase that interest … "

The appellants are admittedly the appropriate authority and the respondents duly served a notice requiring them to purchase the whole of their hereditament.
The Act of 1959 then provides by s 40 that the appropriate authority may within two months after the service of the notice serve a counter-notice objecting to the notice. Section 42 provides that where a notice has been served and there is either no counter-notice objecting to the notice, or (sub-s (1)(b)) where a counter-notice has been served and "… the objection is withdrawn, or, on a reference to the Lands Tribunal, is not upheld by the tribunal", the appropriate authority shall be deemed to be authorised to acquire the land compulsorily and to have served a notice to treat. The appellants did serve a counter-notice and it is necessary to set out in some detail what they did and what the Act of 1959 provides with regard to counter-notices and how they are to be dealt with.
Section 40, having in sub-s (1) provided for service of a counter-notice, sets out in sub-s (2) six "grounds on which objection may be made in a counternotice", and provides by sub-s (3):

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> "Any counter-notice … shall specify the grounds (being one or more of the grounds mentioned in the last preceding subsection) on which the appropriate authority object to the notice."

One of those grounds is:

> "(e) that (for reasons specified in the counter-notice) the interest of the claimant is not an interest qualifying for protection under this Part of this Act."

There is nothing in the Act entitling the appropriate authority to add to or amend its counter-notice after the expiry of the two months, or entitling the Lands Tribunal to make or authorise any such addition or amendment. This omission appears to me to be deliberate and I can see good reason for it.
The appellants' counter-notice was duly served within the two months period. It contained the following statements:

> "The grounds on which objection is taken are—The condition specified in paras. (c) and (d) of s. 39(2) of the Town and Country Planning Act, 1959, are not fulfilled.
> "Note: If you do not accept this objection, you may require the objection to be referred to the Lands Tribunal, under the provisions of s. 41 of the Act. In that case you should notify the Registrar of the Lands Tribunal, 3. Hanover Square,

London, W.1, within two months of the date of service of this notice."

Admittedly there is nothing in the counter-notice which could be construed as a reference to para (e) of s 40(2) and counsel for the appellants frankly admitted that it was only at some later date that it occurred to them that the respondents' interest did not qualify for protection under the Act.
The tribunal is brought in in this way. Section 41(1) provides that, where a counter-notice has been served objecting to a notice, the claimant "may require the objection to be referred to the Lands Tribunal". The respondents did so require. The duty of the Lands Tribunal is then specified in s 41 as follows (omitting provisions which do not apply in this case):

"(2) On any such reference, if the objection is not withdrawn, the Lands Tribunal shall consider the matters set out in the notice served by the claimant and the grounds of the objection specified in the counter-notice; and, subject to the next following subsection, unless it is shown to the satisfaction of the tribunal that the objection is not well-founded, the tribunal shall uphold the objection.
"(4) If the tribunal determines not to uphold the objection, the tribunal shall declare that the notice to which the counter-notice relates is a valid notice."

Before the reference to the tribunal had proceeded very far it occurred to the appellants that the interest of the respondents did not qualify for protection because it did not fall within s 39(4) and they took the view that they could bring this before the tribunal notwithstanding the fact that it could have been, but was not, raised in their counter-notice. As I understand it their argument was that there could not be a valid reference to the tribunal unless there was a valid notice, that a notice could not be valid if any of the conditions in s 39(2) were not satisfied or at least if the interest was not one which qualified for protection, and that the provision in s 41(2) that the tribunal "shall consider the matters set out in the notice" enabled them to raise the point. Accordingly they applied to have this matter dealt with on a preliminary point of law.
In my judgment this was a complete misapprehension. In the first place it would go far to nullify the elaborate provisions of s 40. Why should that section provide that the counter-notice must specify the grounds of objection to the notice and in the case of ground (e) must further specify the reasons, if it is to be open to the authority to disregard these requirements and make a case

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under ground (e) before the tribunal without even mentioning it in the counter-notice. What is referred to the tribunal is not the validity of the notice, but the validity of the objection in the counter-notice. Any other view would be inconsistent with the provisions of s 41(4). There "the objection" must be referring back to "the objection specified in the counter-notice" in s 41(2) and if that objection is not upheld the tribunal is expressly directed to declare the notice valid. So, when s 41(2) refers to "the matters set out in the notice served by the claimant", it must mean those matters which are relevant to the question referred to the tribunal—the validity of the objection—and cannot be intended to include matters irrelevant to that question. If the authority does not choose to question the validity of the notice at the time and in the manner required by the Act, it cannot do so at some later time or in some other manner.
I draw the same conclusion from the provisions of s 42. Suppose there were no counter-notice. Then the authority is deemed to have served a notice to treat. It could not possibly say at some later date that, because the claimants' notice was invalid, s 42 never came into operation. But s 42 treats alike cases where there has been no counter-notice and where the objection (which again must mean the objection in the counter-notice) has not been upheld. So why should the authority be unable to question the validity of the notice, if there is no counter-notice, but able to question it if there is a counter-notice dealing with quite a different matter. Suppose that in this case the authority has no intention of pursuing the grounds in its counter-notice—as may well be the case—it would be strange that the mere existence of this counter-notice should enable it to insist on some novel and different objection from which otherwise it would be excluded. Section 39(2) does not say that a person can give a valid notice only if the four conditions which it sets out are satisfied: it says that he can give a notice if he claims that they are satisfied. And then s 42 requires that the notice shall be treated as valid unless an objection in a counter-notice is upheld.
So it appears to me to follow inevitably that the tribunal had no jurisdiction to do anything more in this case than to determine whether the objection in the appellants' counter-notice should or should not be upheld. The question in the Case Stated is in no sense a preliminary point of law. It is irrelevant to the question referred to the tribunal because, whichever way it is answered, the answer can make no difference in determining whether the objection in the counter-notice is a valid objection. Its purpose and effect could only be to determine the validity of a ground of objection not stated in the appellants' counter-notice and, therefore, not referred to the tribunal.

But the appellants say that the respondents cannot be allowed to maintain this point now because they consented to the matter being dealt with by the tribunal. What in fact happened was that the appellants requested the tribunal to deal with this point as a preliminary point of law; this request was intimated to the respondents and they did not object; then the respondents appeared before the tribunal and argued the point but, not being then alive to their rights, they did not protest. I need not consider whether this amounted to a consent to widening the reference to the tribunal, because in my judgment it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.
If the High Court, having general jurisdiction, proceeds in an unauthorised manner by consent there may well be estoppel. And an arbitrator, or other tribunal deriving its jurisdiction from the consent of parties, may well have his jurisdiction extended by consent of parties. But there is no analogy between such cases and the present case. The tribunal in the present case had no power to state a Case except with regard to some matter arising out of the exercise of its limited statutory jurisdiction, and this Stated Case does not deal with any such matter. I am, therefore, of opinion, that the Stated Case was not properly

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before the Court of Appeal and is not properly before your Lordships. Accordingly, this House ought to refuse to answer the question set out in the Case Stated. In view of an undertaking as to costs given by the appellants in seeking leave to appeal to this House the appellants ought to pay the respondents' costs here and in the Court of Appeal.
But in the circumstances I do not think that it would be right simply to leave the matter there. The Court of Appeal have answered the question and their answer stands as an authority in the reports. If we disagree with that answer I think that we ought to say so, and if we say so, we must give our reasons. I have had an opportunity of reading the speeches about to be delivered by your Lordships and I agree that we should not accept the reasoning of the Court of Appeal. The question is a short one. The interest of an owner-occupier who is not resident only qualifies for protection if the annual value of his hereditament does not exceed the prescribed limit (s 39(4)) and the prescribed limit is £250. Annual value is defined as meaning the value which is shown in the valuation list as the rateable value (s 43(5)). But churches, places of religious worship, church halls and similar buildings are not liable to be rated. So they are not valued and the only entry in the valuation list is "exempt". This is not in my opinion the same as an entry "nil", which would imply that the hereditament had been valued but the value was nil. Nil or nought is, of course, less than £250 or any other sum. But if no value at all is shown in the list, how can it be said that something which does not exist is either less or greater than any specified sum? This may seem very technical but it is obvious that the draftsman of the Act of 1959 simply forgot about exempt hereditaments: the addition or alteration of one or two words would have settled the matter one way or the other. And there would have been arguments both ways. So all we can do is to take the words of the Act of 1959 as they stand. Treating the matter therefore as a pure question of construction I could not avoid the conclusion that hereditaments like that in the present case do not qualify for protection under Part 4 of the Act of 1959.

