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June 14, 2010

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Motion (the "Motion") by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* (the "*OEB Act*") and Ontario Regulation 66/10.
OEB File EB-2010-0184

Attached please find the Book of Materials for Submissions of Union Gas Limited on Preliminary Motion which Submissions were filed on June 9, 2010.

Sincerely,

George Vegh

c: All Parties and Intervenors.
1402985

EB-2010-0184

IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10

BOOK OF MATERIALS

SUBMISSIONS OF UNION GAS LIMITED ON PRELIMINARY MOTION

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Table of Contents

TAB A

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Schutz and Ontario Municipal Board et al.

R. E. HOLLAND, GOODMAN AND ROBINS, JJ. 26TH JUNE 1978.

Administrative law — Boards and tribunals — Ontario Municipal Board — Rehearings — Board required by statute to make report to Minister setting out findings and recommendations — Governing statute permitting Board to rehear application before decision or to review decision made by it — Report not decision — Board entitled to rehear — Pits and Quarries Control Act, 1971 (Ont.), c. 96, s. 9(3) — Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 42.

APPLICATION for leave to appeal from a decision of the Ontario Municipal Board.

D. N. Plumley, for applicant.
D. W. Brown, for Ontario Municipal Board.
A. McLennan, for Towns of Uxbridge and Pickering.
T. Sheffield, for Town of Pickering.
T. Clarke, for Regional Municipality of Durham.

The judgment of the Court was delivered orally by

R.E. HOLLAND, J.:—This is an application for leave to appeal from the decision of the Ontario Municipal Board that it had no jurisdiction under s. 42 of the *Ontario Municipal Board Act*, R.S.O. 1970, c. 323, to rehear or review its report to the Minister made pursuant to s. 9 of the *Pits and Quarries Control Act*, 1971 (Ont.), c. 96.

Section 9(3) of that Act requires the Board to make a report to the Minister and requires the Board to set out its findings and its recommendations. Section 42 of the *Ontario Municipal Board Act* provides that:

> 42. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

We are all of the view that the report in question was not a decision, approval or order of the Board and that as such, although this raises a question of law, the Board was right in its decision and that therefore leave to appeal should not be granted.

Leave to appeal is refused. There will be no costs.

Application dismissed.

TAB B

IN THE MATTER of an application for an order for prohibition;

AND IN THE MATTER of the *Architects Act*, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;

AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects;

between

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd. *Appellants*

v.

Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh and Mary K. Green *Respondents*

INDEXED AS: CHANDLER *v.* ALBERTA ASSOCIATION OF ARCHITECTS

File No.: 19722.

1989: January 30; 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Jurisdiction — Continuation of original proceedings — Functus officio — Inquiry into the practices of a firm of architects — Board conducting a valid hearing but issuing ultra vires findings and orders — Board's findings and orders quashed — Board failing to consider whether it should make recommendations as required by legislation — Whether Board empowered to continue original proceedings — Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) — Alberta Regulation, 175/83, s. 11(1).

Pursuant to s. 39 of the *Architects Act*, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of

DANS L'AFFAIRE d'une demande d'ordonnance de prohibition;

ET DANS L'AFFAIRE de l'*Architects Act*, chapitre A-44.1 des Revised Statutes of Alberta, 1980, et modifications;

ET DANS L'AFFAIRE de la Practice Review Board de l'Alberta Association of Architects;

entre

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk et Peter J. Dandyk Architect Ltd. *Appelants*

c.

Alberta Association of Architects, la Practice Review Board de l'Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh et Mary K. Green *Intimés*

RÉPERTORIÉ: CHANDLER *c.* ALBERTA ASSOCIATION OF ARCHITECTS

N° du greffe: 19722.

1989: 30 janvier; 1989: 12 octobre.

Présents: Le juge en chef Dickson et les juges Wilson, La Forest, L'Heureux-Dubé et Sopinka.

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

Droit administratif — Commissions et tribunaux administratifs — Compétence — Continuation des procédures initiales — Functus officio — Enquête sur les pratiques d'un cabinet d'architectes — La Commission a tenu une audience valide mais a formulé des conclusions et des ordonnances ultra vires — Annulation des conclusions et ordonnances de la Commission — La Commission a omis de se demander si elle devait faire des recommandations comme l'exige la loi — La Commission a-t-elle le pouvoir de continuer les procédures initiales? — Architects Act, R.S.A. 1980, chap. A-44.1, art. 39(3) — Alberta Regulation, 175/83, art. 11(1).

Conformément à l'art. 39 de l'*Architects Act*, la Commission de révision des pratiques de l'Association des architectes de l'Alberta a tenu une audience en vue

architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for *certiorari* and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore *functus officio*. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not *functus officio*. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tri-

de réviser les pratiques d'un cabinet d'architectes en faillite et a présenté un rapport. Même si l'audience devait constituer une révision des pratiques, la Commission, dans son rapport, a tiré 21 conclusions de conduite contraire à la profession à l'encontre du cabinet et de six de ses architectes, imposé des amendes et des suspensions et leur a ordonné de payer les frais de l'audience. La Cour du Banc de la Reine a accueilli la demande de *certiorari* des appelants et a annulé les conclusions et ordonnances de la Commission. La Cour d'appel a confirmé la décision et a conclu que la Commission n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. En vertu du par. 39(3) de la Loi, la Commission est tenue simplement de rendre compte au Conseil de l'Association des architectes de l'Alberta et de faire les recommandations qui s'imposent.

La Commission a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin de décider s'il y aurait lieu de rédiger un nouveau rapport à l'intention du Conseil et de renvoyer toute l'affaire au Comité d'examen des plaintes. La Cour du Banc de la Reine a accueilli la demande des appelants visant à interdire à la Commission de poursuivre l'affaire. La cour a conclu que la Commission s'était acquittée de sa fonction et qu'elle était donc *functus officio*. La Cour d'appel a annulé l'ordonnance de prohibition. Elle a conclu que le par. 39(3) de la Loi et le par. 11(1) du Règlement imposent à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation au Conseil ou au Comité d'examen des plaintes. La Commission ne l'a pas fait et, par conséquent, elle n'a pas épuisé sa compétence.

Arrêt (les juges La Forest et L'Heureux-Dubé sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Wilson et Sopinka: La Commission n'est pas *functus officio*. En règle générale, lorsqu'un tribunal administratif a statué définitivement sur une question dont il est saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou si un lapsus a été commis en rédigeant la décision ou s'il y a eu une erreur dans l'expression de l'intention manifeste du tribunal. Le principe du *functus officio* s'applique dans cette mesure à un tribunal administratif. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel

bunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were *ultra vires*. The Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was *functus officio* when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio*.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore, once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters. Finally, as a general rule, a tribunal should not

en bonne et due forme. Son application doit donc être plus souple et moins formaliste dans le cas des tribunaux administratifs dont les décisions ne peuvent faire l'objet d'un appel que sur une question de droit.

En l'espèce, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par la Loi. La Commission a tenu une audience valide au sujet des pratiques des appelants, mais elle a formulé des conclusions et des ordonnances qui étaient *ultra vires*. Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire les recommandations requises par le Règlement et le par. 39(3) de la Loi. La Commission a voulu statuer sur la question de façon définitive, mais sa décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Dans ces circonstances, la Commission, qui a tenu une audience valide jusqu'au moment de statuer sur la question, devrait pouvoir continuer les procédures initiales afin d'examiner la possibilité de trancher la question d'une façon appropriée. Cependant, à la continuation des procédures initiales, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement.

Les juges La Forest et L'Heureux-Dubé (dissidents): Sans autorisation de la loi, un tribunal administratif ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission. En l'espèce, la Commission était *functus officio* lorsqu'elle a prononcé sa décision. Elle avait complété sa fonction quand elle a rendu son rapport final. Le fait que la décision initiale soit erronée ou que le tribunal ait agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio*.

Si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. La Loi n'autorise aucunement la Commission à changer d'avis de sa propre initiative. En outre, une fois qu'une commission excède sa compétence, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les

be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Lodger's International Ltd. v.*

pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire. Enfin, en règle générale, il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Si la Commission a omis de remplir une obligation qui lui incombait de faire des recommandations, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. Cependant, tout réexamen de l'affaire ne devrait pas être considéré comme «la continuation des procédures initiales par la Commission». Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, ce serait de nature à éroder la garantie d'équité et de justice naturelle dont on s'attend de la part des tribunaux administratifs. En l'espèce, il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

La Cour d'appel a commis une erreur en appliquant les principes du *mandamus* au présent cas.

Jurisprudence

Citée par le juge Sopinka

Arrêts mentionnés: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577.

Citée par le juge L'Heureux-Dubé (dissidente)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Lodger's International*

O'Brien (1983), 45 N.B.R. (2d) 342; *Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Cité de Jonquière v. Munger*, [1964] S.C.R. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.
Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].
Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).
National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly *National Transportation Act*], s. 66.
Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

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Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "*functus officio*".
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "*functus officio*".
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench[1], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W. E. Code, Q.C., and *B. G. Kapusianyk*, for the appellants.

No one appearing for the respondents.

[1] Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)

Ltd. v. O'Brien (1983), 45 R.N.-B. (2e) 342; *Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), conf. [1989] 1 R.C.S. 1038; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577; *Cité de Jonquière v. Munger*, [1964] R.C.S. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Lois et règlements cités

Alberta Regulation, 175/83, art. 11.
Architects Act, R.S.A. 1980, chap. A-44.1, art. 9(1)j.1) [aj. 1981, chap. 5, art. 6], 39 [mod. 1981, chap. 5, art. 16].
Labour Relations Code, S.A. 1988, chap. L-1.2, art. 11(4).
Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), chap. N-20 [auparavant la *Loi nationale sur les transports*], art. 66.
Loi sur la Commission des affaires municipales de l'Ontario, L.R.O. 1980, chap. 347, art. 42.

Doctrine citée

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, «*functus officio*».
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, «*functus officio*».
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1985), 67 A.R. 255, qui a accueilli l'appel interjeté par les intimés à l'encontre d'une décision de la Cour du Banc de la Reine[1], qui avait accueilli la demande des appelants visant à obtenir une ordonnance de prohibition contre la Practice Review Board. Pourvoi rejeté, les juges La Forest et L'Heureux-Dubé sont dissidents.

W. E. Code, c.r., et *B. G. Kapusianyk*, pour les appelants.

Personne n'a comparu pour les intimés.

[1] B.R. Alb., nº 8501-19113, 8 octobre 1985 (le juge Brennan).

The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

SOPINKA J.—The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was *functus officio*.

Facts

As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the *Architects Act*, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55

Version française du jugement du juge en chef Dickson et des juges Wilson et Sopinka rendu par

LE JUGE SOPINKA—Dans ce pourvoi, il s'agit de déterminer si la Practice Review Board (la «Commission de révision des pratiques «) de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était *functus officio* après avoir établi un rapport sur les pratiques ayant entraîné la faillite du Chandler Kennedy Architectural Group. La Cour d'appel de l'Alberta a accueilli l'appel interjeté contre la décision de la Cour du Banc de la Reine de l'Alberta qui avait accordé l'ordonnance de prohibition, demandée par les appelants, visant à interdire à la Commission de poursuivre l'affaire, pour le motif que la Commission n'avait plus compétence et qu'elle était *functus officio*.

Les faits

En juin 1984, le Chandler Kennedy Architectural Group s'est déclaré insolvable. La Commission de révision des pratiques de l'Association des architectes de l'Alberta a alors décidé, de sa propre initiative, de procéder à une révision des pratiques du groupe et d'un certain nombre de ses membres, conformément à l'al. 39(1)b) de l'*Architects Act*, R.S.A. 1980, chap. A-44.1. Les audiences ont débuté le 14 août 1984 et se sont poursuivies pendant dix-huit jours. Les dernières plaidoiries ont été entendues le 17 décembre 1984 et la Commission a présenté son rapport le 6 mars 1985.

Le rapport de 71 pages comportait 21 conclusions précises de conduite contraire à la profession à l'encontre du cabinet et de plusieurs de ses membres. Des amendes s'élevant à 127 500 $ ont été imposées à six membres du cabinet. Ces mêmes six membres ont également été suspendus de l'exercice de la profession d'architecte pour des périodes de six mois à deux ans. De même, les appelants devaient payer les frais de l'audience, soit environ 200 000 $.

Les tribunaux d'instance inférieure

Les appelants ont déposé un avis d'intention d'interjeter appel contre la décision de la Commission auprès du Council of the Alberta Association

of the *Architects Act*. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of *certiorari* to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the *Architects Act* the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the *Architects Act* did not give to the Board the powers it purported to exercise.

A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

of Architects («Conseil de l'Association des architectes de l'Alberta»), conformément à l'art. 55 de l'*Architects Act*. Toutefois, avant même l'audition de l'appel, les appelants ont présenté à la Cour du Banc de la Reine de l'Alberta une requête visant à obtenir une ordonnance tenant d'un *certiorari* qui annulerait les conclusions et l'ordonnance de la Commission de révision des pratiques. Le juge Kryczka a accordé l'ordonnance demandée et conclu que l'omission d'aviser les appelants qu'ils faisaient l'objet d'accusations ou d'allégations de conduite contraire à la profession contrevenait aux principes de justice naturelle. Le juge Kryczka a statué que les commentaires du président de la Commission indiquaient clairement que les audiences devaient constituer une révision des pratiques plutôt qu'une enquête portant sur des allégations de conduite contraire à la profession.

L'Association des architectes de l'Alberta a interjeté appel de cette décision devant la Cour d'appel de l'Alberta. Dans l'arrêt de la Cour d'appel (1985), 39 Alta. L.R. (2d) 320, le juge Prowse a maintenu, au nom de la cour, la décision du juge Kryczka, en se fondant toutefois sur des motifs différents. Le juge Prowse a conclu que la Commission de révision des pratiques n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. Il a estimé que les pouvoirs disciplinaires étaient conférés à un autre organe de l'Association des architectes de l'Alberta, savoir le Comité d'examen des plaintes. En vertu du par. 39(3) de l'*Architects Act*, la Commission est tenue simplement de rendre compte au Conseil et de faire les recommandations qu'elle juge appropriées. Par conséquent, la Cour d'appel a rejeté l'appel pour le motif que l'*Architects Act* ne conférait pas à la Commission les pouvoirs qu'elle prétendait exercer.