LORD JENKINS.
My Lords, I concur.

LORD MORRIS OF BORTH-Y-GEST.
My Lords, the agreed statement of facts records the events which lead to a reference to the Lands Tribunal. The respondents served a purchase notice requiring the appellants to purchase the land and buildings. That was served pursuant to s 39 of the Town and Country Planning Act, 1959. It was served (see sub-s (2)) on the basis that the whole or part of the hereditament was comprised "in land of any of the specified descriptions" and because the respondents claimed (a) that they were entitled to an interest in the hereditament, (b) that the interest was one which qualified for protection under Part 4 of the Act, (c) that since the relevant date they had made reasonable endeavours to sell that interest, and (d) that they had been unable to sell it except at a price substantially lower than that for which it might reasonably have been expected to sell if no part of the hereditament were comprised in land of any of the specified descriptions.
It was provided by the section (see s 39(4)) that an interest in the whole or part of a hereditament is to be taken to be an interest qualifying for protection under Part 4 of the Act of 1959 of on the date of service of a notice either (a)

the "annual value" of the hereditament did not exceed "the prescribed limit" and the interest was that of an owner-occupier, or (b) in a case not so covered the interest was that of a resident owner-occupier. "Annual value" is defined (see s 43(5)) as follows:

> "'annual value', in relating to a hereditament, means the value which, on the date of service, is shown in the valuation list as the rateable value of that hereditament, except that, where the rateable value differs from the net annual value, it means the value which on that date is shown in the valuation list as the net annual value thereof."

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The "prescribed limit" has been fixed at £250 (see SI 1959 No 1318).
On receipt of the notice which the respondents served the appellants had the statutory rights which were given to them by s 40. They were entitled within a period of two months to serve a counter-notice in a prescribed form objecting to the notice served on them. They were entitled to object on one or more of the grounds specified in s 40(2) and they were obliged (see s 40(3)) to specify the grounds of their objection. They could for example object on the ground (see s 40(2)(a)) that no part of the hereditament to which the notice related was comprised in land of any of the specified descriptions: they could object on the ground (see s 40(2)(d)) that the respondents were not entitled to an interest in any part of the hereditament: they could object on the ground (see s 40(2)(e)) that for some specified reasons the interest of the respondents was not an interest qualifying for protection under Part 4 of the Act: they could object (see s 40(2)(f)) on the ground that the conditions, to which I have referred previously, in s 39(2)(c) and (d) were not fulfilled. Being so entitled the appellants did in fact serve a counter-notice and they served it within the statutory two months. They limited their objection to the last of the grounds of objection that I have mentioned. Their counter-notice (in prescribed form) made reference to the relevant paragraph of s 40(2) and, complying with the requirement to specify the ground of objection, stated: "The conditions specified in paras (c) and (d) of s 39(2) of the Town and Country Planning Act, 1959, are not fulfilled" (s 40(2)(f)).
The respondents then did what they were entitled to do pursuant to s 41(1). The subsection provides that where a counter-notice has been served a claimant may within a certain time "require the objection to be referred to the Lands Tribunal". On 10 March 1960 (which was within the prescribed time) the respondents did refer the appellants' objection to the Lands Tribunal. The Lands Tribunal thereafter were charged with the duty of deciding whether or not to uphold the objection. So far as applicable in the present case s 41(2) and (4) provide as follows:

> "(2) On any such reference, if the objection is not withdrawn, the Lands Tribunal shall consider the matters set out in the notice served by the claimant and the grounds of the objection specified in the counter-notice; and … unless it is shown to the satisfaction of the tribunal that the objection is not well-founded, the tribunal shall uphold the objection.
> "(4) If the tribunal determines not to uphold the objection, the tribunal shall declare that the notice to which the counter-notice relates is a valid notice."

My Lords, it seems clear that it became an obligation of the Lands Tribunal to declare that the respondents' notice was a valid notice, unless they upheld the objection of the appellants.
At a later date (on 19 September 1960) the Lands Tribunal made an order that a "point of law" should be disposed of at a preliminary hearing. The order was made pursuant to an application by the appellants, but was consented to by the respondents. The "point of law" as recorded in a statement of facts agreed by the parties was

> "the question whether or not the provisions of Part 4 of the Town and Country Planning Act, 1959, enable a purchase notice to be served under s. 39 of that Act, in respect of land part of which (being a church) is exempt from rates and has no rateable value and whether or not the purchase notice served by the claimants in this case is valid."

When this "point of law" is examined it will be seen that it constitutes a ground which the appellants could previously have raised as an objection to the respondents' notice. It was the ground referred to under s 40(2)(e), viz,

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> "that (for reasons specified in the counter-notice) the interest of the claimant is not an interest qualifying for protection under this Part of this Act."

The appellants were raising the point that the interest in the hereditament of the respondents was not to be taken to be an interest qualifying for protection (see s 39(4)), because it was not shown that the annual value of the

hereditament did not exceed the prescribed limit of £250. They were wishing to contend that as the hereditament was exempt from rates (see s 7 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955) it could not be held that the annual value did not exceed £250.

My Lords, had the appellants earlier thought of raising the point to which I have referred, they would have been entitled to raise it as one of the grounds (which was required to be specified; see s 40(3)) of their counter-notice. Any counter-notice had to be served within two months. The point was, however, not raised. Accordingly, the point did not constitute "an objection" which was referred to the Lands Tribunal. The jurisdiction of the Lands Tribunal is purely statutory and is limited by statute and it was not open to the Lands Tribunal to deal with an objection which was never referred to it: nor could the Lands Tribunal by the consent of the parties assume a jurisdiction going beyond the provisions of the sections to which I have referred. Had the point raised been in reality a "point of law" which was preliminary to the issue which was in fact referred for adjudication of the Lands Tribunal then its prior disposal as a preliminary point would have been eminently reasonable (see r 44(1) of the Lands Tribunal Rules, 1956 (SI 1956 No 1734)). But a separate and distinct objection, not raised as by statute required, and not referred as by statute required, cannot be dealt with under the guise of a "point of law". The point raised was not a "point of law" preliminary to the objection—and the only objection—which had been raised by the appellants. It was quite distinct from the matters which were raised and which were referred to the Lands Tribunal—viz, whether the respondents had made reasonable endeavours to sell and whether they had been unable to sell except at a price substantially lower than that for which the hereditament might have sold had it not been affected by planning proposals. It constituted an entirely separate ground of objection—and constituted one of the specific possible grounds of objection referred to in s 40(2). As it had not been raised it could not be referred to the Lands Tribunal. As it was not referred to the Lands Tribunal it was not before the tribunal and there was no authority to deal with it. The tribunal could not assume a jurisdiction with which it would only be endowed if certain steps had been taken and certain conditions satisfied.

My Lords, these reasons seem to me to impel the conclusion that it was not open to the Lands Tribunal to deal with the so-called "point of law" and their decision on it can be of no effect. The appellants asked pursuant to s 3(4) of the Lands Tribunal Act, 1949, for a Case to be stated; that was on the ground that the "decision" of the Lands Tribunal was erroneous in point of law. But as the "decision" of the Lands Tribunal related to a question which had never been referred to and was not before the tribunal, it would be of no avail or effect to answer the question which was raised by the President of the Lands Tribunal in the Case Stated, viz:

> "whether upon the findings of fact I came to a correct decision in law in holding that the notice served by the claimant under s. 39 of the Town and Country Planning Act, 1959, was a valid notice."

In these circumstances it seems to me that your Lordships cannot entertain this appeal. Leave to appeal was only granted on an undertaking of the appellants not to seek to disturb existing orders as to costs and to pay the costs of the respondents in any event.