Un mois après la décision de la Cour d'appel, la Commission de révision des pratiques a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin d'envisager la possibilité de rédiger un nouveau rapport à l'intention du Conseil de l'Association des architectes de l'Alberta et de renvoyer toute l'affaire au Comité d'examen des plaintes.

The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore *functus officio* and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the *Architects Act* and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. *Functus officio* was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 11(4); *Ontario Municipal Board Act*, R.S.O. 1980, c. 347, s. 42; and *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20, s. 66 (formerly the *National Transportation Act*). It is therefore necessary to consider (a) whether it had made a final decision, and (b) whether it was, therefore, *functus officio*.

Les appelants ont alors soumis une requête à la Cour du Banc de la Reine en vue d'interdire à la Commission de poursuivre l'affaire. Le juge Brennan a conclu que la Commission s'était acquittée de la fonction pour laquelle elle avait été constituée, qu'elle était donc *functus officio* et n'avait pas compétence pour poursuivre l'audience. Cette décision a également fait l'objet d'un appel à la Cour d'appel de l'Alberta.

La Cour d'appel (1985), 67 A.R. 255 a accueilli l'appel et annulé l'ordonnance de prohibition. Le juge Kerans a conclu, au nom de la cour, que le par. 39(3) de l'*Architects Act* et le par. 11(1) du règlement 175/83 imposaient à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation. Le juge a statué que la Commission n'avait pas envisagé de recommander le renvoi de l'affaire devant le Comité d'examen des plaintes et que, par conséquent, elle n'avait pas épuisé sa compétence. On a jugé que le principe du *functus officio* ne s'appliquait pas dans ce cas puisque la Commission avait omis d'examiner des questions qu'elle avait le devoir d'examiner en vertu de la loi. C'est cette décision qui fait l'objet du présent pourvoi.

Les pouvoirs conférés à la Commission par la Loi

Pour déterminer si la Commission avait le pouvoir de poursuivre les procédures engagées contre les appelants, il est nécessaire d'examiner le contexte légal dans lequel elle fonctionne. La Loi n'a pas pour objet de conférer à la Commission le pouvoir d'abroger, de réviser ou de modifier une décision définitive qu'elle a rendue, ni de revenir sur une telle décision. Une telle disposition est courante dans les lois habilitantes de nombreux tribunaux. Voir le *Labour Relations Code*, S.A. 1988, chap. L-1.2, par. 11(4), la *Loi sur la Commission des affaires municipales de l'Ontario*, L.R.O. 1980, chap. 347, art. 42, et la *Loi nationale sur les attributions en matière de télécommunications*, L.R.C. (1985), chap. N-20, art. 66 (auparavant la *Loi nationale sur les transports*). Il convient donc de décider a) si elle avait rendu une décision définitive et b) si elle était, par conséquent, *functus officio*.

The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,

(ii) the evaluation of desirable standards of competence of authorized entities generally,

(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and

(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

La Commission a entrepris, de sa propre initiative, une enquête sur les pratiques des appelants, conformément à l'art. 39 de la Loi dont voici le texte:

[TRADUCTION] **39**(1) La Commission

a) doit, de sa propre initiative ou à la demande du Conseil, enquêter, faire rapport au Conseil et le conseiller au sujet de

(i) l'évaluation des normes actuelles et l'élaboration de nouvelles normes en matière de formation et d'expérience préalablement nécessaires à l'obtention et au maintien de l'enregistrement en vertu de la présente loi,

(ii) l'évaluation des normes de compétence souhaitables pour les entités autorisées en général,

(iii) toute autre question que le Conseil juge nécessaire ou appropriée en rapport avec l'exercice de ses pouvoirs et l'exécution de ses fonctions relativement à la compétence dans l'exercice de la profession d'architecte, en vertu de la présente loi et des règlements, et

(iv) l'exercice de l'architecture par des entités autorisées en général,

et

b) peut procéder à la révision des pratiques d'une entité autorisée, conformément à la présente loi et aux règlements.

(2) Toute personne citée à témoigner par la Commission, lors d'une enquête tenue en vertu du présent article, peut y être représentée par un avocat.

(3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

(4) Le Conseil peut ordonner qu'une enquête tenue par la Commission en vertu du présent article ait lieu à huis clos, en totalité ou en partie, s'il est dans l'intérêt public de le faire.

Il est évident que l'art. 39 porte non pas sur la discipline mais bien sur les pratiques ayant cours au sein de la profession et vise l'amélioration de celles-ci. Toutefois, si dans le cours d'une enquête sur les pratiques, la Commission estime qu'une question devrait être confiée au Comité d'examen des plaintes, la Loi prévoit le renvoi de cette question à ce comité. L'alinéa 9(1)j.1) de la Loi confère au Conseil le pouvoir d'adopter des règlements:

(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer, the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the unco-operative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

[TRADUCTION] j.1) concernant les pouvoirs, obligations et fonctions de la Commission de révision des pratiques, dont le renvoi de questions par la Commission au Conseil ou au Comité d'examen des plaintes, et les appels interjetés à l'encontre de décisions rendues par la Commission;

L'article 11 du règlement 175/83 adopté en vertu de l'al. 9(1)j.1) prévoit que:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

a) faire une ou plusieurs recommandations à l'entité autorisée ou au dessinateur d'intérieurs agréé dont les pratiques font l'objet d'une révision, au sujet des améliorations qu'il est souhaitable d'apporter à la pratique qui fait l'objet d'une révision;

b) ordonner qu'un réviseur assure le suivi de la révision des pratiques afin de déterminer si les recommandations de la Commission ont été adoptées et si elles ont entraîné les améliorations souhaitées dans les pratiques de l'entité en cause;

c) si, à son avis, l'une des questions suivantes est assez grave pour que le Comité d'examen des plaintes fasse enquête, ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête:

(i) manque de collaboration d'une entité autorisée ou d'un dessinateur d'intérieurs agréé dans le cadre d'une révision des pratiques ou d'un suivi;

(ii) manquement à la Loi, au Règlement sur l'exercice de la profession, au Code de déontologie, au Règlement sur le dessin d'intérieurs ou aux règlements généraux;

(iii) défaut d'adopter et d'appliquer les recommandations relatives à l'amélioration souhaitée des pratiques de l'entité en cause;

(iv) toute apparence de fraude, négligence ou fausses déclarations, ou tout manquement aux normes généralement acceptées pour l'exercice de la profession d'architecte et de la profession de dessinateur d'intérieurs;

d) si, dans le cadre de sa révision des pratiques, la Commission estime que la conduite d'une entité autorisée ou d'un dessinateur d'intérieurs agréé constitue

(i) un manque de compétence dans l'exercice de la profession d'architecte ou une conduite contraire à la profession, ou les deux à la fois,

(ii) un manque de compétence dans l'exercice de la profession de dessinateur d'intérieurs ou une conduite contraire à la profession, ou les deux à la fois,

the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) make recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) *after a notice under section 42 of the Act has* been given, fails to attend the hearing or does not make representations.

The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.

As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.

. . .

Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand

la Commission procédera conformément aux articles 50 à 53 de la Loi;

e) indiquer qu'elle n'a aucune recommandation à faire ou que la pratique faisant l'objet d'une révision s'est avérée satisfaisante;

f) faire des commentaires sur le maintien d'un idéal élevé de pratique et, avec le consentement de l'entité autorisée ou du dessinateur d'intérieurs agréé en cause, faire connaître cet idéal élevé ainsi que le nom des personnes visées;

g) faire au Conseil des recommandations visant l'élaboration de nouvelles normes dans des domaines précis ou généraux de l'architecture.

(2) La Commission ne peut imposer de sanction en vertu de l'alinéa (1)d) que si l'entité autorisée ou le dessinateur d'intérieurs professionnel en cause

a) a présenté ses arguments à la Commission, ou

b) *n'a pas assisté à l'audience ni présenté d'arguments*, après avoir reçu un préavis donné en vertu de l'article 42 de la Loi.

La Commission a procédé à une enquête sur les pratiques conformément à la Loi. Au cours de l'enquête, le président a fait les observations suivantes qui décrivent bien la nature de l'enquête:

[TRADUCTION] J'aimerais tout d'abord établir très clairement, et je crois que vous y aviez fait allusion au début, qu'il s'agit non pas de l'examen d'une plainte mais bien d'une révision des pratiques et que, par conséquent, nous ne sommes pas saisis d'un cas précis d'actes répréhensibles, ce à quoi vous faites allusion, je crois, et pour lesquels vous avez beaucoup d'expérience devant les tribunaux. Il s'agit de la révision des pratiques des diverses entités autorisées et donc, d'une révision complète. Par conséquent, cette l'audience a uniquement pour but de réviser les pratiques dans leur ensemble. Il ne s'agit pas de réviser des points précis. La Commission a voulu comprendre entièrement et de façon aussi globale que possible, dans les circonstances, les pratiques de ces diverses entités.

À la suite de la révision de ces entités autorisées, il nous incombe de faire des recommandations et de tirer des conclusions, ce que nous allons faire ci-après.

. . .

Après chaque témoignage, nous avons permis que le témoin soit questionné. La Commission devra tenir compte de toute la preuve qui lui a été soumise et elle a consacré beaucoup de temps à s'assurer qu'elle écoutait et essayait de comprendre tout ce qui s'était passé. Mais

everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be *ultra vires*. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were *ultra vires* and have been quashed.

In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

Kerans J.A. based his conclusion that the Board was not *functus officio* on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly

encore une fois, comme je l'ai dit à votre avocat il y a quelques minutes, il ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession. [Je souligne.]

Néanmoins, lorsque vint le temps de donner des directives et de faire des recommandations, la Commission a procédé en vertu de l'al. 11(1)d) du Règlement, que la Cour d'appel a jugé *ultra vires* dans le premier appel, au lieu d'agir sous le régime du par. 39(3) de la Loi, précisé par les al. 11(1)a), b), c), e), f) ou g) du Règlement. La Cour d'appel a statué que les art. 50 à 53 portaient sur des questions disciplinaires qui outrepassent la compétence de la Commission. Cette décision de la Cour d'appel n'a pas été contestée. Par conséquent, il en résulte que la Commission a tenu une audience valide sur les pratiques des appelants, mais qu'elle a formulé des conclusions et des ordonnances qui étaient *ultra vires* et qui ont été annulées.

Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire des recommandations en vertu du par. 39(3) de la Loi ou des al. 11(1)a), b), c), e), f) ou g), et en particulier de l'al. c), du Règlement.

Le juge Kerans a conclu que la Commission n'était pas *functus officio* parce qu'elle avait l'obligation d'envisager la possibilité de faire une recommandation. Voici ce qu'il a affirmé à la p. 257:

> [TRADUCTION] Même si la commission a, en vertu du par. 39(3) et peut-être également du règlement, le pouvoir discrétionnaire de faire ou non une recommandation, nous estimons que cette disposition impose à la commission l'obligation d'envisager la possibilité de faire une recommandation. Le rapport n'indique pas que la commission l'a fait. Si la commission n'a pas envisagé cette possibilité alors, contrairement à ce que le juge de la Cour du Banc de la Reine a conclu, elle n'a pas épuisé sa compétence.

Étant donné l'emploi inexplicable de l'expression «peut/doit» au par. 11(1) du Règlement, il est difficile de préciser ce que la Commission était

it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the *Architects Act*.

I am, however, of the opinion that the application of the *functus officio* principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a number of *ultra vires* findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of *functus officio*?

Functus Officio

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

In *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal

tenue de faire. Il serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations, que ce soit aux parties ou au Conseil, ou d'envisager un renvoi au Comité d'examen des plaintes. Par conséquent, je souscris à l'opinion du juge Kerans selon laquelle la Commission était tenue d'envisager la possibilité de faire des recommandations, conformément au Règlement et au par. 39(3) de l'*Architects Act*.

J'estime cependant qu'il faut plutôt traiter de l'application du principe *functus officio* dans le contexte de la qualification suivante de l'état actuel des procédures devant la Commission. La Commission a tenu une audience valide au sujet de certaines pratiques des appelants. À la fin de l'audience, au lieu d'envisager de formuler des recommandations et des directives, elle a formulé un certain nombre de conclusions et d'ordonnances *ultra vires* qui étaient nulles et qui ont été annulées. Dans ces circonstances, la décision de la Commission est-elle définitive, ce qui justifierait l'application du principe du *functus officio*?

Functus officio

La règle générale portant qu'on ne saurait revenir sur une décision judiciaire définitive découle de la décision de la Court of Appeal d'Angleterre dans *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. La cour y avait conclu que le pouvoir d'entendre à nouveau une affaire avait été transféré à la division d'appel en vertu des *Judicature Acts*. La règle ne s'appliquait que si le jugement avait été rédigé, prononcé et inscrit, et elle souffrait deux exceptions:

1. lorsqu'il y avait eu lapsus en la rédigeant ou

2. lorsqu'il y avait une erreur dans l'expression de l'intention manifeste de la cour. Voir *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186.

Dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, le juge Martland s'exprimant en son propre nom et en celui du juge Laskin, s'est dit d'avis que le même

Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At page 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.

raisonnement ne s'appliquait pas à la Commission d'appel de l'immigration dont les décisions ne pouvaient faire l'objet d'un appel que sur une question de droit. Même s'il s'agissait d'une opinion dissidente, seul le juge Pigeon, parmi les cinq juges ayant entendu l'affaire, n'y a pas souscrit. Le juge Martland affirme, à la p. 589:

> Le même raisonnement ne s'applique pas aux décisions de la Commission, dont il n'y a pas d'appel, sauf sur une question de droit. Il n'y a pas d'appel par voie de nouvelle audition.
>
> Dans *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, la Chambre d'appel de la Cour suprême de l'Alberta a exprimé l'avis que la législature albertaine reconnaissait l'application de la restriction énoncée dans l'affaire *St. Nazaire Company* aux commissions administratives puisque des dispositions expresses prévoyant une nouvelle audition avaient été insérées dans les lois établissant certaines commissions provinciales, tandis que, dans le cas du Development Appeal Board en question, il n'y en avait pas. La Cour a poursuivi en signalant que l'un des buts de la création de ces commissions était d'arriver rapidement au règlement de problèmes administratifs.

Il a ensuite conclu que le texte de la loi exprimait l'intention d'habiliter la Commission à entendre d'autres éléments de preuve, dans certains cas, même si une décision définitive avait été rendue.

Je ne crois pas que le juge Martland ait voulu affirmer que le principe *functus officio* ne s'applique aucunement aux tribunaux administratifs. Si l'on fait abstraction de la pratique suivie en Angleterre, selon laquelle on doit hésiter à modifier ou à rouvrir des jugements officiels, la reconnaissance du caractère définitif des procédures devant les tribunaux administratifs se justifie par une bonne raison de principe. En règle générale, lorsqu'un tel tribunal a statué définitivement sur une question dont il était saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou s'il y a eu un lapsus ou une erreur au sens des exceptions énoncées dans l'arrêt *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, précité.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd.*

Le principe du *functus officio* s'applique dans cette mesure. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel en bonne et due forme. C'est pourquoi j'estime que son application doit être plus souple et moins formaliste dans le cas de décisions rendues par des tribunaux administratifs qui ne peuvent faire l'objet d'un appel que sur une question de droit. Il est possible que des procédures administratives doivent être rouvertes, dans l'intérêt de la justice, afin d'offrir un redressement qu'il aurait par ailleurs été possible d'obtenir par voie d'appel.

Par conséquent, il ne faudrait pas appliquer le principe de façon stricte lorsque la loi habilitante porte à croire qu'une décision peut être rouverte afin de permettre au tribunal d'exercer la fonction que lui confère sa loi habilitante. C'était le cas dans l'affaire *Grillas*, précitée.

De plus, si le tribunal administratif a omis de trancher une question qui avait été soulevée à bon droit dans les procédures et qu'il a le pouvoir de trancher en vertu de sa loi habilitante, on devrait lui permettre de compléter la tâche que lui confie la loi. Cependant, si l'entité administrative est habilitée à trancher une question d'une ou de plusieurs façons précises ou par des modes subsidiaires de redressement, le fait d'avoir choisi une méthode particulière ne lui permet pas de rouvrir les procédures pour faire un autre choix. Le tribunal ne peut se réserver le droit de le faire afin de maintenir sa compétence pour l'avenir, à moins que la loi ne lui confère le pouvoir de rendre des décisions provisoires ou temporaires. Voir *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.)

Dans l'affaire qui nous intéresse, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par l'*Architects Act*. La Commission a voulu rendre une décision définitive, mais cette décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Traditionnellement, le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une déci-

and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.
>
> If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.
>
> In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and

sion valide. Dans la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), le juge McLachlin (maintenant de notre Cour) a résumé le droit applicable à ce sujet dans le passage suivant, à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40 à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide.
>
> Trizec Equities Ltd. n'a formulé aucune plainte à l'égard de l'audience du 19 mars. Par conséquent, même si la cour a outrepassé sa compétence en prétendant augmenter les cotisations le 17 mars 1982 au matin, sa décision subséquente, rendue le 19 mars 1982, demeure valide.
>
> Si l'erreur qui a pour effet de rendre nulle la décision entache la totalité des procédures, le tribunal doit tout recommencer. Les arrêts *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), et *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330, se situent dans cette catégorie. Dans chaque cas, il s'agissait d'un déni de justice naturelle qui avait pour effet de vicier toute l'instance. Le tribunal était tenu de tout recommencer afin de remédier à ce vice.
>
> En l'espèce, la Commission a tenu une audience valide jusqu'au moment de trancher la question. Elle a alors prononcé une décision qui est nulle de nullité absolue. Elle n'a pas envisagé de régler la

should be entitled to do so. The Court of Appeal so held.

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting)—I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

The issues which arise in this appeal are:

(1) Was the Practice Review Board ("Board") of the Alberta Association of Architects *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?

(2) If the Board was not *functus officio*, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?

(3) Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

The first two, closely related issues, turn on the construction of s. 39 of the *Architects Act*, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

question de façon appropriée, ce qu'elle devrait pouvoir faire maintenant. C'est ainsi qu'en a décidé la Cour d'appel.

Cependant, à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement. Cela permettra aux appelants d'aborder directement la question des recommandations que la Commission devrait faire, le cas échéant.

En définitive, le pourvoi est rejeté, mais sans dépens. Les intimés n'ont pas présenté de plaidoirie ni déposé de mémoire.

Les motifs des juges La Forest et L'Heureux-Dubé ont été rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—Avec égards, je ne puis souscrire à la conclusion à laquelle en arrive mon collègue le juge Sopinka.

Les questions en litige dans ce pourvoi sont les suivantes:

1) La Practice Review Board («la Commission») de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était-elle *functus officio* après avoir établi un rapport sur les pratiques qui ont entraîné la faillite du Chandler Kennedy Architectural Group?

2) Si la Commission n'était pas *functus officio*, a-t-elle compétence pour poursuivre l'audience initiale, à l'encontre des appelants, afin d'envisager la possibilité de faire des recommandations au Comité d'examen des plaintes?

3) La Cour d'appel a-t-elle commis une erreur en examinant et en appliquant les principes relatifs au *mandamus*?

Les deux premières questions sont étroitement liées et portent sur l'interprétation de l'art. 39 de l'*Architects Act*, R.S.A. 1980, chap. A-44.1, et du règlement 175/83 (adopté en vertu de la Loi), qui créent la Commission et en définissent les pouvoirs.

Section 39(3) of the *Architects Act* provides:

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

The disputed text is found in Regulation 175/83, s. 11(1):

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

. . .

(c) ... direct that the matter be referred to the Complaint Review Committee for investigation: ...

The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative, mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) *Functus Officio*

When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.

In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is *functus officio*. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not

Le paragraphe 39(3) de l'*Architects Act* dispose:

[TRADUCTION] (3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

Le texte contesté en l'espèce figure au par. 11(1) du règlement 175/83:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

. . .

c) ... ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête ...

La confusion tient à la juxtaposition des termes facultatif «peut» et impératif «doit», sans priorité apparente. Cependant, même si je me propose d'examiner les conséquences des deux interprétations, j'estime que le pourvoi devrait être accueilli de toute façon.

1) *Functus officio*

Lorsque la Commission a voulu rouvrir l'enquête pour la première fois, les appelants ont demandé une ordonnance de prohibition qui leur a été accordée par le juge Brennan, juge en chambre de la Cour du Banc de la Reine, qui a affirmé en rendant l'ordonnance:

[TRADUCTION] Malheureusement, la Commission de révision des pratiques a agi comme si elle avait des fonctions disciplinaires, en tirant des conclusions et en imposant des peines. Monsieur le juge Kryczka a jugé que ces conclusions et ordonnances étaient nulles, ce qui a été confirmé par la Cour d'appel de l'Alberta.

À mon avis, la Commission de révision des pratiques s'est acquittée des fonctions pour lesquelles elle a été constituée et elle est donc *functus officio*. Par conséquent, elle n'avait pas compétence pour poursuivre l'exercice de quelque fonction que ce soit. La demande d'ordonnance de prohibition interdisant à la Commission de poursuivre l'affaire contre les requérants est donc accueillie et il est notamment interdit à la Commission de tenir d'autres audiences sur cette question.

Cette décision a été infirmée par la Cour d'appel de l'Alberta: (1985), 67 A.R. 255. Selon le juge Kerans, s'exprimant au nom de la cour, la Com-

functus officio, and should be allowed to "voluntarily . . . do the right thing" (at p. 257):

[T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

Jowitt's Dictionary of English Law (2nd ed. 1977) defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

Black's Law Dictionary (5th ed. 1979) defines *functus officio* as "a task performed":

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effet.

mission n'était pas *functus officio* et il devrait lui être loisible de [TRADUCTION] «procéder de la bonne façon [. . .] volontairement» (à la p. 257):

[TRADUCTION] [A]près avoir décidé erronément qu'elle avait le pouvoir de traiter directement et définitivement de questions disciplinaires, la Commission a rejeté trop hâtivement toute possibilité de faire des recommandations à d'autres organismes. Nous pensons que la Commission, convaincue erronément d'être investie de ces autres pouvoirs, a commis une erreur si énorme quant à la portée de ses pouvoirs de recommandation que l'on ne peut conclure qu'elle a exercé cette compétence.

L'expression *functus officio* est définie par [TRADUCTION] «qui s'est acquitté de sa fonction» dans le *Jowitt's Dictionary of English Law* (2e éd. 1977). Cette expression s'applique à un juge, magistrat ou arbitre qui a rendu une décision ou prononcé une ordonnance et a ainsi épuisé sa compétence. La conclusion à laquelle est arrivé le juge Morton, dans *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), est bien résumée dans le sommaire:

[TRADUCTION] Lorsqu'un juge a décrété un sursis d'exécution qui a été prononcé et inscrit, il devient *functus officio* et ni lui ni aucun autre juge de même juridiction n'a le pouvoir d'en modifier les modalités. L'appel devant une instance supérieure est alors le seul moyen d'obtenir une modification de l'ordonnance.

La mention suivante a été ajoutée par l'arrêtiste:

[TRADUCTION] C'est une question de pratique. Il est bien établi que la cour peut modifier une ordonnance avant de la prononcer et de l'inscrire. Une fois que l'ordonnance est prononcée et inscrite, la cour est *functus officio* et ne peut la modifier elle-même. Seule une juridiction d'appel peut procéder à la modification de l'ordonnance.

Dans le *Black's Law Dictionary* (5e éd. 1979), *functus officio* est défini ainsi: [TRADUCTION] «une fonction remplie»:

[TRADUCTION] Ayant rempli sa fonction, s'étant acquitté de sa charge ou ayant réalisé son objectif et n'ayant donc plus aucun pouvoir ni compétence. S'applique à un fonctionnaire dont le mandat est expiré et qui n'a donc plus de pouvoir officiellement; également à un acte, à un pouvoir, à un organisme, etc., qui a atteint l'objectif visé lors de sa constitution et n'a donc plus aucun autre effet.

The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)) "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

In *Re Nelsons Laundries Ltd.*, Verchere J. cited *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it .... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file

En vertu du principe du *functus officio*, une instance décisionnelle, qu'il s'agisse d'un arbitre, d'un tribunal administratif ou d'une cour de justice ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (C.S.C.-B.)) [TRADUCTION] «Permettre à l'instance décisionnelle de se pencher encore sur la question de sa propre initiative, sans réentendre toute l'affaire est contraire à ce principe» (mémoire des appelants, à la p. 19).

Dans la décision *Re Nelsons Laundries Ltd.*, le juge Verchere cite l'arrêt *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (C.A.C.-B.), à la p. 154:

> [TRADUCTION] Il s'agit donc de déterminer à quel moment la décision a été rendue. À mon avis, c'est lorsque l'arbitre a tout fait ce qu'il pouvait faire, c'est-à-dire lorsqu'il a consigné sa décision par écrit et l'a publiée à ce titre.

Dans l'arrêt *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (C.A.T.-N.), le juge Morgan affirme (à la p. 163):

> [TRADUCTION] La question de savoir si le juge de première instance a commis une erreur au départ en déclarant que l'instance était nulle et en ordonnant la radiation du bref d'assignation et de la déclaration n'est pas pertinente en l'espèce. L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier. De toute évidence, le juge était dès lors functus officio et n'avait pas compétence pour entendre l'affaire.

Les auteurs de traités de droit administratif sont étonnamment parcimonieux lorsqu'ils parlent du principe du *functus officio*. L'ouvrage de Pépin et Ouellette, intitulé *Principes de contentieux administratif* (2e éd. 1982), contient peut-être l'énoncé le plus concis de ce principe, à la p. 221:

> Dans les cas des actes quasi judiciaires, la jurisprudence considère que les décisions régulièrement rendues sont irrévocables. On veut en quelque sorte que les droits accordés ou reconnus aux administrés par l'Administration ne puissent être remis en cause par le biais d'un pouvoir de reconsidération; les administrés ont droit à la sécurité juridique des décisions. Une fois la décision

is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not *functus officio* after handing down its decision, at what point does it become so? In this case an appeal was filed, though not heard because the original ruling was quashed. If the Board is not *functus officio* when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes *functus officio*, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretion-

rendue, le dossier est fermé et l'Administration est «functus officio». Souvent d'ailleurs, le législateur prendra la peine de préciser que la décision est «finale et sans appel». La règle de l'irrévocabilité des décisions à caractère quasi judiciaire semble s'appliquer également aux tribunaux domestiques. Cependant, la règle pourra souffrir des exceptions lorsque la décision initiale est entachée d'un vice de procédure grave comme l'inobservance d'un principe de justice naturelle.

Suivant ce principe, si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. Le caractère définitif de la décision de la Commission peut s'inférer du langage qu'elle emploie dans ses ordonnances. Le rapport de la Commission indique que les audiences ont pris fin le 17 décembre 1984. Les membres de la Commission ont signé le rapport sous la rubrique «Conclusions». De plus, vu que le Conseil de l'Association des architectes de l'Alberta avait déposé un avis d'appel contre la décision rendue par la Commission, lui aussi doit avoir considéré que l'audition était terminée. Dans sa décision, la Commission a imposé des suspensions exécutoires immédiatement. Le rapport est intitulé [TRADUCTION] «Rapport de la Commission de révision des pratiques». Il a été rendu dans l'exercice des fonctions de ce tribunal. Tous ces facteurs révèlent que la Commission avait complété sa fonction et rendu son rapport final.