It is to be noted that in the decision of the Lands Tribunal annexed to the

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Case Stated the view was expressed that as the land of the respondents (which appeared in the valuation list) was not assigned an annual value but was entered as "exempt", the annual value did not exceed the prescribed limit contemplated by s 39(4). The decision continued: "In these circumstances I must conclude that the notice purporting to be served by the Essex County Council under s 40 is invalid". This seems surprising in view of the fact that the only ground of objection raised by the appellants in their counter-notice under s 40 awaited adjudication pending a decision on what was called the preliminary point of law.

Any opinion in regard to the question which was in fact raised in the preliminary point could only be expressed obiter. In these circumstances there must be doubt as to the desirability of expressing an opinion that will lack binding efficacy. As, however, the question was argued and as it was argued at the expense of one party and as both parties seemed desirous of having your Lordships' views, I can state mine quite shortly. The matter was argued on the assumption that the word "exempt" appeared in the valuation list. The respondents' interest would qualify if the annual value (on the date of service of their notice) of their hereditament did not exceed £250. Applying the definition of "annual value" (see s 43(5)) the respondents' interest would qualify if the value which (on the date of service of their notice) was shown in the valuation list as the rateable value of their hereditament did not exceed £250. If the rateable value had been shown as "nil"—then it would not have exceeded £250. But no rateable value was shown. What was recorded was that the hereditament was "exempt". In those circumstances I would not have thought that the interest of the respondents satisfied the test required to qualify an interest for protection. If a hereditament is "exempt" then no rateable value is shown in the valuation list. If no rateable value is shown in the

valuation list then I cannot see how it can be asserted that the value which "is shown in the valuation list as the rateable value" is a value which "does not exceed the prescribed limit".

LORD HODSON.

My Lords, in my opinion this appeal must fail for the reasons given by my noble and learned friend Lord Reid.

The Essex Incorporated Congregational Union, who are the claimants, served on Essex County Council, who are the compensating authority, a notice dated 23 November 1959, pursuant to s 39(2) of the Town and Country Planning Act, 1959. The notice required the compensating authority to purchase the site and buildings fronting High Street, Wickford, on which stand a church and a church hall. The notice was in the prescribed form and was met as the statute provides by a counter-notice under s 40 of the Act objecting to the purchase notice. The counter-notice was served on 15 January 1960, and was thus served within two months of the claimants' notice, the time limit imposed by the same section, which contains no provision for extension of time. The counter-notice stated that the objections to the notice were that the claimants had not fulfilled the conditions of paras (c) and (d) of s 39(2) of the Act, which provide that the claimants must have made reasonable endeavours to sell their interest and that they had been unable to sell except at a price substantially lower than that for which the hereditament might reasonably have been expected to sell if no part thereof were comprised in land of any of the specified descriptions. This counter-notice has not been adjudicated on by the Lands Tribunal, because the compensating authority desired to take the point, which they could have but did not take within the two months, that the claimants did not qualify for protection, since their notice was invalid having been made in respect of land, part of which (being a church) is exempt from rates and has no rateable value. I have said that the compensating authority could have taken the point within time, for s 40(2)(e) of the Act provides as one of the grounds of objection.

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> "that (for reasons specified in the counter-notice) the interest of the claimant is not an interest qualifying for protection under this Part of this Act."

This last question was not raised in the form of an objection, but as a preliminary point in order to obtain a decision whether or not the claimants, being exempt from rates, came within the purview of this Part of the Act. Both the claimants and the compensating authority agreed to this matter being decided by the Lands Tribunal, who found in favour of the claimants that the notice was valid since although the hereditament was exempt from rates it was nevertheless true to say that its annual value did not exceed the prescribed limit (£250) and the interest in question was that of an owner-occupier of the hereditament; see s 39(4)(a) of the Act of 1959. At the request of the compensating authority a Case was stated by the Lands Tribunal for the decision of the Court of Appeal. On the hearing of the appeal the point was taken for the first time that the Lands Tribunal had no jurisdiction to do other than decide on objections raised under the statute and that this point under s 39(4) not having been raised as one of the objections, there was no jurisdiction to decide it. The Court of Appeal rejected this submission having regard to the fact that the only point argued throughout was the point under s 39(4). Had the question been procedural only no difficulty would have arisen, for the parties had consented to the course taken before the Lands Tribunal, but in my opinion the jurisdiction of the tribunal is circumscribed by the terms of the Act of 1959 so that it has no power in this matter to do other than deal with objections put forward within the statutory time limit of two months.

The consent of the parties cannot confer jurisdiction where none exists nor can any question of estoppel arise for estoppel cannot enlarge the jurisdiction of a court of limited jurisdiction. In my opinion the service of this notice by the claimants was good in that the compensating authority would have had to buy the site, if no objection were put in within time and adjudicated on as the Act provided.

Section 41(4) of the Act provides that if the tribunal determines not to uphold the objection, the tribunal shall declare that the notice to which the counter-notice relates is a valid notice. This provision is imperative.

No objection having been made pursuant to the statute raising the desired question within time the defect cannot be cured out of time by seeking to achieve the same result by obtaining a decision on a preliminary point of law.

I am therefore of opinion that the objection taken to jurisdiction is sound and that your Lordships cannot deal effectively with the matter which the parties desired to raise. The same objection, of course, applies to the jurisdiction of the Court of Appeal, who could not for their part give an effective decision any more than your Lordships.

Since, however, your Lordships have heard a full argument on the point raised by the Case Stated, it is, I think, desirable that even if the question raised cannot be formally answered an opinion should be expressed especially

as I understand all of your Lordships take a different view from that taken by the Court of Appeal on the construction of s 39(4)(a) of the Act in particular of the words "the annual value of the hereditament does not exceed the prescribed

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limit". The question is—Can a hereditament which is exempt from rating and has therefore no annual value be said to have an annual value of less than £250? This answer must, I think, be in the negative. I cannot agree, with all respect to the Court of Appeal, that because the property is exempt, therefore the annual value is nil so that it must be less than £250. Exempt from rates is not equivalent to a nil valuation and involves no more than that the annual value has not been ascertained, not that it could not be ascertained, and, if ascertained, might not exceed the limit of £250. When an hereditament is exempt the question whether or not its annual value exceeds the prescribed limit cannot be answered. I would therefore have answered the question in the opposite way from the Lands Tribunal and the Court of Appeal.

LORD DELVIN.

My Lords, the plans of a local authority to acquire land for a public purpose are generally known some considerable time in advance of the date when they are put into execution. In this case your Lordships are concerned with the plans of the appellants, Essex County Council, as a highway authority. They propose to widen High Street, Wickford, and that means that sooner or later they will have to acquire the property of the respondents who own a freehold interest in a church and the church hall adjoining the existing boundary of High Street. It is plain that a situation of this sort can cause hardship to property owners in the position of the respondents. They cannot very easily sell property which is going to be the subject of future acquisition and they will not get planning permission for any development that would conflict with the plans for the new highway.

Part 4, comprising s 39 to s 43 inclusive, of the Town and Country Planning Act, 1959, is designed to give a measure of relief to some of such property owners. Not to all, but only to those who are considered most deserving, that is, who are entitled to an interest "which qualifies for protection", to use the words in s 39(2)(b). Broadly speaking (cf s 39(4)) they must be owner-occupiers, either in residence (which the respondents of course are not) or whose property has an annual value of less than £250. They must also be able to show that they have endeavoured to sell their interest and have been unable to do so except at a depreciated price. If they are prepared to claim that they fulfil these conditions, they can serve the authority with a notice conveniently called a purchase notice. If the authority does not dispute the claim, it is put in the same position as if it had served a notice to treat. If it does dispute the claim, it can within two months serve a counter-notice objecting to the purchase notice on any one of six grounds specified in s 40(2). The grounds for objection enable, inter alia, a challenge to be made to the claims contained in the purchase notice. On the fourth ground the authority can dispute the existence of an interest and on the fifth that it is qualified for protection; and on the sixth ground it can dispute that the claimant has made reasonable endeavours to sell and has been unable to do so.

The respondents on 23 November 1959, served a purchase notice and on 15 January 1960, the appellants served a counter-notice. The counter-notice stated one ground of objection only, namely, the sixth ground, which I have summarised above. On 10 March 1960, the objection was referred to the Lands Tribunal.

As I have said, only certain classes of interest, conveniently referred to as "qualifying interests", qualify for protection under the Act. The qualification in the respondents' case is that the property should have an annual value below £250. Now, "annual value" is defined by s 43(5) of the Act as the value "shown in the valuation list". The respondents' property, being a church, is not liable to rates; and no value is shown in the list, which is marked "exempt". Is no annual value the same thing as an annual value of nil? If what is shown in the list is to be taken as an annual value of nil, then "nil" is less than £250 and the respondents qualify. If no annual value is shown in the list, then they do not qualify. This is the point that was argued and decided in the Lands Tribunal and in the Court of Appeal.

It is impossible to suppose that this point had occurred to the appellants when they served their counter-notice. Lack of qualifying interest is, as I said, the subject-matter of the fifth ground of objection. Sometime between 23 January 1960,[c], and 19 September 1960, the appellants must have become aware that lack of qualifying interest was a point to be argued. The appellants evidently took the view, the correctness of which the House must consider, that the service of a counter-notice stating an objection on any ground threw open for argument the

[c] The time for serving a counter-notice expired with 22 January 1960

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question of the validity of the purchase notice as a whole. The facts relating to qualifying interest were not in dispute, so that on that matter only a point of law was raised, while the ground of objection specified in the counter-notice raised a question of fact. The appellants thought it convenient that the point of law should be disposed of first and accordingly they framed a preliminary point of law which without objection from the respondents was set down for determination by the tribunal. The point of law was

> "the question whether or not the provisions of Part 4 of the Town and Country Planning Act, 1959, enable a purchase notice to be served under s. 39 of that Act in respect of land part of which (being a church) is exempt from rates and has no rateable value, and whether or not the purchase notice served by the claimants in the case is valid."

It was open to the respondents to deal with this question of law in either one of two ways. They could say either that they had a qualifying interest or that, if they had not, it was not open to the appellant to take the point since they had not made it a ground of objection in their counter-notice. Both the tribunal and the Court of Appeal answered the the question in the respondents' favour on the first ground. Before the tribunal the second ground was not referred to at all; and the Court of Appeal refused to consider it because it had not been argued before the tribunal and was not covered by the point of law as framed. I differ with respect from the Court of Appeal's conclusion on the first ground; I agree with the conclusion and reasoning on this point already expressed by my noble and learned friends[d] and can add nothing useful to what they have said.

[d] All their Lordships expressed like views on this point, see p 331, letters *d* and *e*, p 334, letters *d* and *e*, and p 335, letter *i*, post

I should, therefore, if the matter stopped there, have to consider the second ground and also the Court of Appeal's reasons for not entertaining it. But before your Lordships it has been contended that the question ought not to be answered at all. The basis for this contention is that since the lack of qualifying interest was not a ground stated in the counter-notice, the tribunal had no jurisdiction to consider it or to state a Case raising a question of law on it; and consequently neither the Court of Appeal nor this House have any jurisdiction to answer such a question and the appeal should be dealt with accordingly. I must therefore examine in detail the relevant sections of the Act, which I have only summarised broadly, in order to find out whether the question should be answered at all, and, if so, in what way.

It is not at all easy to understand just what under the Act of 1959 the Lands Tribunal has to do. It has to end up, if it does not upheld an objection, by declaring the purchase notice to be a "valid notice", but it is not at all clear what is meant by validity. Undoubtedly a notice would be invalid if some condition precedent to its issue was not complied with. This is evidently the point at which the question of law as stated is directed, for the question speaks of enabling a purchase notice to be served. It is plain from s 39(2) that the purchase notice is to apply to the whole or a part of a hereditament and that there are two conditions precedent to the service of the notice. The first is that the whole or part must be comprised in land "of any of the specified descriptions". These descriptions are set out in the preceding subsection and cover the sort of situations I have described as those in which the Act of 1959 gives relief. It is not disputed that part of the plaintiffs' land is

> "land shown on plans approved by a resolution of a local highway authority as land comprised in the site of a highway as proposed to be constructed, improved or altered by that authority":

s 39(1)(f). The second condition is that the person serving the notice should make the four claims thereafter set out which, if successful, would establish

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that he had a qualifying interest, had endeavoured to sell and had been unable to do so except at a depreciated price. Counsel for the respondents has pointed out the significance of the word "claim". Whereas the service of the notice is conditional on the existence of a resolution or whatever else it may be which brings the land within the specified descriptions, it is not conditional on the existence of a qualifying interest; it is necessary only that one should be claimed.

Your Lordships must look next at s 40(1) which provides for the service of a counter-notice. It is a counter-notice "objecting to the notice". There is only one objection and it is an objection to the notice as a whole, not to any claim in it; and, if I may jump forward to s 41(1) it is "the objection" which is referred to the tribunal. But s 40(3) requires that the counter-notice shall specify the grounds for the objection which must be one or more of the six grounds

defined in s 40(2). As I have said, the fourth, fifth and sixth grounds are simply denials of the claims contained in the purchase notice. The third ground does not relate to this type of case. The first ground challenges the fulfilment of the condition precedent to the notice, ie, it objects that the hereditament is not "land of any of the specified descriptions". The second ground introduces new matter altogether. It permits the authority to assert that it does not propose to acquire any part of the hereditament affected. I say "permits it to assert" because under s 41(3) the burden of proof under this head is placed on the authority, whereas under the other heads it is by s 41(2) for the claimant to destroy the objection.
Finally, your Lordships must see what it is that the tribunal is expressly told to do. Under s 41(2) it has to

> "consider the matters set out in the notice served by the claimant and the grounds of the objection specified in the counter-notice … "

It must then determine whether or not to uphold the objection. Thus, while it has to consider the grounds in the counter-notice, it does not have to make any specific determination on any of them. If it does not uphold the objection, it declares, and is obliged under s 41(4) to declare, that the purchase notice is a valid notice. If it upholds the objection, it does nothing. This is presumably because it is only the sort of purchase notice that is described in the marginal note to s 42 as a "valid notice" that compels the authority to purchase. It follows that, if not declared valid, a purchase notice would be ineffective or invalid.
In the light of all these provisions, what is meant in the Town and Country Planning Act, 1959, by the "validity" of the purchase notice? There are under the Act three different ways in which the notice may be attacked. There is only one of them in which it is easy to see how the attack affects validity and that is the first ground of objection. If this is successful, it shows that a condition precedent to the service of the notice has not been fulfilled. But the fourth, fifth and sixth grounds, if the authority succeeds on them, simply show that the claims in the purchase notice have not been made good. How does that affect the validity of the notice? There can be bad claims in a good notice just as there can be good claims in a bad notice. The second objection is even more remote from validity, for it admits new matter of defence. But the House must give effect to the Act of 1959 and I cannot read it otherwise than as conferring jurisdiction on the tribunal under certain conditions to determine the validity of the purchase notice. Whether, if it is not declared valid, it is avoided ab initio or is treated as quashed, because of defect in the claims or otherwise, is not a matter I need go into. I cannot accept the argument that the goodness or badness of a claim is irrelevant to the validity of the notice.
Another unusual feature of the arrangements made by the Act of 1959 is that the tribunal in deciding on the validity or invalidity of the purchase notice has to decide on its own jurisdiction. Without a valid purchase notice there can be no counter-notice and so nothing to initiate proceedings before the tribunal.

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But although unusual it is not unknown for an inferior tribunal to be given statutory power (subject, of course, to appeal, if any is provided) to determine its own jurisdiction; and that it appears to me, so far as the validity of the purchase notice is a condition precedent to the jurisdiction, is what this statute does in terms.
Accordingly, my Lords, I dismiss the notion that by inquiring into the validity of the notice, as the point of law plainly demands that it should do, the tribunal was necessarily exceeding its power. It has power to do so under certain conditions. What are these conditions?
Before answering this question it is convenient to consider what it is that a superior court has to be satisfied about when it is questioning the jurisdiction of an inferior tribunal. It has to be satisfied that the tribunal has general jurisdiction, that is, jurisdiction to enter on the inquiry. A statute, besides laying down conditions precedent to the entry of the inquiry, often lays down conditions which have to be satisfied before the tribunal takes some step in the course of the inquiry or makes interim or final orders. If these conditions are not satisfied, it is then sometimes said that the tribunal had no power to take the step or make the order. That is not what is meant by general jurisdiction. If the tribunal makes an order it ought not to have made, it may thereby fall into an error of law which can be corrected, but the error does not deprive it of jurisdiction. This distinction is made clear in the opinion of the Judicial Committee in the well-known case of Colonial Bank of Australasia v Willan ((1874), LR 5 PC 417 at p 444) where it is said:

> "… the question is, whether the inferior court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry."