Le raisonnement de la Cour d'appel de l'Alberta me semble entaché d'un vice fondamental. Si la Commission n'est pas *functus officio* après le prononcé de sa décision, quand le devient-elle? En l'espèce, un appel a été interjeté bien qu'il n'ait jamais été entendu puisque la décision initiale a été annulée. Si la Commission n'est pas *functus officio* lorsqu'elle prononce sa décision, elle doit certainement l'être au moment où cette dernière est portée en appel. Sinon, il faudrait logiquement conclure que la Commission pourrait siéger de nouveau pour réexaminer une affaire même après l'audition de l'appel. Aucun principe en effet ne permet d'affirmer que la Commission devient *functus officio* à un certain moment après le prononcé de sa décision, et il semble rationnellement impossible de faire une exception pour le rare cas

ary duty. In my view, this point should be fatal to the respondents.

If a tribunal has discretion, i.e., if it may consider making recommendations, and chooses not to, there is no authority in the *Architects Act* that permits it to change its mind on its own initiative. Furthermore, once a board acts *ultra vires*, it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes *functus officio* and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); *Re Nelsons Laundries Ltd.*, *supra*). However, the Board in the present case is

où la Commission fait défaut de considérer l'exercice d'un pouvoir discrétionnaire. À mon avis, ce point devrait être fatal aux intimés.

Si un tribunal détient un pouvoir discrétionnaire, c.-à-d. s'il peut envisager de faire des recommandations et s'il choisit de ne pas le faire, l'*Architects Act* ne l'autorise aucunement à changer d'avis de sa propre initiative. En outre, une fois qu'une commission agit de façon *ultra vires*, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire.

Dans la plupart des décisions administratives, le tribunal ne s'arrête pas à la question de savoir s'il a considéré tous les pouvoirs discrétionnaires dont il est investi, mais a choisi de n'en exercer que quelques-uns. Je suis d'accord avec l'arrêt *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.), portant qu'il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations au Conseil, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Il y a évidemment des exceptions à la règle générale portant qu'un arbitre ayant prononcé une décision définitive devient *functus officio* et ne peut modifier cette décision par la suite. Par exemple, une instance décisionnelle peut corriger des erreurs matérielles ou des fautes imputables à un lapsus ou à une omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 R.N.-B. (2e) 342 (C.A.N.-B.); *Re Nelsons Laundries Ltd.*, précité).

not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is *functus officio*: any further action would be entirely without authority (*Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of *functus officio* would be rendered nugatory.

In *Lodger's International Ltd.*, *supra*, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the *Human Rights Act* provided that the orders were "final". The court held that the second order was improper and that the Commission was *functus officio* after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

Unlike the enabling statute in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under

En l'espèce, toutefois, la Commission ne tente pas de corriger un lapsus ou une erreur matérielle. Si elle avait la possibilité d'envisager de faire des recommandations et a choisi de ne pas le faire, ce choix n'altère en rien le caractère définitif de la décision.

Lorsqu'une décision est rendue et qu'il ne reste rien à compléter, l'instance décisionnelle est incontestablement *functus officio*: toute mesure additionnelle serait prise en l'absence de toute compétence (*Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), confirmé par [1989] 1 R.C.S. 1038). Donc, si la Commission est perçue comme ayant discrétion pour décider de faire ou non des recommandations et si l'arrêt de la Cour d'appel de l'Alberta est maintenu, le principe du *functus officio* serait privé de tout effet.

Dans l'arrêt *Lodger's International Ltd.*, précité, la Cour d'appel du Nouveau-Brunswick était saisie d'une série d'ordonnances prononcées par la Commission des droits de l'homme du Nouveau-Brunswick. La Commission avait d'abord ordonné à un employeur d'indemniser deux employés. L'employeur ne s'étant pas exécuté, la Commission a renouvelé l'ordonnance en l'assortissant d'un délai de paiement. Le paragraphe 21(2) de la *Loi sur les droits de l'homme* prévoit que les ordonnances sont «définitive[s]». La cour a statué que la seconde ordonnance était irrégulière et que la Commission était *functus officio* après avoir rendu la première ordonnance, parce que l'art. 21 ne l'autorisait pas à rendre d'autres ordonnances. S'exprimant au nom de la cour, le juge La Forest (maintenant de notre Cour) a abordé la question de savoir si la Commission avait le pouvoir de prononcer une telle série d'ordonnances et a conclu ce qui suit (aux pp. 352 et 353):

> Il faudrait des arguments bien solides pour me convaincre que la Législature a jamais eu l'intention de conférer ce genre de pouvoir à un organisme administratif, si nobles que soient ses objectifs et si libérale que soit l'interprétation escomptée de la loi pour faciliter la réalisation de ces objectifs.

Contrairement à la loi habilitante en cause dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, où, en vertu de l'art. 15 sur la *Loi sur la Commission d'appel de*

s. 15 of the *Immigration Appeal Board Act*, there is no authority in the *Architects Act* for the Board to hold a rehearing. *Cité de Jonquière v. Munger*, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

Furthermore, I agree with the holding in *M. Hodge and Sons Ltd.*, *supra*, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio* (at p. 163):

The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

The Alberta Court of Appeal interpreted the *Architects Act*, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations" (p. 860). Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 863), my colleague suggested that "[o]n the continuation of the Board's original proceedings ... either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter" (p. 864). Hence, while it would

l'immigration, la Commission d'appel de l'immigration avait compétence pour procéder à une nouvelle audition, l'*Architects Act* n'autorise aucunement la Commission à réentendre ainsi une affaire. L'arrêt *Cité de Jonquière v. Munger*, [1964] R.C.S. 45, confirme également que les décisions doivent être définitives à moins que la loi ne prévoie le contraire. En confirmant l'arrêt unanime de la Cour d'appel du Québec, le juge Cartwright statue au nom de la Cour (à la p. 48):

[TRADUCTION] Je suis convaincu que le conseil avait le droit d'interpréter la décision mais non de la modifier. Cela ne signifie pas toutefois qu'il n'avait pas le droit de corriger une simple erreur d'écriture. Toute entité dotée de pouvoirs quasi judiciaires doit avoir ce droit, sinon la moindre petite erreur de rédaction pourrait avoir des conséquences désastreuses.

De plus, je souscris à la conclusion de la cour dans l'arrêt *M. Hodge and Sons Ltd.*, précité, selon laquelle le fait que la décision initiale était erronée ou que la cour a agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio* (à la p. 163):

[TRADUCTION] L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier.

2) La compétence de la Commission pour réentendre une affaire

Dans son interprétation de l'*Architects Act* et du règlement 175/83, la Cour d'appel de l'Alberta a conclu que ces textes imposaient à la Commission l'obligation d'envisager si elle devait faire une recommandation au Conseil ou au Comité d'examen des plaintes.

Malgré le langage ambigu de ces textes législatifs, mon collègue le juge Sopinka conclut que la Loi impose une telle obligation parce qu'«[i]l serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations» (p. 860). Étant donné que «la Commission a tenu une audience valide jusqu'au moment de trancher la question» (p. 863), mon collègue postule qu'«à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments perti-

provide for the presentation of supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly *ultra vires*. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision" (p. 862) (emphasis added), relying on *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R.

nents aux fins de régler l'affaire» (p. 864). Par conséquent, même si la nouvelle audition permettait aux parties de présenter des éléments de preuve additionnels, cette audition ne constituerait pas un réexamen de la question dans son entier mais plutôt la «continuation des procédures initiales par la Commission».

Intuitivement, cette analyse offre un certain attrait: étant donné que la Commission de révision des pratiques existe et qu'elle a une certaine fonction à remplir, elle devrait être autorisée à exercer cette fonction ou plutôt y être tenue. En l'espèce, cependant, le litige porte précisément sur le fait que la Commission a bel et bien exercé cette fonction, même si elle l'a fait dans l'illégalité.

Il est admis que lorsqu'elle a prononcé ses ordonnances définitives, la Commission a clairement outrepassé sa compétence. Le président de la Commission a lui-même décrit les fonctions de la Commission et reconnu explicitement que:

> [TRADUCTION] [I]l ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession.

Après cette introduction, la Commission s'est engagée dans un processus décisionnel que les tribunaux ont ensuite jugé entièrement *ultra vires*. Si elle avait l'obligation d'envisager de faire des recommandations au Comité de révision des plaintes, elle ne l'a pas fait.

Même si la Commission a commis une erreur en prononçant sa décision initiale, il s'agit de déterminer si cela l'empêche de tenter cette fois d'exercer correctement sa fonction. Selon mon collègue, comme la décision de la Commission était nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision: «le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une décision valide» (pp. 862 et 863) (je souligne), s'appuyant sur la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), où le juge

(3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

Furthermore, *Re Trizec* dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

(1) the court in *Re Trizec* was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in *Chandler* allowed the Board to continue its original proceeding;

(2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in *Chandler* was not

McLachlin (maintenant de notre Cour) écrit à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40, à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide. [Je souligne.]

D'après cette jurisprudence, il est clair que lorsqu'en raison de circonstances particulières, un tribunal administratif est justifié de réexaminer une affaire, ce dernier doit procéder à un réexamen de la question dans son entier et non à la simple continuation du processus vicié que l'on tente maintenant de corriger.

En outre, dans la décision *Re Trizec*, il s'agissait d'une erreur de procédure commise par la Cour de révision. Tout en respectant les limites de sa compétence sur le plan du fond, la Cour de révision avait augmenté une cotisation établie à l'encontre d'un contribuable avant même d'entendre ce dernier. Deux jours plus tard, à la demande du contribuable, la cour a été convoquée de nouveau et a tenu une audition. Cette affaire doit être distinguée sur au moins trois aspects:

(1) dans *Re Trizec*, on a ordonné à la cour de réexaminer l'affaire et de procéder à une audience régulière; dans *Chandler*, la Cour d'appel de l'Alberta a permis à la Commission de continuer ses procédures initiales;

(2) la cour, agissant dans les limites de sa compétence, a commis une erreur de procédure qu'elle a ensuite corrigée; dans *Chandler*, la

empowered at the substantive level to make any of the findings it did; and

(3) the taxpayer itself requested a hearing, whereas the Board in *Chandler* reopened the proceedings on its own initiative.

The issues in *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in *Re Trizec*, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

The suggestion that the Board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position

Commission n'avait pas le pouvoir, sur le plan du fond, de formuler les conclusions en cause; et

(3) le contribuable a lui-même demandé une audience alors que dans *Chandler*, la Commission a rouvert l'instance de sa propre initiative.

Les questions en litige dans l'arrêt *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), invoqué dans *Re Trizec*, étaient presque identiques. Un professeur avait été congédié pour trois motifs d'inconduite mais n'avait pu témoigner qu'à l'égard de deux d'entre eux. Par la suite, il avait pu se faire entendre au sujet du troisième motif et le congédiement avait été confirmé.

La suggestion que les procédures initiales puissent être continuées est particulièrement inquiétante. Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, cela serait de nature à éroder la garantie d'équité et de justice naturelle à laquelle chaque citoyen de ce pays est en droit de s'attendre de la part des tribunaux administratifs. La Commission a tenu l'audience initiale en croyant à tort qu'elle pouvait prononcer certaines ordonnances, malgré les propos préliminaires tenus par le président. Les commentaires du président que j'ai déjà reproduits indiquent clairement que les audiences devaient constituer une révision des pratiques plutôt qu'un examen des plaintes portant sur la conduite non professionnelle.

En Cour du banc de la Reine de l'Alberta, le juge Kryczka a statué que, compte tenu de ce que les appelants n'ont pas été avisés qu'ils faisaient face à des accusations ou allégations de nature disciplinaire, [TRADUCTION] «il m'est difficile d'imaginer que le résultat éventuel puisse être considéré comme autre chose qu'un simulacre de justice». Les appelants auraient peut-être agi différemment ou présenté un autre genre de défense à l'audience s'ils avaient soupçonné qu'ils faisaient l'objet d'une enquête sur des questions excédant totalement la compétence de la Commission. Puisqu'ils n'étaient pas au courant ni informés des accusations de nature disciplinaire que la Commis-

to prepare a full defense to the allegations and orders ultimately made against them.

Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, cited with approval in *Grillas*, *supra*, at pp. 588-89. *Canadian Industries* dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be required to conduct a new hearing. *Re Trizec* and *Lange*, *supra*. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

I would like to briefly address the *prima facie* apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered *functus officio*. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity,

sion envisageait de porter, les appelants n'étaient pas légalement en mesure de préparer une défense pleine et entière à l'égard des allégations et des ordonnances dont ils ont finalement fait l'objet.

Les appelants ajoutent que s'il est confirmé, l'arrêt de la Cour d'appel de l'Alberta devra alors être considéré comme renversant l'arrêt de la même cour dans *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, qui a été cité avec approbation dans l'arrêt *Grillas*, précité, aux pp. 588 et 589. L'arrêt *Canadian Industries* portait sur une audience tenue par une commission sans avis préalable à l'appelant, qui avait droit à un tel préavis en tant que partie intéressée. Après avoir donné les avis appropriés, la Commission a procédé à une nouvelle audition de l'affaire et a décidé, après avoir entendu les arguments, de ne pas modifier son ordonnance antérieure. Le juge Johnson a statué, au nom de la Cour d'appel, que les deux ordonnances devaient être annulées. La première était nulle parce que l'appelant n'avait pas été avisé. La deuxième était tout aussi nulle, parce que la loi n'autorisait pas clairement la tenue d'une nouvelle audition.

Comme nous l'avons déjà mentionné, aucun texte de loi n'habilite clairement la Commission à tenir une nouvelle audition. Si la Commission a omis de remplir une obligation qui lui incombe, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. *Re Trizec* et *Lange*, précités. Cependant, si elle se propose de faire une chose et qu'en fin de compte elle fait quelque chose de tout à fait différent, tout réexamen de l'affaire ne devrait pas être considéré comme la «continuation des procédures initiales par la Commission».

J'aimerais aborder brièvement la question de la crainte *prima facie* que le fait d'ordonner à la Commission de tenir une nouvelle audition équivaille à une «double décision». Cette crainte pourrait être justifiée si l'on estimait que la Commission détient un pouvoir discrétionnaire. Elle prononcerait alors des ordonnances après être devenue *functus officio*. Cependant, si elle était dans l'obligation d'agir, la tenue d'une nouvelle

and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, *Lodger's International Ltd.*, *supra*, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

(3) *Mandamus*

As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

Laidlaw J.A. set out the requirements for mandamus in *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" . . .; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief . . .»; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy . . . .

Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here.

audition ne s'imposerait que si l'audience initiale était jugée nulle de nullité absolue et si les circonstances le justifiaient. Dans ce cas, il n'y aurait pas lieu de craindre de permettre au tribunal de prononcer une série d'ordonnances, *Lodger's International Ltd.*, précité. À mon avis, en l'espèce il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

3) *Mandamus*

Puisque la Cour d'appel s'est référée à deux reprises aux principes du *mandamus*, j'en traiterai également. Je conviens toutefois avec les appelants que ces principes n'ont rien à voir avec le présent pourvoi.

Dans l'arrêt *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (C.A. Ont.), le juge Laidlaw décrit les conditions applicables à l'obtention d'un *mandamus*, à la p. 297:

> [TRADUCTION] Pour être en mesure d'obtenir ce redressement, le requérant doit démontrer (1) «qu'il a le droit, clairement prescrit par la loi, d'obtenir que la chose qu'il demande soit faite et ce, de la façon demandée et par la personne en cause» . . .; (2) «la fonction dont on demande l'exercice par voie de *mandamus* doit réellement incomber au fonctionnaire en cause, au moment où le redressement est demandé» . . .; (3) cette fonction doit être de nature purement ministérielle et «incomber directement à un fonctionnaire en vertu de la loi ou de la nature de son poste; il ne doit jouir d'aucun pouvoir discrétionnaire à cet égard»; (4) il doit y avoir eu demande et refus d'accomplir l'acte que l'on veut faire accomplir par voie judiciaire . . .

Il appert donc que le *mandamus* s'applique à l'encontre d'un tribunal ou d'une autorité et qu'il ne peut être invoqué par ceux-ci. Si la Commission avait refusé d'exercer sa compétence, il y aurait lieu de délivrer un *mandamus*. Toutefois ce n'est pas le cas ici. C'est plutôt le contraire: la Commission a pris sur elle d'exercer des pouvoirs plus étendus que ceux qui lui étaient conférés. Ce seul fait militerait à l'encontre de l'application du *mandamus* à l'espèce par la Cour d'appel. En outre, si nous respectons les conditions susmentionnées applicables à l'obtention d'un *mandamus* les faits de l'espèce ne semblent satisfaire à aucune de celles-ci:

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.

(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.

(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

(4) Conclusion

On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now *functus officio*. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

Appeal dismissed, LA FOREST *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitors for the appellants: Code Hunter, Calgary.

1) Aucun droit clairement prescrit par la loi n'est en cause.

2) La Commission pouvait avoir le pouvoir discrétionnaire de décider de faire ou non des recommandations.

3) La question de savoir si le règlement confère un pouvoir discrétionnaire à la Commission demeure ouverte; si la Commission a le devoir de considérer de faire des recommandations, elle a certainement le pouvoir discrétionnaire de décider de les faire ou non, et de choisir la recommandation appropriée, le cas échéant.

4) Les appelants n'ont pas demandé qu'un acte soit accompli et la Commission n'a pas refusé de le faire, comme le requiert le *mandamus*.

4) Conclusion

Peu importe la façon dont on interprète le langage ambigu du règlement, j'estime que le pourvoi doit être accueilli. Si la Commission avait le pouvoir discrétionnaire d'agir et a décidé d'agir d'une certaine façon, elle est maintenant *functus officio*. Si elle avait le devoir d'agir et qu'elle ne l'a pas fait, elle ne peut poursuivre une audience viciée. Pour les motifs qui précèdent, le *mandamus* n'est pas un facteur déterminant en l'espèce.

Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de la Cour d'appel et de rétablir le jugement du juge Brennan interdisant à la Commission de poursuivre l'affaire, le tout avec dépens dans toutes les cours.

Pourvoi rejeté, les juges LA FOREST *et* L'HEUREUX-DUBÉ *sont dissidents.*

Procureurs des appelants: Code Hunter, Calgary.

TAB C

22

Agency Decisions and Reasons

22.1 WHAT ARE DECISIONS? WHAT ARE REASONS?

22.1(a) Decisions

Every time an agency elects to do something (or to do nothing) it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing. A decision is the "what" an agency decides to do. Thus, allowing a person to intervene in a proceeding, refusing an adjournment, assigning particular members to a proceeding, refusing an application, initiating a prosecution, issuing an order, allowing a person to have an interpreter, deciding to re-open a matter; these are all decisions.[1.01] A decision is what the agency has decided it will do with respect to a request, an application, an investigation, or other circumstances, which puts it in a position to act. Although there is a tendency to use the terminology loosely and sometimes even interchangeably, and to combine the two concepts together into one document, technically, there is a difference between a "decision" and the "reasons" for a decision. The decision is the "what" and the "reasons" are the "why". I will discuss reasons in more detail later.

Notwithstanding the above generic meaning of "decision", a particular legislative scheme may adopt a more limited meaning of the term "decision".[1.01A]

1.01 Thus, the Immigration and Refugee Board's election not to translate all of its orders automatically was a "decision" for the purposes of judicial review under the Federal Court Act (*Devinat v. Canada (Immigration & Refugee Board)* (1999), [2000] 2 F.C. 212 (Fed. C.A.)).

1.01A See, for example, *Get Acceptance Corp. v. British Columbia (Financial Institutions Commission)*, 2008 CarswellBC 2170, 2008 BCCA 404 (B.C. C.A.). In that case the British Columbia Court of Appeal held that the statutory right of appeal granted under section 9(1) of the B.C. *Mortgage Brokers Act* respecting "decisions" did not apply to the decision of the Registrar to post a notice of an upcoming hearing. Section 9(1) provided that: "A person affected by a direction, decision or order of the registrar under this Act may appeal it to the tribunal. . ." The Court of Appeal held that the "decision" contemplated by the section was one of an adjudicative or coercive nature - not a mere practice undertaken by the Registrar in the course

TAB D

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

RP-2003-0063
EB-2005-0189

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND IN THE MATTER OF the Ontario Energy Board's RP-2003-0063/EB-2004-0480 Decision setting rates for Union Gas Limited for 2005;

AND IN THE MATTER OF a Notice of Motion by Union Gas Limited for the Board to vary its RP-2003-0063/EB-2004-0480 Decision.

BEFORE: Gordon E. Kaiser
Vice Chair and Presiding Member

Bob Betts
Member

Paul Vlahos
Member

DECISION AND ORDER

The Applicant, Union Gas Limited, filed a Notice of Motion dated February 2, 2005 seeking an Order varying, cancelling or suspending certain provisions of a Decision of this Board dated December 15, 2004. Specifically, the following relief was sought,

1. An Order cancelling or suspending that portion of the Order implementing an earning sharing mechanism (ESM) for 2005 until further notice or alternatively,

2. An Order varying that portion of the Order implementing an ESM for 2005;

   (a) to provide that any ESM operate on actual earnings not weather normalized earnings;

   (b) to provide that any ESM operate around a deadband of 1%;

   (c) to provide that any ESM operates symmetrically both above and below the 1% deadband;

   (d) to specify a benchmark ROE for any ESM of 9.63% based on the October Consensus interest rate forecast which is the last interest rate forecast that would have been available to set rates prospectively for January 1, 2005; and

   (e) to provide,

      (i) that the existing earning sharing mechanism for Union's storage and transportation transactional activity is suspended in favour of a global ESM of 50/50; or

      (ii) that the existing storage of transportation deferral account margin is excluded from revenue for the purpose of the ESM.

This Application is brought pursuant to Section 21.2 of the Statutory Powers and Procedures Act which provides that "a tribunal may if it considers it advisable and if its rules made under Section 25.1 deal with the matter, review all or part of its own decision order, and may confirm, vary, suspend or cancel the decision or order." This Board's Rules of Practice and Procedure contemplate such a process in Rules 42 to 44.

For reasons which follow, the Board is not prepared to set aside or vary the Decision of December 15, 2004.

Background

On October 22, 2004, Union Gas filed an application, RP-2003-0063/EB-2004-0480, with the Board under Section 36 of the *Ontario Energy Board Act* to implement 2005 rates on January 1, 2005. The application included a draft Rate Order, with supporting working papers. Four different rate changes were contemplated. The Board issued Procedural Order No. 1 on November 4, 2004 calling for submissions from interested parties.

On November 19, 2004, the Board issued a further Decision dealing with certain procedural matters. In that Decision, the Board noted Union's statement that it did not intend to apply for any other changes to 2005 rates other than changes associated with the Quarterly Rate Adjustment Mechanism. This led the Board to issue the following direction:

> "In addition to all the above, an outstanding issue in the Board's view is the potential presence of material excess revenue in fiscal 2005 since the 2005 revenue requirement was not considered when setting the current rates. As part of the submissions stage set out in Procedural Order No. 1, the Board wishes to receive input from the parties as to what options, if any, should be considered by the Board in dealing with this issue."

With the submissions process being completed on December 10, 2004, the Board issued a Decision on December 15, 2004 approving the requested rate changes. The Board noted that it has received submissions from interested parties with respect to the mechanisms to deal with potential excess revenues in fiscal 2005. The Board concluded at page 8 of the December 15 Decision:

> "The Board has decided that an asymmetric earning sharing mechanism with no deadband is appropriate for Union's 2005 fiscal year. The sharing of excess earnings shall be on the basis of a 50:50 split between ratepayers and the shareholder. Any under-earnings will be to the account of the shareholder alone. The Board has decided that the determination of any excess earnings shall be done in conjunction with the next rates proceeding. In determining excess earnings, the benchmark ROE should be determined through the Board's formulaic approach and should be based on the most recent data that was available and could have been used had a cost of service review hearing been used to determine the new rates for January 1, 2005. Consistent with past practice, any excess earnings should reflect normalization for weather."

It is this Decision that Union seeks to set aside or in the alternative to modify.

Standard of Review

Counsel for the Industrial Gas Users Association stated that the Board should only vary or cancel an Order of a previous Panel in unusual circumstances. In the Enbridge decision of October 10, 2003, RP-2003-0048, the Board stated:

> "The Board agrees with the submissions made by the CAC that regulatory agencies should not review and vary their decisions except in unusual circumstances."

In this case, the Board has allowed the Applicant to proceed and make detailed submissions with regard to the rationale for the ESM and the various conditions related to it, notwithstanding the fact that the Applicant had full opportunity to address those matters in the earlier proceedings. In the specific circumstances of this Decision , the Board recognized that confirmation or clarification might be helpful.

Should the Board have Imposed an ESM on the Applicant?

The Applicant does not question the jurisdiction of the Board but argues that there were better and more appropriate remedies to address the problem the Board faced. That problem needs to be set out clearly.

The Board had previously set 2004 rates based on 2004 cost of service calculations. At the time, there was no suggestion that Union would not be applying to the Board for 2005 rates. Accordingly, no attention was devoted to that matter.

Later, it came to the attention of the Board that Union would not be applying for 2005 rates. There is some dispute as to when Union notified the Board. This panel does not consider that to be material.

The practical problem is how to protect the ratepayers if it ultimately became apparent that there were over-earnings. The existing rates are final rates and they continue until altered by the Board. None of the parties dispute this. Nor do any of the parties dispute

the fact that the Board is charged with fixing just and reasonable rates and that this means balancing the interests of the utility shareholders and the ratepayers.

Some mechanism is therefore necessary to create what in effect would be a rate adjustment if over-earnings are ultimately determined in a future proceeding. This issue becomes even more important in light of the subsequent statement by Union that it does not intend to apply for 2006 rates. The 2006 issue will be addressed separately.

One option suggested by an intervenor was to declare the 2004 rates interim for 2005.

Another possibility is that the Board could require Union to file a rates application. The Board could commence a proceeding on its own motion under Section 19(4) of the Act and then under Section 21(1) of the Act require the preparation of evidence. Under the Section of 36(7) of the Act, the burden of proof to establish that rates are just and reasonable continues to lie with the utility.

The third possibility is the one proposed by the Applicant. That was that the Board should conduct financial investigations pursuant to Sections 107 and 108 of the Act. Under those sections, an inspector appointed by the Board would have the authority to require the Applicant to produce documents, records, or information. The Applicant argues that these sections give the Board adequate power to ensure that there is no over-earning.

The problem with the third option is, as pointed out by the intervenors, that this is a confidential process. At most, it could be used as a vehicle to make a determination as to whether the Board should force the Applicant to file an Application pursuant to the Sections referred to above. Such a process would be time consuming and impose significant regulatory costs on all parties; and more importantly, it has the disadvantage of being non-transparent.

The Decision of the previous Panel on this matter did not discuss the interim rate proposal in any detail. This Panel has considered this option and concluded that interim rates may not be in the utility's interest. There is a view that interim rates creates uncertainty that is not welcomed by the investment community. Also, interim rates, by their very nature, may involve retroactivity. It is this Panel's view that if the objective of

balancing the interests of the utility's shareholder and customers could be achieved, in the circumstances, through a method other than interim rates, it should be preferred.

This Panel accepts the findings of the earlier Panel. In the circumstances, the use of an ESM was the most practical way to determine just and reasonable rates, absent of any evidence with respect to year 2005. It is admittedly, as one of the intervenors stated, rough justice. Whether it could work for more than one year will have to be considered in a separate proceeding.