Lord Sumner spoke to the same effect in R v Nat Bell Liquors Ltd ([1922] All ER Rep 335 at p 348; [1922] 2 AC 128 at p 151). Andrews v Elliott which was cited in argument, is an illustration of the same point. It illustrates also the rule that if there is no general jurisdiction, no consent or acquiescence can confer it. But if there is general jurisdiction, consent or lack of objection, such as is alleged here, might prevent the respondents from relying on any irregularity in the proceedings.

The scope of the inquiry which the court must make in order to satisfy itself whether there was general jurisdiction is described by Sir James Colvile in Colonial Bank of Australasia v Willan ((1874), LR 5 PC at pp 442, 443). The two subjects that are relevant here are "the nature of the subject-matter of the inquiry" and whether there are "certain proceedings which have been made essential preliminaries to the inquiry".

I do not think it can be disputed that service of a counter-notice is an essential preliminary to the inquiry. But there was here a counter-notice and if that is all that is needed, the court can inquire into the validity of the purchase notice. I do not think with respect that it can be right on any view to declare on a preliminary point of law the purchase notice to be valid before the grounds of objection in the counter-notice have been considered, but that is a matter which could be put right in the form of answer to the question if it is to be answered. Of course it does not follow from the fact that the tribunal can inquire into the validity of the notice that it can properly invalidate it on a ground not stated in the counter-notice. It may well be, and I should if necessary so hold, that on the true construction of the Act of 1959 the notice is conclusively presumed to be valid in all respects which are not covered by grounds of objection. If it were otherwise, there would never be any need to specify more than one ground of objection which would be directly contrary to s 40(3). But to construe the Act of 1959 otherwise would on this hypothesis be an error of law committed in the course of the inquiry. There would be jurisdiction to

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state a Case on the point; and if it were held that there was an error in going beyond the counter-notice as served, it would be necessary to consider whether the respondents impliedly consented, as the appellant contends, to the extension of the counter-notice to cover the point.

But if the service of the counter-notice is not only an "essential preliminary to the inquiry" but further by its contents it confines "the nature of the subjectmatter of the inquiry", the result would be different. I do not find this an easy point because of the rather evasive language of the Act of 1959.

But on the whole I have reached the conclusion that the inquiry is limited to the grounds set out in the objection. I appreciate that it is only the objection that is referred to the tribunal and not any of the grounds and that s 40(3), which says that grounds must be specified, might taken by itself be construed as a provision requiring particulars to be given and not as one prescribing boundaries. But when the statute requires "the objection to be referred" to the tribunal, I think it must mean the contents of the objection; there is more in that phrase than a provision that the fact of the objection is to initiate the inquiry. This construction is strengthened by the requirement in the next subsection that the tribunal shall consider "the grounds of the objection specified in the counter-notice"; there must there be an implied prohibition against considering any grounds that are not specified. I appreciate that the tribunal is to consider also "the matters set out in the notice served by the claimant"; but here again, if this were to be treated as a permission to consider claims that were not challenged, there would be no point in making provision for them to be challenged by the counter-notice. The power to declare the purchase notice a valid notice is not an unqualified one but is conditional on an objection not being upheld. I conclude therefore that the jurisdiction given to the tribunal to determine the validity of the purchase notice is confined within the grounds set out in the counter-notice; and accordingly that if the tribunal goes beyond those grounds it is not merely taking a step which is contrary to the provisions of the Act but is exceeding its jurisdiction.

In order to show that I have not overlooked a point that was not raised in argument, I must say that this excess of jurisdiction is apparent on the face of the Case Stated. The copy of the agreed statement of facts and of the tribunal's decision forms part of the Case and in both these documents it appears that the objection in the counter-notice was limited to the sixth ground.

I do not think that the House can do otherwise than set aside the orders of the Lands Tribunal and of the Court of Appeal as orders made without jurisdiction. I have entertained some doubt whether in these circumstances your Lordships ought to offer any opinion on the existence or not of a qualifying interest. Your Lordships have heard full argument on the point. It is one of general importance to the appellants and one that will doubtless arise again; it was on this footing that they obtained leave to appeal to the House on the terms that they paid all the costs in any event. If the House left the point where it now stands, the authority which would govern it would be that of the dicta in the Court of Appeal which must now be regarded as obiter. Having heard full argument on the point your Lordships are satisfied that those dicta are incorrect. Although your Lordships' dicta will also be obiter, I think that in the circumstances it would be right to express them.

Orders of Lands Tribunal and Court of Appeal made without jurisdiction. Appeal not entertained.

Solicitors: *Sharpe, Pritchard & Co* agents for *Christian Berridge,* Chelmsford (for the appellants); *Ellison & Co* (for the respondents).

C G Leonard Esq Barrister.

Indexed as:

Canadian National Railway Co. v. Canadian Transport Commission

Canadian National Railway Company (Applicant)
v.
Canadian Transport Commission (Respondent)
Canadian Pacific Limited (Applicant)
v.
Canadian Transport Commission (Respondent)

[1988] 2 F.C. 437

[1987] F.C.J. No. 626

Court File Nos. T-2153-86, T-2154-86

Federal Court of Canada - Trial Division

McNair J.

Heard: Winnipeg, June 24, 1987.
Judgment: Ottawa, July 14, 1987.

Federal Court jurisdiction -- Trial Division -- Applications for prohibition to prevent Canadian Transport Commission from considering application for relocation of railway facilities -- Upon filing of application for second phase of relocation, Commission writing to parties stating satisfied no outstanding statutory conditions precedent and therefore application considered received -- Applications dismissed -- In determining application considered received, Commission formulating opinion as to statutory authorization to receive plan -- Decision dealing with question of law or jurisdiction from which legal consequences flow -- Appealable to Federal Court of Appeal under National Transportation Act, s. 64(2) -- Federal Court Act, s. 29 precluding Trial Division's s. 18 jurisdiction -- Form of ruling (letter) immaterial -- Consent of parties not giving Court jurisdiction denied by statute.

These were applications for prohibition to prevent the Canadian Transport Commission from considering the application by the city of Regina for the relocation of certain railway facilities.

Upon receipt of the City's application for the second phase of the relocation, the Commission wrote to the parties, indicating that no statutory conditions precedent were outstanding and therefore the application was considered received. Although the parties agreed that the Court had jurisdiction to entertain the application for prohibition and should proceed to determine the merits of the controversy, the Court had misgivings about that and considered, as a preliminary issue, whether the Commission's letter constituted a "decision" or "interlocutory ruling," raising a question of law or jurisdiction, appealable to the Federal Court of Appeal under subsection 64(2) of the National Transportation Act. According to Canadian National Railway Co. v. Canadian Transport Commission, [1986] 3 F.C. 548 (C.A.), section 29 of the Federal Court Act would then deprive the Trial Division of section 18 jurisdiction. The [page438] applicants argued that the Commission's decision was not appealable as it was not a decision on the merits but merely acknowledged receipt of the application. In seeking prohibition, they argued that the Commission lacked jurisdiction to hear the application because the City had filed two plans for the same transportation study area, contrary to the provisions of the Railway Relocation and Crossing Act, and that the division of the relocation project into two phases constituted a denial of natural justice. The respondent argued that a broad and remedial interpretation of the statute did not preclude making the relocation applications in stages.

Held, the motions should be dismissed.