Should the ESM operate on actual earnings?

The Applicant argues that the ESM should operate on actual earnings. The intervenors generally argued that the ESM should operate on weather normalized earnings because the effects of weather has always been a risk borne by the shareholder. This Board in its decision of December 15, 2004 held that weather normalized earning should be used.

The Applicant referred to a previous decision of the Board where actual earnings were used for Union in calculating an ESM.[1] That decision dealt with the Applicant's three year Performance Regulation Plan, not the situation that is before the Board in this Motion. The Board's decision in the Enbridge RP-2003-0048 case[2] is more relevant because it too dealt with rates for a post PBR plan. In that case, the Board varied its original decision specifying actual, in favour of using weather normalized results in earnings sharing calculation.

The Panel finds that weather normalizing is the correct approach in this case. The risk of weather has always been borne by the shareholder and, in the absence of a longer term mechanism in place, earnings sharing on the basis of weather normalization is consistent with common regulatory practice and the Board's recent decision in the case of Enbridge.

Should the ESM operate symmetrically?

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1 Decision With Reasons, *Union Gas Limited*, RP-1999-0017, July 21, 2001, paras. 2.551 to 2.558.

2 Decision and Order, *Enbridge Gas Distribution Inc.*, RP-2003-0048, October 10, 2003.

The Applicant claims that the ESM should operate symmetrically. That is, the shareholder and the ratepayer should share equally the benefits of any over-earnings and any losses from under-earnings. The intervenors all state that the ESM should operate asymmetrically which is to say that any under-earnings should be strictly borne by the shareholder. This Board in its December 15, 2004 decision concluded the ESM should operate asymmetrically.

This Panel finds that the ESM should operate asymmetrically. The rationale, which highlights key difference from other situations, is that the utility has chosen, for reasons solely within its knowledge, not to file a rate application. As pointed out by the intervenors, the utility has the knowledge and has made this decision based on that knowledge. Only the utility can influence the earnings outcome, and therefore only the utility should face the downside risks of under-earnings. The ratepayer should not face any risk associated with under-earnings.

The Applicant says an asymmetrical ESM will create inappropriate and unnecessary incentives for the utility to file rate applications to protect against the under-earning risk. The Panel does not agree with this assessment. It is true however, that an asymmetrical ESM will cause the utility to not make these decisions capriciously. What would be worse would be a situation where the utility, by deciding not to make application, would be protected on both the upside and the downside.

Should the ESM operate around a deadband?

The Applicant argued that the ESM should operate around a deadband of 1%. The only real logic offered is that in a previous case where Union had an ESM, there was a deadband.[3] Accordingly, it was argued that a deadband in this case should be consistent with past practice. However, there is a previous Enbridge decision where the ESM used did not include a deadband.[4] The Board has already discussed the relevance of the two decisions in the context of its earlier discussion regarding earnings sharing.

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3 Decision With Reasons, *Union Gas Limited*, RP-1999-0017, July 21, 2001, para. 2.556.

4 Oral Decision, *Enbridge Gas Distribution Inc.*, RP-2003-0048, September 4, 2003, Tr. Para 67.

The fact remains that there is little logic for a deadband in this case. A deadband may make sense in a PBR case but this ESM is a simple mechanism to deal with the distribution of any over-earnings that are ultimately determined. There is no evidence on this record of any productivity gains or improvements to be achieved through a deadband. This is not a case where we are evaluating the materiality of an over-earning and therefore the band within which excess earnings will be not be shared. This is a simple calculation to provide ratepayers with some relief if it is ultimately determined that the utility's decision not to file a rate application operates to their detriment. Accordingly, this Panel agrees with the Board's earlier Decision that there should be no deadband.

The Benchmark Return on Equity ("ROE")

The Applicant, in its Notice of Motion, asks the Board to specify a benchmark ROE for any ESM of 9.63% based on the October Consensus interest rate forecast, which is the last interest rate forecast that would have been available, to set rates prospectively for January 1, 2005. This Board, in its December 15 Decision, stated only that;

> "In determining the excess earnings, the benchmark ROE shall be determined through the Board's formulaic approach and shall be based on the most recent data that was available and could have been used had a cost of service review hearing been used to determine the new rates for January 1, 2005."

The Applicant states that it wanted to clarify the data to be used to avoid future disputes. The Applicant says that the October forecast is the last data that could have been available in order to set rates non-retroactively on January 1, 2005. The Applicant included in the Record the October 2004 Consensus forecast. If that data had been used in the calculation, a benchmark return on equity of 9.63% is generated. The Board accepts the specificity of a 9.63% ROE for 2005.

Should the existing earning sharing mechanism for Union's storage and transportation be suspended in favour of a new ESM of 50/50?

Union currently uses its storage and transportation assets to capture incremental revenue from parties other than its franchise customers. Under the current treatment, that incremental revenue is shared 75% to the ratepayer and 25% to Union. The December 15 Decision was silent in this matter. Union noted that including the earnings

from this revenue source could lead to sharing-on-sharing, or double-counting. The Panel agrees.

These earnings from storage and transportation assets, and the deferral account to which it relates, should not be included in the earnings calculation into which this ESM is applied. All of the parties appear to be in agreement with this approach. This was not an issue that was argued before the previous Panel. This is clarification sought by the Applicant in this proceeding.

Conclusion

For the reasons outlined, the Applicant's motion to set aside or vary the Board Decision of December 15, 2004 is dismissed. The clarifications of the Order requested are granted on the terms outlined.

This leaves the issue of 2006 rates. As indicated, Union has now advised that the company does not intend to file a rate application for that year. Counsel for the Applicant was asked what procedure his client was proposing for 2006. The response was that Union would like to see the Decision in this case first. That is reasonable. The Board expects the Applicant to advise the Board of its position and to notify the parties of record in this proceeding.

THE BOARD ORDERS THAT:

1. The Motion of the Applicant, Union Gas Limited, to cancel or vary this Board's Decision of December 15, 2004 is dismissed, subject to the specification and clarification described in paragraph 2.

2. The Board's Decision of December 15, 2004 is modified to specify that the rate of return on common equity for 2005 is 9.63% and the previously approved incremental revenue sharing for storage and transportation transactional activities is separate from, and not to be included in, the more general earnings sharing.

3. The Applicant will advise the Board within 30 days as to how it intends to proceed with rates for 2006, including its proposal for an earnings sharing mechanism.

4. The Applicant will pay the costs of the intervenors appearing on the Motion, costs to be determined and taxed in the usual fashion.

DATED at Toronto, March 18, 2005.

ONTARIO ENERGY BOARD

Original signed by

Peter H. O'Dell
Assistant Board Secretary

TAB E

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2005-0292

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF a Motion by Oakville Hydro Electricity Distribution Inc. under subsection 21 (4) of the Ontario Energy Board Act to vary the Board's May 11, 2005 written Reasons for its oral Decision of March 24, 2005.

PROCEDURAL ORDER NO. 1

On May 19, 2005, Oakville Hydro Distribution Inc. filed the attached Notice of Motion with the Board. This Application, which as made under section 21 (4) of the Ontario Energy Board Act, 1998 seeks to vary the Board's May 11, 2005 written Reasons for its oral Decision of March 24, 2005.

The Applicant requested that the Board exercise its jurisdiction pursuant to Section 21.2 of the Statutory Powers Procedure Act, R.S.O. 1990, chap. S. 22, and Rules 62 and 63 of the Board's Rules of Practice and Procedure; to vary the Board's May 11, 2005 written Reasons by deleting the second paragraph of the section of the Reasons entitled "Board Comments", found at page 5 of the Reasons.

THE BOARD ORDERS THAT:

1. The Board will hear the Application in an oral hearing to commence on June 15, 2005 at 10:00 a.m. at 2300 Yonge Street, 25th Floor, Toronto in the Board's Hearing Room.

2. The Applicant shall file with the Board and all parties to this proceeding, by June 6, 2005, any evidence the Applicant believes the Board should consider.

3. The Applicant shall also file by June 6, 2005 a factum indicating its arguments and any legal authority for the relief requested.

4. Any other parties who wish to file evidence or submissions may do so by June 9, 2005.

ISSUED at Toronto, June 2, 2005

ONTARIO ENERGY BOARD

Peter H. O'Dell
Assistant Board Secretary

EB-2004-0527

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B

AND IN THE MATTER OF an Application by Oakville Hydro Electricity Distribution Inc. for an Order or Orders approving or fixing a proposed schedule of adjusted distribution rates and other charges, effective January 1, 2005.

NOTICE OF MOTION

Oakville Hydro Electricity Distribution Inc. ("Oakville Hydro") will make a motion to the Ontario Energy Board (the "OEB") on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: Oakville Hydro requests that this matter be disposed of without a hearing, pursuant to Subsection 21(4) of the *Ontario Energy Board Act, 1998* (the "OEB Act") on the ground that no person, other than Oakville Hydro, will be adversely affected in a material way by the outcome of this motion, and Oakville Hydro has consented to disposing of this motion proceeding without a hearing.

THE MOTION IS FOR THE FOLLOWING RELIEF:

1. An Order, pursuant to Section 21.2 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chap. S.22, as amended (the "SPPA"), and Rules 42 (reviews of orders and decisions), and Rule 43 (Board Powers) of the Board's Rules of Practice and Procedure, reviewing and varying the OEB's May 11, 2005 written Reasons for its oral Decision of March 24, 2005 in this proceeding (referred to herein as the "Reasons"), by deleting the second paragraph of the section of the Reasons entitled "Board Comments", found at page 5 of the Reasons;

2. The replacement of the version of the Reasons currently posted on the OEB web site with the amended version; and the notification of visitors to the web site of the amended version by way of a link from the OEB's "What's New" page; and

3. That the review be conducted by a panel of the OEB other than the panels that adjudicated (a) the above captioned application; and (b) the application by Oakville Hydro for its 2005 Distribution Rate Adjustment, effective March 1, 2005 for implementation April 1, 2005 (OEB File Nos. RP-2005-0013 and EB-2005-0059).

THE GROUNDS FOR THE MOTION ARE:

Denial by the Panel of the opportunity to respond to the Panel's allegations of attesting to incorrect evidence and failing to correct the record:

4. On March 24, 2005, in an oral Decision, a two-member panel (the "Panel") of the OEB granted Oakville Hydro's application for an adjustment of its electricity distribution rates in order to recover a significant loss of revenue on account of a change in the operations of one of its Large Use customers.

5. On May 11, 2005, the panel issued its written Reasons. At page 5 of its Reasons, in the second paragraph of the section titled "Board Comments" the Panel wrote:

> "The Board panel hearing this case became aware through normal administrative knowledge that the Applicant was aware at the time it presented its evidence in the hearing that the information it was attesting to was incorrect. Oakville Hydro and its Counsel chose to withhold that information from this Panel, while having many opportunities to correct the evidence prior to or during the oral hearing. While the effect of that revised information was considered by another Board Panel immediately after this Decision was rendered, the Board warns the parties to this application that it is not their prerogative to choose when and if incorrect evidence should be brought to the attention of a Board panel. There are no circumstances that allow any party to knowingly submit incorrect information to the Board, or to choose not to correct erroneous evidence. Such actions will draw serious consequences."

6. These allegations are not supported by the facts of this proceeding (this is discussed below under the heading of "Mistake of Fact"). In the almost seven weeks between the oral hearing and Decision on March 24th, and the issuance of the written Reasons on May 11th, neither Oakville Hydro, nor the members of its witness panel, nor its counsel received any contact from the OEB regarding this

allegation, nor were those parties given any opportunity to address the OEB's concern in this regard. The first indication of any such concern on the part of the Panel came with receipt by Oakville Hydro's counsel of the OEB's Reasons on Thursday, May 12, 2005. This was followed later in the day by the publication of the Reasons on the OEB's web site, where they are now available worldwide. The issuance of the Reasons was publicized on the main page of the web site, in the "What's New" section, which is regularly viewed by parties involved in the energy sector in Ontario. The Reasons are accessible by following a link from the "What's New" section to the "Press Releases" page, which contains one link to a press release that announces the issuance of the Reasons, and another link to the Reasons on the "Decisions and Reports" page which, according to the description on that page, "lists the most significant Decisions and Reports issued by the Board since 1999."

7. This failure on the part of the Panel and the OEB generally to allow Oakville Hydro and those associated with this Application the opportunity to respond to these serious allegations before making them in its Reasons and publishing them on the World Wide Web represents a denial of natural justice to Oakville Hydro.

8. Without a correction of the record by the OEB, these damaging allegations will remain on the public record and put at risk the reputation of Oakville Hydro and its management and staff; the reputation of its independent rate design consultant (an individual with approximately 25 years of experience in cost of service and cost allocation methodologies and rate design) and the consulting firm with which he is a senior consultant; and the professional reputation of counsel to Oakville Hydro and that of the law firm of which he is a Partner.

Mistake of Fact:

9. The Reasons do not disclose the information that the Panel believed was incorrect. Counsel to Oakville Hydro made several attempts on Thursday, May 12, 2005 to reach members of OEB staff, in an effort to understand what

information the Panel was referring to. Counsel to Oakville Hydro was able to speak on Friday, May 13th with the staff member who served as counsel to the OEB at the hearing, and was advised as to what Oakville Hydro now understands to have been the reason for the Panel's concern: it relates to a perceived discrepancy between the $1.261 million adjustment granted by the Panel in this proceeding, and a $0.977 million adjustment referred to in the subsequent Decision of another panel of the OEB in Oakville Hydro's 2005 Rate Adjustment Application (OEB File Nos. RP-2005-0013 and EB-2005-0059).

10. In fact, there is no discrepancy. Put as simply as possible, the perceived discrepancy arises out of fact that in this proceeding, in which the Panel granted the $1.261 million adjustment, the relief consisted of a lump sum. In the other proceeding, the same total relief was split into three component parts, of which the $0.977 million referred to by the OEB in that subsequent proceeding was only one part. The circumstances of this matter can be summarized as follows:

(a) Two Oakville Hydro applications were before the OEB at the time of the hearing: the within Application, EB-2004-0527 (referred to here as the "Large User Adjustment Application"); and RP-2005-0013/EB-2005-0059, Oakville Hydro's 2005 rate adjustment application (the "2005 Application"), which provided for the recovery of the third tranche of its Market Adjusted Revenue Requirement. The Large User Adjustment Application was the subject of the oral hearing on March 24th; the 2005 Application was not. The 2005 Application was being addressed by a different panel, although OEB Member Paul Vlahos sat on both of the panels. The 2005 Application was disposed of by way of a written hearing, as were the 2005 rate adjustment applications for other LDCs.

(b) In the Large User Adjustment Application, Oakville Hydro requested an adjustment of $1.261 million. This is the adjustment that was required in order to keep Oakville Hydro whole for the significant reduction in the

subject customer's demand and consumption; it is the amount that was requested of the OEB by Oakville Hydro; and it is the amount that was granted by the Panel. There was no error in that information.

(c) In order for the OEB to process Oakville Hydro's 2005 Application, the OEB and its staff analyst needed the Decision in the Large User Adjustment Application. The rate schedule resulting from that Decision would in turn be adjusted for the 2005 Rate Application to the "base rate" level required by the OEB's 2005 Rate Adjustment Model (the "RAM"). The base rates constitute the starting point for the calculation of Oakville Hydro's April 1, 2005 distribution rates. It is clear from the transcript of the hearing on the Large User Adjustment Application (for example, at paragraph 976) that the Panel understood that the Large User Adjustment Application was distinct from the 2005 Application. As the OEB is well aware, all distributors' existing rate schedules were adjusted in order to arrive at the base rates required by the 2005 RAM.

(d) In preparing for the oral hearing, Oakville Hydro staff determined that the OEB's analyst would have to properly account for the anticipated Large User Adjustment in order to ensure that the base rates were correctly calculated and that Oakville Hydro's customers would pay no more than necessary to recover the revenue forgone on account of the loss of the large user.

(e) In the oral hearing on March 24, 2005, David Sweezie, Oakville Hydro's Chief Financial Officer and a member of the Oakville Hydro witness panel, advised the Panel that an adjustment would have to be made to the 2005 rate adjustment calculations that would result in slightly reduced bill impacts for Oakville Hydro's customers. The following is an extract from the Transcript from the hearing:

"I should also note that, although Oakville Hydro's January 17th, 2005 rate-adjustment application is not before you today, even when combined with the adjustments being made in that application, the overall customer impacts remain minimal. And we expect that the remaining large-use customer's bill will decrease.

304

We currently estimate that the impact of Oakville Hydro's 2005 rate adjustment on the typical residential customer consuming 1,000 kilowatt hours of electricity per month will be 5.78 percent, or $5.76 per month.

305

That impact includes the adjustment for the loss of large user covered in the application before you today, the recovery of the third tranche of Oakville Hydro's MARR, the 2005 portion of Oakville Hydro's interim recovery of regulatory assets, and finally, the 2005 PILs proxy.

306

Further, we expect that the remaining large user's bill will decrease by about $1,000 per month, which represents a .2 percent reduction.

307

These impacts are not identical to the impacts shown in the January 17th application as amended earlier this month. In the amended application, the bill impact on the 1,000 kW customer was 6.21 or $6.19 dollars per month.

308

In the course of preparing for this hearing, we determined that an adjustment should be made to the 2005 rate-adjustment calculations that will slightly reduce bill impacts to Oakville Hydro customers. The adjustment does not affect the relief being claimed in the application before you today. Oakville Hydro staff will be addressing this with the OEB staff analyst in that application." (Emphasis added)

(f) There was no question for the witness panel from Board Counsel or the Panel in respect of this comment. The adjustment to the 2005 Application was acknowledged by Mr. Sweezie during the oral hearing. Nevertheless, the Panel now makes the allegation that it was misled. This is not true.

(g) Oakville Hydro reiterates that there is no discrepancy between the $1.261 million adjustment granted by the Panel, and the $0.977 million adjustment referred to in the Decision of the other panel of the OEB in the 2005 Application. This can be explained as follows:

(i) In simple terms, the relief sought in both applications is the same. In the Large User Adjustment Application, the relief was to be recovered in one lump sum adjustment. However, in the 2005 Application, the mechanics of the OEB's 2005 rate adjustment process required the total relief to be broken into three components: a component net of Payments-in-Lieu of Taxes ("PILs") and Regulatory Assets (this is referred to here as the "Net

Component"); a PILs component; and a Regulatory Asset component. The Net Component forms part of, and is collected in, Oakville Hydro's adjusted base rates used in the 2005 Application. The PILs amount is collected in the PILs adjustment section of the 2005 RAM. The Reglatory Asset amount is collected in the Regulatory Asset adjustment section of the 2005 RAM. The difference is simply that each application involves a different "mechanical" method of arriving at the same total amount. The $0.977 million referred to in the other panel's Decision in the 2005 Application reflects only the Net Component. Any suggestion by the Panel that the total relief requested by Oakville Hydro has changed from $1.261 million to $0.977 million is incorrect.

(ii) The reconciliation of the lump sum in the Large User Adjustment Application with the components in the 2005 Application is as follows:

Large User Adjustment Application	($ Millions)
Lump Sum	$1.261
2005 Application	
Net Component – Base Rate Adjustment	$0.977
PILs Adjustment	$0.246
Regulatory Asset Adjustment	$0.038
Total	$1.261

(iii) The evidence of the Oakville Hydro witness panel supported the requested relief in the amount of $1.261 million. From the foregoing, it is clear that the information before the Panel was both correct and consistent with the information before the OEB in the 2005 Application. Oakville Hydro submits that its staff were correct in dealing with OEB staff in the 2005 Application to ensure

that the adjustment for the loss of the large user was correctly incorporated into the 2005 rate adjustment.

(h) During the oral hearing for the Large User Adjustment Application it was the understanding of the Oakville Hydro witness panel, and it appeared to be the understanding of the Panel and OEB staff present at the hearing, that the hearing was being conducted to address issues related to the Large User Adjustment application only, and that once the Decision was rendered on that application, any issue related to the 2005 Rate Application would be handled with the OEB staff analyst assigned to the application, as was the case with every other 2005 Rate Application for other LDCs in the province.

(i) In its comments, the Panel observed that "the effect of that revised information was considered by another Board Panel immediately after this Decision was rendered." First, as discussed above, the total adjustments related to the loss of the large user were the same in both applications. The total relief required and requested did not drop from $1.261 million to $0.977 million. In the Decision in the 2005 Application, the OEB highlighted only one part of the total relief to be recovered, giving the erroneous impression that the total relief had been reduced. Second, the reason that another panel considered the different information (which amounts to the splitting of the lump sum relief requested and granted in the Large User Adjustment Application into three components in the 2005 Application) is because the other panel was seized of the 2005 Application, including the calculation of base rates, and it was in the information before that other panel that the split had to be made. OEB staff had not identified the need to split the $1.261 million in order to calculate base rates in the 2005 Application. However, left unaddressed, a failure to do so would have resulted in an over-recovery by Oakville Hydro, in that that PILs and Regulatory Assets would have been collected

twice. It was Oakville Hydro staff that brought the need for this adjustment in the 2005 rate calculation to the attention of OEB staff involved in that application shortly after becoming aware of it. By bringing the adjustment in the base rate calculation to the attention of OEB staff in a timely manner, Oakville Hydro ensured that the information before the OEB was correct. Accordingly, the information before the OEB in both proceedings was correct, and consistent.

(j) In its Decision on the 2005 Application, the OEB wrote that "Subsequent to the Board's March 24 Decision in EB-2004-0527, the Applicant adjusted its application on March 30, 2005 to correct for a PILS error it identified in the calculation of the revenue loss associated with the large customer. The Applicant reduced the revenue loss from $1,261,493 to $977,455." It is not correct to characterize the adjustment in the 2005 Application as the correction of an error; it is more accurate to consider it an adjustment to correctly calculate Oakville Hydro's base rates required by the OEB's RAM Model to establish the correct distribution rates in the 2005 Application. In either event, as Mr. Sweezie testified, it did not affect the relief being claimed in the Large User Adjustment Application. In a letter to the OEB from Oakville Hydro's counsel dated March 30, 2005 that enclosed copies of the revised RAM in the 2005 Application, he stated that "As with the adjustment of $907,637, the resulting adjusted total forgone revenue of $977,455 excludes PILs. The 2005 RAM will add the appropriate amount of PILs to the $977,455." That letter is consistent with the fact that the PILs and the Regulatory Asset amounts must be added to the Net Component in order to arrive at the full recovery necessary to make Oakville Hydro whole.

(k) To summarize, the relief claimed in the Large User Adjustment Application, and its evidence in respect thereof, was correct; Oakville Hydro and its witnesses did not attest to incorrect evidence in the oral

hearing; and counsel to Oakville Hydro did not present incorrect information to the Panel, nor did he withhold correct information from it.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

(a) The May 19, 2005 letter of James C. Sidlofsky, counsel to Oakville Hydro, to the OEB in respect of this matter; and

(b) Such further documentary evidence as counsel for Oakville Hydro may submit and the Board allow.

All of which is respectfully submitted this 19th day of May, 2005.

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TAB F

Donald Martin *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

and between

Ruth A. Laseur *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

INDEXED AS: NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* MARTIN; NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* LASEUR

Donald Martin *Appelant*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

et entre

Ruth A. Laseur *Appelante*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

RÉPERTORIÉ : NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* MARTIN; NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* LASEUR

Neutral citation: 2003 SCC 54.

File Nos.: 28372, 28370.

2002: December 9; 2003: October 3.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Administrative law — Workers' Compensation Appeals Tribunal — Jurisdiction — Charter issues — Constitutional validity of provisions of Appeals Tribunal's enabling statute — Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Constitutional law — Charter of Rights — Equality rights — Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured workers four-week functional restoration program beyond which no further benefits are available — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation

Référence neutre : 2003 CSC 54.

N[os] du greffe : 28372, 28370.

2002 : 9 décembre; 2003 : 3 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit administratif — Workers' Compensation Appeals Tribunal — Compétence — Questions relatives à la Charte — Constitutionnalité de certaines dispositions de la loi habilitante du tribunal d'appel — Le tribunal d'appel a-t-il compétence pour appliquer la Charte canadienne des droits et libertés? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Loi sur l'indemnisation des accidentés du travail excluant la douleur chronique du champ d'application du régime habituel d'indemnisation des accidentés du travail et remplaçant les prestations auxquelles ont normalement droit les accidentés du travail par un programme de rétablissement fonctionnel d'une durée de quatre semaines, après quoi aucun autre avantage n'est disponible — La loi viole-t-elle l'art. 15(1) de la Charte canadienne des droits et libertés? — Dans l'affirmative, la violation est-elle justifiable au regard de l'article premier de la Charte? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Questions de droit constitutionnel — Pouvoirs des tribunaux administratifs de trancher des questions de droit constitutionnel — Critère applicable.

Les appelants, L et M, sont tous les deux atteints d'une incapacité due à la douleur chronique à la suite de la lésion liée au travail qu'ils ont subie chacun. M occupait un poste de contremaître et a subi une entorse lombaire. Au cours des mois suivants, il est retourné au travail à maintes reprises, mais il a dû cesser de travailler à cause d'une douleur récurrente. Il a suivi un programme de conditionnement au travail et de renforcement. Pendant cette période, la Workers'

V. Analysis

A. *Jurisdiction of the Appeals Tribunal to Apply the Charter*

1. The Policy Adopted by This Court in the Trilogy

27 This Court has examined the jurisdiction of administrative tribunals to consider the constitutional validity of a provision of their enabling statute in *Douglas College*, *supra*, *Cuddy Chicks*, *supra*, and *Tétreault-Gadoury*, *supra* (together, the "trilogy"). On each occasion, the Court emphasized the strong reasons, of principle as well as policy, for allowing administrative tribunals to make such determinations and to refuse to apply a challenged provision found to violate the Constitution.

28 First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". The invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1). Thus, in principle, such a provision is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects. In that sense, by virtue of s. 52(1), the question of constitutional validity inheres in every legislative enactment. Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine

V. Analyse

A. *Compétence du tribunal d'appel pour appliquer la Charte*

1. La politique adoptée par notre Cour dans la trilogie

Dans les arrêts *Douglas College*, *Cuddy Chicks* et *Tétreault-Gadoury*, précités (la « trilogie »), notre Cour a examiné la question de la compétence d'un tribunal administratif pour décider de la constitutionnalité d'une disposition de sa loi habilitante. Dans chaque cas, elle a fait ressortir les raisons sérieuses, tant sur le plan des principes que sur celui de la politique générale, de permettre aux tribunaux administratifs de se prononcer à ce sujet et de refuser d'appliquer une disposition contestée qui a été jugée inconstitutionnelle.

Premièrement — ce qui est le plus important —, la Constitution est, aux termes du par. 52(1) de la *Loi constitutionnelle de 1982*, « la loi suprême du Canada » et « elle rend inopérantes les dispositions incompatibles de toute autre règle de droit ». L'invalidité d'une disposition législative incompatible avec la *Charte* découle non pas d'une déclaration d'inconstitutionnalité par une cour de justice, mais plutôt de l'application du par. 52(1). Donc, en principe, une telle disposition est invalide dès son adoption, et l'obtention d'un jugement déclaratoire à cet effet n'est qu'un moyen parmi d'autres de protéger ceux et celles qui en souffrent préjudice. En ce sens, la question de la constitutionnalité est inhérente à tout texte législatif en raison du par. 52(1). Les tribunaux judiciaires ne doivent pas appliquer des règles de droit invalides, et il en va de même pour tout niveau ou organe de gouvernement, y compris un organisme administratif de l'État. De toute évidence, un fonctionnaire ne saurait être tenu de s'interroger et de se prononcer sur la constitutionnalité de chaque disposition qu'il est appelé à appliquer. Toutefois, s'il est investi du pouvoir d'examiner les questions de droit liées à une disposition, ce pouvoir englobe habituellement celui d'évaluer la constitutionnalité de cette disposition. Cela s'explique par le fait que la compatibilité d'une disposition avec la Constitution est une question de droit découlant de l'application de cette disposition. À vrai dire, il n'y

whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: see *Douglas College*, *supra*, at pp. 603-4. In La Forest J.'s words, "there cannot be a Constitution for arbitrators and another for the courts" (*Douglas College*, *supra*, at p. 597). This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings. As McLachlin J. (as she then was) stated in her dissent in *Cooper*, *supra*, at para. 70:

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.