The Court lacked jurisdiction to deal with the merits of the issue of whether prohibition should lie. The Commission's letter stated that the Phase II relocation application was considered to have been received within the meaning of Part 1 of the Railway Relocation and Crossing Act. In making this determination, the Commission satisfied itself that the accepted plan materially affected only those municipalities located wholly or in part within the transportation study area to which the accepted plan related, and that there were no statutory conditions precedent left outstanding in respect of the application. Clearly, the Commission Formulated an opinion regarding its statutory authorization to receive the relocation plan. This was a decision or order on a question of law or of jurisdiction from which legal consequences would inevitably flow, notwithstanding that nothing further was ordered or required to be done at that particular stage. It was immaterial that the ruling was issued and communicated in letter form. The question of law or of jurisdiction dealt with was appealable to the Federal Court of Appeal under subsection 64(2) of the National Transportation Act. The Trial Division was therefore precluded by section 29 of the Federal Court Act from granting prohibition.

The parties could not confer jurisdiction on the Court by consent, it being denied by statute. Total absence of jurisdiction was to be distinguished from a procedural irregularity, which may be waived by agreement. Where a court pronounces judgment in a matter over which it has no jurisdiction, the judgment amounts to nothing.

Statutes and Regulations Judicially Considered

Federal Court Act. R.S.C. 1970 (2nd Supp.), c. 10, ss. 18, 29.

Interpretation Act, R.S.C. 1970, c. I-23, s. 11.
National Transportation Act, R.S.C. 1970, c. N-17, ss. 46, 57, 64(2) (as am. by R.S.C. 1970 (2nd Supp.), c. 10, s. 65).

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Railway Act, R.S.C. 1970, c. R-2, s. 331.
Railway Relocation and Crossing Act, S.C. 1974, c. 12, ss. 3(1),(2),(5),(6), 5(1),(2).

Cases Judicially Considered

Followed:
Canadian National Railway Co. v. Canadian Transport Commission, [198613 F.C. 548 (C.A.).

Applied:
Canadian National Railway Co. v. Canadian Transport Commission, [1982] 1 F.C. 458 (C.A.).
Essex Incorporated Congregational Church Union v. Essex County Council, [1963] A.C. 808 (H.L.).
Dominion Canners Ltd. v. Costanza, [1923] S.C.R. 46; [1923] 1 D.L.R. 551.

Referred To:
Farquharson v. Morgan, [1894] 1 Q.B. 552 (C.A.).
Township of Cornwall v. Ottawa and New York Railway Co. et al. (1916), 52 S.C.R. 466; 30 D.L.R. 664.
Canadian Pacific Railway Co. v. Fleming (1893), 22 S.C.R. 33.
Mulvey vs The Barge Neosho (1919), 19 Ex.C.R. 1.
Harris Abattoir Co. Ltd. v. SS. Aledo & Owners, [1923] Ex.C.R. 217.

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De Smith's Judicial Review of Administrative Action, 4th ed., J.M. Evans, London: Stevens & Sons Limited, 1980.

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Canadian Transport Commission, Saskatoon, for the respondent Canadian Transport Commission.

The following are the reasons for order rendered in English by

1 **McNAIR J.**:-- The case involves applications made by Canadian National Railway Company and Canadian Pacific Limited under section 18 of the Federal Court Act [R.S.C. 1970 (2nd Supp.), c. 10] for a writ of prohibition or relief in the nature thereof prohibiting the Canadian Transport Commission from considering the application of the city of Regina for the relocation of certain facilities owned and operated by CN, CP and VIA Rail Canada Inc., pursuant to the Railway Relocation and Crossing Act, S.C. 1974, c. 12 (the "Act"). It was agreed that the two applications should be heard together and treated as one, based on common evidence. The grounds for relief are identically stated in the motions as follows:

> (1) The Canadian Transport Commission is without jurisdiction in this matter as the Application of the City of Regina does not comply with subsection 3(1) of the Railway Relocation and Crossing Act.
> (2) The Canadian Transport Commission is without jurisdiction in this matter in that without compliance with subsection 3(1) of the Railway Relocation and Crossing Act the Canadian Transport Commission will not be able to make a determination under subsection 5(1) thereof.

2 In 1970 the city of Regina established a Regina Railway Relocation Programme. The purpose was to relocate all the railway yards and subdivisions currently within the boundaries of the City. Between 1974 and 1980 a number of segments of railway lines were relocated in Regina by mutual agreement between the City and the railways.

3 On March 30, 1984 the City filed an application under the Act with the Canadian Transport Commission for the relocation of CN's yard and remaining subdivisions and one CP subdivision. The [page441] Government of Canada had committed funds to the Phase I relocation under subsection 3(5) of the Act. This application became known as Phase I of the City's Global Railway Relocation Programme. The railways took steps to prevent the Commission from dealing with the Phase I application, none of which have been successful to date.

4 On July 29, 1985 the City filed an application with the Commission for the relocation of CP's yard and main line and a part of CN's Central Butte Subdivision. The application also involved certain VIA Rail facilities. This application can be conveniently referred to as Phase II of the City's Global Railway Relocation Program. The Government of Canada has committed no funds to the Phase II relocation.

5 On August 21, 1985 the Commission wrote a letter to the parties, stating in part as follows:

> The Commission has now had an opportunity to examine the Phase II relocation application filed by the City of Regina. After examining the application and plans the Commission is satisfied that:
>
> (a) the accepted plan materially affects only those municipalities located wholly or in part within the transportation study area to which the accepted plan relates,
> (b) The Urban Development Plan does not contemplate the use of federal programs,
> (c) The Transportation Plan and Financial Plan do not contemplate the allocation of monies from the monies appropriated by Parliament for the purposes of making relocation grants under Part I of the Railway Relocation and Crossing Act.
>
> Accordingly, the Commission is satisfied that no statutory conditions precedent are outstanding in respect of the Phase II application and therefore the Phase II application is considered to be received within the meaning of Part I of the R.R.C.A. as of this date. The reception of this application by the Commission commences the time period for the filing of Answers pursuant to the provisions of the Canadian Transport Commission General Rules.

6 The purpose of the present motions is to prohibit the Commission from proceeding with the consideration of the Phase II application for railway relocation in Regina. Leaving aside any preliminary question of jurisdiction, the issue is whether [page442] the application sufficiently complies with subsection 3(1) of the Act to enable the Commission to make the required determination under subsection 5(1) thereof.

7 Before dealing with the jurisdictional question, I feel that I should summarize briefly the main points of argument for and against the granting of prohibition.

8 The principal submission of the applicants is that subsection 3(1) of the Railway Relocation and Crossing Act envisages one urban development plan and one transportation plan for one transportation study area. Here, the city of Regina has submitted two urban development plans and

two transportation plans in respect of the same transportation study area for which there is no authority under the Act. Consequently, the Commission is without jurisdiction to hear the Phase II application. This is abundantly apparent from the fact that all references in the Act to the filing of requisite plans are contextually limited to the singular rather than the plural. The applicants stress that there is no authority in the Act that would permit the phasing of an entire relocation project with respect to an adjudication on the merits, having regard to the "cost-benefit equilibrium test" mandated by subsection 5(1) of the Act.

9 The applicants also submit that the division of the entire relocation project into two phases, even assuming such a procedure were permitted by the Act, represents a denial of natural justice by depriving the applicants of the opportunity to examine the total relocation project as a whole in making out their case in answer thereto. Instead, the railways are forced into the inimical position of having to contest a fragmented application on a piecemeal basis.

10 The case for the respondent was argued in main by counsel for the city of Regina. Counsel for the Canadian Transport Commission played a relatively passive role in a watching brief capacity. Counsel for the City agrees that the issue is whether the application filed by the city of Regina complies with subsection 3(1) of the Railway Relocation and Crossing Act. He supports the [page443] position of opposing counsel that the Court has jurisdiction to grant prohibition in a proper case.

11 The respondent sees the question at issue as being primarily one of statutory interpretation and he invokes both the remedial, liberal rule prescribed by section 11 of the Interpretation Act [R.S.C. 1970, c. I-23] and the modern principle for the interpretation of statutes formulated by Driedger and approved by the Supreme Court of Canada. The application of these rules of statutory interpretation negates the applicants' argument for a strict construction of the Act because of its alleged expropriatory nature.

12 The respondent's argument in a nutshell is that a broad and remedial interpretation of the relevant statutory provisions does not preclude the making of applications for railway relocation in stages. To suggest otherwise leads to the untenable conclusion that a municipality has only one opportunity to make an application under the Act. Such an unreasonable interpretation would prevent a municipality from implementing any long-term objective of railway relocation in an orderly fashion depending on the availability of financial resources or other relevant considerations, and is totally unsupported by the words of the Act. The respondent submits that the applicable statutory provisions of the Act have been met in the present case. The Phase II application is completely self-contained and the required urban development plan, transportation plan and financial plan have been filed in support thereof and duly received by the Commission.

13 Nothing in the Act precludes a further application to relocate railway lines that were unaffected by the initial Phase I application. The respondent makes the further point that the actual determination of the cost-benefit equilibrium referred to in paragraph 5(1)(a) will only take place

after the mandatory public hearing prescribed by subsection 5(2). In making such determination, the Commission is not restricted to information contained in the plans as filed.

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14 In response to the denial of natural justice argument, the respondent contends that the railways will be entitled to adequately state their case on the whole question of relocation in its entirety. The respondent points out that in the Phase I application Canadian Pacific filed evidence pertaining to Phase II.

15 Subsections 3(1), 3(2) and 3(6) of the Railway Relocation and Crossing Act, read as follows:

> 3. (1) Where, in respect of an area in a province that includes or comprises an urban area (hereinafter in this Part called a "transportation study area"), the government of the province and all the municipalities within that area have agreed upon an urban development plan and transportation plan (hereinafter in this Part called an "accepted plan") for that transportation study, area, the province or a municipality may, subject to subsection (5), apply to the Commission for such orders as the Commission may make under section 6 and as are necessary to carry out the accepted plan.
>
> (2) The Commission may receive an application in respect of a transportation study area that includes only a part of an urban area if the Commission is satisfied that the accepted plan materially affects only those municipalities located wholly or in part in the transportation study area to which the accepted plan relates.
>
> ...
>
> (6) The Commission may, if it deems it necessary to do so, make rules for the handling of applications under subsection (1), and may by such rules prescribe the periods during which applications will be received by the Commission and may adopt an order of priorities governing the receipt by it of any such applications.

16 Paragraph 5(1)(a) of the Act provides as follows:

> 5. (1) The accepted plan, together with the financial plan, shall be filed with the Commission and the Commission may accept the transportation Plan and the financial plan either as submitted or with such changes in either of them

as the Commission considers necessary, if

(a) The financial plan will not, in the opinion of the Commission, either

(i) impose on any railway company affected thereby any costs and losses greater than the benefits and payments receivable by the railway company under the plan, or
(ii) confer on any railway company affected thereby any benefits and payment; greater than the costs and losses incurred by the railway company under the plan;

17 Subsection 5(2) sets out the requirement for a hearing before making any order under section 6 in respect of any accepted plan, stating as follows:

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5. ...

(2) Before making any order under section 6 in respect of any accepted plan, the Commission shall hold a hearing thereon.

18 As previously stated, counsel for the railways and the city of Regina were agreed that the Court had jurisdiction to entertain the application for prohibition under section 18 of the Federal Court Act and should proceed to determine the statutory issue pertaining to the Phase II application on its merits. I expressed serious misgivings about this because of the recent decision of the Federal Court of Appeal in Canadian National Railway Co. v. Canadian Transport Commission [[1986] 3 F.C. 548 (C.A.)]. The reasons for judgment applied equally to the other appeal decision in Canadian Pacific Limited v. Canadian Transport Commission [indexed as: Canadian National Railway Co. v. Canadian Transport Commission].[1] Both cases were appeals from the decisions of Mr. Justice Pinard dismissing the applications of the railways for prohibition and certiorari against a decision of the Canadian Transport Commission dated February 8, 1985 [WDR 1985-02].

19 The Commission's decision dealt with and rejected preliminary motions brought by the railways to strike the application for Phase I relocation filed by the city of Regina. After dealing exhaustively with substantially the same arguments of statutory non-compliance and consequent lack of jurisdiction as are now advanced in respect of the Phase II application, the Commission concluded as follows:

> In our opinion, the conditions precedent to the receipt of the relocation application by the Commission have been satisfied and the application filed is not one which is beyond the jurisdiction of this Commission to grant or deny, based on the evidence to be adduced by the parties following a public hearing on the merits. Furthermore, Canadian Pacific Limited and the Canadian National Railway Company have failed to discharge the onus of proof imposed by law to show why the [page446] Application of the City of Regina should be struck out. Accordingly, for all of the above reasons the motions brought by both CP and CN to strike the Application are denied.

20 Pinard J., held that section 29 of the Federal Court Act deprived the Trial Division of section 18 jurisdiction because the Commission's decision to receive the Phase I application essentially dealt with a question of law and of jurisdiction that could be appealed to the Federal Court of Appeal by virtue of subsection 64(2) of the National Transportation Act [R.S.C. 1970, c. N-17 (as am. by R.S.C. 1970 (2nd Supp.), c. 10, s. 65)].

21 The Federal Court of Appeal unanimously agreed with that result. Hugessen J., stated the Court's conclusion in Canadian National Railway Co. v. Canadian Transport Commission, supra, at page 552 as follows:

> Accordingly we conclude that the Trial Division was without jurisdiction to entertain the applications for prohibition and certiorari because the impugned decision of the Commission, although simply an interlocutory ruling, raised a question of law or of jurisdiction which could properly have been made the subject of an appeal to this Court under subsection 64(2) of the National Transportation Act. We recognize that in so holding we have gone further than was explicitly decided by this Court in Canadian National Railway Co. v. Canadian Transport Commission, [1982] 1 F.C. 458 (C.A.) but the facts of that case did not require the Court to consider the broader aspects of the question which we decide today.

22 The railways sought leave to appeal this decision to the Supreme Court of Canada. Their applications were denied in December, 1986.

23 The Commission's letter of August 21, 1985 explicitly states that "the Commission is satisfied that no statutory conditions precedent are outstanding in respect of the Phase II application and therefore the Phase II application is considered to be received within the meaning of Part I of the R.R.C.A. as of this date". The issue of the case at this juncture, as I see it, is whether this is an appealable "decision" or "interlocutory ruling" within the purview of the judgment of the Federal [page447] Court of Appeal in Canadian National Railway Co. v. Canadian Transport Commission, supra. If the answer is in the affirmative then I am clearly bound by the appellate decision.

24 Subsection 64(2) of the National Transportation Act reads as follows:

> 64. ...
>
> (2) An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and desire to be heard; and the costs of such application are in the discretion of that Court.

25 Section 29 of the Federal Court Act states:

> 29. Notwithstanding sections 18 and 28, where provision is expressly made by, an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

26 As Mr. Justice Hugessen pointed out in his reasons for judgment in the Canadian Pacific [Canadian National] appeal decision, the focus of the text of subsection 64(2) of the National Transportation Act is on the appealable question of law or jurisdiction rather than on the actual form of the decision or order sought to be appealed from. The learned Judge was led to conclude [at page 552] that "the emphasis of section 64 is on the 'question', be it of law or jurisdiction, rather than on the technical vehicle by which the matter was dealt with by the Commission".

27 The case of Canadian National Railway Co. v. Canadian Transport Commission, [1982] 1 F.C. 458 (C.A.) was an appeal from a decision of the Railway Transport Committee of the Canadian Transport Commission in an application by CN for the abandonment of a line of railway in British [page448] Columbia. The Commission ruled at an oral hearing that information as to costs and revenues filed by the railway in support of its application had to be disclosed to the respondent British Columbia Forest Products pursuant to section 331 of the Railway Act [R.S,C. 1970, c. R-2]. The issue was whether this "carefully circumscribed" ruling of the Commission was an "appealable decision" under subsection 64(2) of the National Transportation Act. The Court held that it was.

28 Urie J., per curiam, said at page 463:

> While I am not unmindful of the fact that subsection 64(2) of the National Transportation Act gives a right of appeal after obtaining leave only from orders,

> decisions, rules and regulations, I am satisfied that, in the circumstances of this case, the ruling made is a "decision" of the kind contemplated by that section because it is one made within the jurisdiction of the Commission as provided by section 331 of the Railway Act. I say this notwithstanding the fact that as yet no one has been ordered to do anything nor has anything been done, apparently, pursuant to the ruling. I have formed my opinion on the basis that section 331 gave to the Commission the jurisdiction to make the ruling it made. As such it is an appealable decision under subsection 64(2) of the National Transportation Act.

29 Counsel for the railways take the position that the Commission's letter of August 21, 1985 does not qualify as an appealable decision or order, interlocutory or otherwise, that raises an issue between the parties from which legal obligations could flow. In other words, there was no lis or justiciable controversy like the one before the Commission on the motions to strike the Phase I application. Counsel for the city of Regina supported this position. Counsel for Canadian Pacific draws the interesting analogy that all the letter of August 21, 1985 did was simply confirm that an application had been received sufficient to start the time running for the filing of answers and that this was no different in actuality from the action of a registrar or a clerk of an ordinary court confirming that a pleading or other court document had been duly filed. Counsel for the railways are insistent that the Commission's letter represented nothing more than an acknowledgment of the receipt of the City's Phase II application that marked the inception of the pleading process. In any event, they submit that the waiver or acquiescence of the [page449] parties cures any contingent defect of jurisdiction relating to procedural matters or requirements.

30 Counsel for the Commission came under fire from counsel for the railways in adopting what was alleged to be an aggressive, adversarial position. In my view, the submissions made by counsel for the Commission related solely to the question of jurisdiction and contained no hint of adversarial impropriety.

31 The law is clear that the consent or agreement of the parties cannot confer jurisdiction on a court where none in fact exists. This is especially so in the case of a court like the Federal Court, which is a creature of statute whose jurisdiction is defined and limited by the instrument of its creation. While consent cannot cure a total want of jurisdiction touching the subject-matter of a claim or controversy, contingent defects of jurisdiction relating to purely procedural requirements may be waived in appropriate circumstances. Matters of practice and questions of jurisdiction are two separate and distinct things. The total absence of jurisdiction under a statute with respect to a particular subject-matter is quite a different thing from a procedural irregularity which may be waived by agreement or by taking a step in the proceeding without raising objection. Where a court pronounces judgment in a matter over which it has no jurisdiction, the decision amounts to nothing. See De Smith's Judicial Review of Administrative Action, 4th ed., at page 422; Farquharson v. Morgan. [1894] 1 Q.B. 552 (C.A.), at page 560; Township of Cornwall v. Ottawa and New York Railway Co. et al. (1916), 52 S.C.R. 466; 30 D.L.R. 664; Canadian Pacific Railway Co. v. Fleming

(1893), 22 S.C.R. 33; Dominion Canners Ltd. v. Costanza, [1923] S.C.R. 46; [1923] 1 D.L.R. 551; Mulvey vs The Barge Neosho (1919), 19 Ex.C.R. 1; Harris Abattoir Co. Ltd. v. SS. Aledo & Owners, [1923] Ex.C.R. 217; and Essex Incorporated Congregational Church Union v. Essex County Council, [1963] A.C. 808 (H.L.).

[page450]

32 Lord Reid stated the following conclusion in the Essex Church case, supra, at pages 820 - 821:

> ... in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, ...

33 Anglin J., expressed the same view in Dominion Canners Ltd. v. Costanza, supra, when he said at pages 66 - 67 S.C.R.; 568 D.L.R.:

> Where a court is deprived of jurisdiction over a subject by statute no acquiescence -- not even express consent -- can confer jurisdiction upon it.

34 In some cases the courts have recognized an agreed departure or deviation from the standard practice and procedure in dealing with a subject-matter over which the court had ultimate jurisdiction on the basis of the parties having agreed to abide by the court's decision. In these exceptional circumstances, the court assumes the role of quasi-arbitrator whose decision is not subject to review or appeal. I am unable to conclude that the present case falls within this extra curiam category. On the contrary, it seems to me that the first question calling for answer in the case is whether the consent of the parties can give the Court jurisdiction over a particular subject-matter from which it may have been divested by statute. In my opinion, the mere consent of the parties is ineffectual to accomplish such an end. In short, consent cannot give the court a jurisdiction which statutory authority denies.

35 Essentially, the case poses the perplexing conundrum of how this Court can possess jurisdiction to prohibit the Commission from proceeding with the hearing of the Phase II application of the city of Regina when it was determined by the Federal Court of Appeal that it had no jurisdiction to prohibit the hearing of the City's Phase I application. According to the applicants, the answer is said to lie in the fact that the Commission made a decision on the merits of the controversy arising from the Phase I application, while the decision or order or ruling, call it what you will, with respect to the Phase II application was nothing more than an acknowledgment of its receipt. If that is so, then the next question that suggests itself as it seems to me, is what is the prerogative remedy of [page451] prohibition seeking to prohibit. The applicants' ready response is the want of jurisdiction in the Commission to entertain Phase II that is apparent on the face of the proceedings, pointing out that in such a case the availability of prohibition is not dependent on the

existence of any decision by a statutory tribunal. I agree that prohibition will lie to prevent the exercise of a patent defect of jurisdiction by a statutory tribunal without having to await the outcome of a final decision. I express no opinion beyond this on the question of the apparent defect of jurisdiction by reason that this would entail going into the merits of the controversy before having first cleared the hurdle of the jurisdictional issue.

36 In my opinion, the short question posed by that issue is whether the letter of August 21, 1985 was an order or decision of the Commission upon a question of law or of jurisdiction from which an appeal lay to the Federal Court of Appeal under subsection 64(2) of the National Transportation Act.

37 Subsection 46(1) of the National Transportation Act empowers the Canadian Transport Commission to make orders or regulations in the exercise of any statutory jurisdiction conferred on it by Parliament. By virtue of subsection 46(2), any such orders or regulations may be made to apply to any particular case or class of cases. Sections 57 to 63 of the Act deal with the topic of orders and decisions made by the Commission. Subsection 57(2) provides that the Commission may make interim orders and reserve further directions for an adjourned hearing of the matter or for further application.

38 The Commission is the administrative tribunal empowered by the Railway Relocation and Crossing Act to entertain applications to facilitate the relocation of railway lines or the rerouting of railway traffic in urban areas. I have already covered to some extent the statutory provisions [page452] which seem to be particularly applicable to the exercise of the Commission's statutory jurisdiction.

39 To recapitulate, subsection 3(1) of the Act provides that a municipality may apply to the Commission for orders compelling the relocation of railway facilities within an area referred to as a transportation study area where: (a) such transportation study area includes or comprises an urban area; and (b) the government of the province and all the municipalities in that transportation study area have agreed upon an urban development plan and a transportation plan (therein referred to as an "accepted plan"). Pursuant to subsection 3(2), the Commission may receive an application in respect of a transportation study area that includes only a part of an urban area if the Commission is satisfied that the accepted plan materially affects only those municipalities located wholly or in part in the transportation study area to which the accepted plan relates. Subsection 3(6) authorizes the Commission to make such rules as it deems necessary for the handling of applications under subsection 3(1) and the governing of the time periods of their receipt and the order of priorities thereof.

40 The Commission's, letter of August 21, 1985 stated unequivocally that the Phase II relocation application filed by the city of Regina was considered to have been received within the meaning of Part I of the Railway Relocation and Crossing Act. In making this determination, the Commission satisfied itself that the accepted plan materially affected only those municipalities located wholly or

in part within the transportation study area to which the accepted plan related and that there were no statutory conditions precedent left outstanding in respect of the Phase II application. Clearly, the Commission formulated an opinion regarding its statutory authorization to receive the Phase II relocation plan. In my opinion, this ruling was a decision or order on a question of law or of jurisdiction from which legal consequences would inevitably flow, notwithstanding that nothing further was ordered or required to be done at that particular stage pursuant to such ruling. In my [page453] view, it is immaterial that the ruling was issued and communicated in letter form. In the result, I find that the decision contained in the Commission's letter of August 21, 1985 dealt with a question of law or of jurisdiction from which an appeal lay to the Federal Court of Appeal under subsection 64(2) of the National Transportation Act. It follows therefore that this Court is precluded by section 29 of the Federal Court Act from granting prohibition.

41 For these reasons, the applicants' motions are dismissed with costs to the respondent.

1 Reported: [1986] 3 F.C. 548 (C.A.).