Similar views had been expressed by the majority in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

Second, *Charter* disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies. This need is heightened when, as is often

a pas de question de droit plus fondamentale puisqu'elle permet de déterminer si, dans les faits, la disposition est valide et, par conséquent, si elle doit être interprétée et appliquée, ou s'il y a lieu de ne pas en tenir compte.

29 Il découle, en pratique, de ce principe de la suprématie de la Constitution que les Canadiens doivent pouvoir faire valoir les droits et libertés que leur garantit la Constitution devant le tribunal le plus accessible, sans devoir engager des procédures judiciaires parallèles : voir *Douglas College*, précité, p. 603-604. Pour reprendre les propos du juge La Forest, « il ne peut y avoir une Constitution pour les arbitres et une autre pour les tribunaux » (*Douglas College*, précité, p. 597). Ce souci d'accessibilité est d'autant plus pressant qu'au départ bon nombre de tribunaux administratifs ont compétence exclusive pour trancher les différends relatifs à leur loi habilitante, de sorte qu'obliger les parties à ces différends à saisir une cour de justice de toute question liée à la *Charte* leur imposerait un long et coûteux détour. Comme la juge McLachlin (maintenant Juge en chef) l'a affirmé dans ses motifs dissidents dans l'arrêt *Cooper*, précité, par. 70 :

La *Charte* n'est pas un texte sacré que seuls les initiés des cours supérieures peuvent aborder. C'est un document qui appartient aux citoyens, et les lois ayant des effets sur les citoyens ainsi que les législateurs qui les adoptent doivent s'y conformer. Les tribunaux administratifs et les commissions qui ont pour tâche de trancher des questions juridiques ne sont pas soustraits à cette règle. Ces organismes déterminent les droits de beaucoup plus de justiciables que les cours de justice. Pour que les citoyens ordinaires voient un sens à la *Charte*, il faut donc que les tribunaux administratifs en tiennent compte dans leurs décisions.

Dans l'arrêt *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, les juges majoritaires ont exprimé des points de vue semblables.

30 Deuxièmement, un différend relatif à la *Charte* ne survient pas en l'absence de tout contexte. Son règlement exige une connaissance approfondie des objectifs du régime législatif contesté, ainsi que des contraintes pratiques liées à son application et des conséquences de la réparation constitutionnelle

TAB G

CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 2

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PROCEDURE

59.1 Procedure in constitutional cases

Judicial review of legislation can occur whenever a statute is potentially applicable to facts in proceedings before a court. If the party resisting the application of the statute argues that the statute is invalid, a constitutional issue is presented that must be resolved by the court. Judicial review of legislation can thus occur in any proceedings, before courts of all levels, and even before administrative tribunals. That this is so is made plain by s. 52(1) of the Constitution Act, 1982 (the supremacy clause), which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This supremacy clause must be obeyed, not only by the Supreme Court of Canada, but also by lower courts and administrative tribunals: all bodies with power to decide questions of law possess the power — indeed,

the duty — to review the validity of legislation when the issue arises in proceedings before them.[1]

Judicial review of legislation will occur in a criminal prosecution if the defendant argues that the statute under which the charge was laid is invalid. Judicial review will occur in a civil action if a relevant statute is challenged as invalid by a party whose interest it is to avoid the effect of the statute; for example, the plaintiff in a civil action may allege that a statute of limitation, which apparently bars the action, is unconstitutional. Judicial review will occur before an administrative tribunal if a party claims that the tribunal is acting under, or proposing to apply, an invalid statute. Judicial review of legislation will occur in proceedings to review the decision of an administrative tribunal if the party seeking to overturn the tribunal's decision argues that the tribunal's power stemmed from an unconstitutional statute. It is even possible to bring proceedings in which the only relief sought is a declaration that a statute is invalid. Liberal rules of standing have made declaratory proceedings available to individuals or groups who oppose a particular statute, but who cannot show that the statute has any special impact upon them. The rules of standing are discussed in the next section of this chapter. There is also the uniquely Canadian procedure of the "reference", by which a government (but not a private individual) may refer questions of law to a court for an advisory opinion; although the reference procedure is not confined to constitutional questions, it has been mainly used for that purpose.[2]

Apart from the declaratory action and the reference procedure, which account for only a small proportion of the constitutional cases decided by the Supreme Court of Canada, judicial review usually occurs on the initiative of a private person (individual or corporation) who is attempting to resist the application of a statute which appears to apply to him or her. The private party who makes a constitutional challenge to a statute is attempting to avoid, by whatever legal means are at hand, the duty ostensibly imposed upon him or her by the statute. Mallory is accurate for most of the cases when he says that "the force that starts our interpretive machinery in motion is the reaction of a free economy against regulation".[3] The risk of constitutional issues being resolved by the courts without argument from the interested government has been reduced by rules requiring the party raising a constitutional issue to give notice to the Attorney General, and allowing the Attorney General to intervene in the proceedings. The notice and intervention provisions are discussed later in this chapter.[4]

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1 See generally chs. 15, Judicial Review on Federal Grounds, and 40, Enforcement of Rights, above.

2 See ch. 8, Supreme Court of Canada, under heading 8.6, Reference jurisdiction, above.

3 J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1944) 10 Can. J. Ec. Pol. Sci. 165.

4 Section 59.6, Intervention, below.

TAB H

number of people and a large budget but he was simply one of many employees and managers delivering municipal services to the public. The municipal resolution appointing the respondent to his position in the City of North York cannot be equated to a statutory position as considered in *Knight*.

[54] The respondent's position is somewhat closer to the plaintiff's position in *Hanis*. The plaintiff in that case was the Director of the Social Science Computing Laboratory at the University of Western Ontario, and an Adjunct Professor without tenure. He had built the laboratory from the ground up, played a leading role in its development and management and applied for and received valuable research grants. He was not governed by any detailed instructions from anyone in a greater position of authority. In those circumstances, this court found that the plaintiff was an office holder in the University, which is created by statute and receives public funds. While, as I have said, the respondent managed a large staff and budget, his employment does not otherwise have the attributes of the plaintiff's employment in *Hanis*. I would dismiss the cross-appeal.

Disposition

[55] Accordingly, I would allow the appeal, set aside the judgment and direct that the City pay the respondent in accordance with its offer in December 8, 1998. I would dismiss the cross-appeal. The appellant should serve and file its submissions on costs within 14 days of the release of these reasons. The respondent will have 14 days to serve and file his response.

Appeal allowed; cross-appeal dismissed.

City of Ottawa v. Attorney General for Ontario et al.

[Indexed as: Ottawa (City) v. Ontario (Attorney General)]

Court of Appeal for Ontario, McMurtry C.J.O., Charron and Goudge JJ.A. June 26, 2002[*]

Administrative law — Boards and tribunals — Ontario Energy Board — Jurisdiction to state case for opinion of Divisional Court — Board not limited to stating case in context of particular application — Energy Board may state case where opinion of Divisional Court would be useful in connection with Board's statutory mandate — Sufficiency of factual

[*] This case was recently brought to the attention of the editors.

record for stated case — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 32.

Pursuant to s. 92(1) of the *Ontario Energy Board Act, 1998*, on July 5, 2000, Hydro One Networks Inc. ("Hydro One") applied to the Ontario Energy Board for leave to construct an electricity transmission line in the City of Ottawa. Section 96 of the Act requires the Board to make the order granting leave if it concludes that the proposed construction is in the public interest. Section 1 of the Act sets out certain broad objectives by which the Board must be guided in carrying out its responsibilities in relation to electricity, including, among other things, environmental concerns. Just prior to the application, on June 23, 2000, O. Reg. 365/00 came into effect. It defined "public interest" for applications in respect of electricity as meaning "the interests of consumers, as defined in Part V of the Act, with respect to the pricing, availability, reliability and quality of electricity service."

The City of Ottawa intervened in the application in order to oppose the proposed use of lattice towers and it asked that steel poles be used. Pollution Probe also intervened to raise environmental issues. Hydro One took the position that the City's and Pollution Probe's concerns were both beyond the Board's jurisdiction because of O. Reg. 365/00. The Board responded by deciding to hear Hydro One's application on the merits while at the same time stating a case on a question of law to the Divisional Court pursuant to s. 32 of the Act. The question was: "When s. 1 of Regulation 365/00 is interpreted in conjunction with the *Ontario Energy Board Act, 1998*, is that section consistent with the statute and therefore to be applied to applications made under s. 92 of the Act?"

On January 12, 2001, the Board set out its question for the stated case and it also released its order on the merits of the application under s. 92 with reasons to follow. Its order granted leave to construct the line subject to certain conditions, including the use of steel poles. On January 26, 2001, the Attorney General for Ontario moved to quash the stated case. On February 15, 2001, the Divisional Court quashed the stated case. It did so on the grounds that (1) the Board had been able to render its decision, and it was *functus officio* for the purposes of stating a case; (2) the stated case was academic and ought not to be decided because the Board had not made any findings of fact related to it; and (3) the Board had no jurisdiction to state a case to ask if a regulation is valid. The City of Ottawa appealed.

Held, the appeal should be allowed.

The Board was not *functus officio* for the purposes of stating a case under the Act and was not limited to stating a case only in the context of a particular application. Subsection 32(1) contemplates that the Board may state a case (1) when invited to do so by the Lieutenant Governor in Council; (2) on its own motion; and (3) on request of any party to a proceeding before it. Here, although the stated case originated out of Hydro One's application, the question stated was one of general application. While the Board might be *functus officio* in relation to Hydro One's application, s. 32(1) remained available where the opinion of the Divisional Court would be useful in connection with the Board's statutory mandate.

Before the Divisional Court will entertain the question, it is not necessary for the Board to make findings of fact on the question posed. Section 32(1) contained no such limitation. While it was undoubtedly preferable that all necessary facts be included in the stated case, there was no reason why the record before the Divisional Court could not be supplemented by uncontested facts presented by affidavit. Unlike this case, however, where facts are contested, the Board must hear and decide those facts first. It was open to the Divisional Court to conclude that on the record it was not possible to opine without additional facts; however,

the court should strive to answer the question if it can to assist the Board in the discharge of its statutory mandate.

The Divisional Court erred in characterizing the question posed as a request for the court to determine the validity of the regulation. The Board asked the more limited question of whether the regulation is effective to determine the boundary of the Board's jurisdiction. The question did not seek to determine the validity of O. Reg. 365/00, but was a question which the Board could state and the Divisional Court had jurisdiction to answer.

Cases referred to

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 177 N.R. 325, 85 F.T.R. 79*n*; *Manitoba (Public Utilities Board) v. Manitoba (Attorney-General)*, [1989] M.J. No. 491 (QL), 61 Man. R. (2d) 164 (C.A.); *Ontario (Energy Board) v. Consumers' Gas Co.* (1987), 59 O.R. (2d) 766, 22 O.A.C. 142, 39 D.L.R. (4th) 161 (Div. Ct.); *Ontario Energy Board (Re)* (1985), 51 O.R. (2d) 333, 11 O.A.C. 26, 19 D.L.R. (4th) 753, 2 C.P.C. (2d) 226 (Div. Ct.); *Public Service Staff Relations Act (Canada) (Re)*, [1973] F.C. 604, 38 D.L.R. (3d) 437 (C.A.); *Rosen (Re)*, [1987] 3 F.C. 238, 80 N.R. 47, 31 Admin. L.R. 276, [1987] F.C.J. No. 320 (QL) (C.A.)

Statutes referred to

Federal Court Act, R.S.C. 1985, c. F-7, s. 28(4)
Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, ss. 1, 2, 19(1), 32, 90, 92, 96

Rules and regulations referred to

O. Reg. 365/00 ("*Ontario Energy Board Act*"), s. 1

APPEAL from an order of the Divisional Court (Farley, Dunnet and Sedgwick JJ.) (2001), 146 O.A.C. 46, [2001] O.J. No. 552 quashing a case stated by the Ontario Energy Board pursuant to s. 32 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B.

Peter K. Doody and *Michelle A. Flaherty*, for appellant City of Ottawa.
Patrick Moran, for intervenor Ontario Energy Board.
Sara Blake, for respondent Attorney General for Ontario.
Allyn Abbott, for Hydro One Networks Inc.

The judgment of the court was delivered by

[1] GOUDGE J.A.: — Pursuant to s. 32 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "Act"), the Ontario Energy Board stated a case for the opinion of the Divisional Court on the following question of law:

> When s. 1 of Regulation 365/00 is interpreted in conjunction with the *Ontario Energy Board Act, 1998*, is that section consistent with the statute and therefore to be applied to applications made under s. 92 of the Act?

[2] On the motion of the Attorney General for Ontario, the Divisional Court quashed the stated case without considering it on the merits.

[3] It gave three reasons for doing so. First, without the benefit of the Divisional Court's opinion, the Board had been able to render its decision in the proceeding from which the stated case originated and, as a result, the Board was *functus officio* and unable to state the case. Second, the stated case was academic and hypothetical and ought not to be addressed because the Board had not made any findings of fact related to it. Third, the Board stated a case which, in effect, asked if a regulation is valid and has no jurisdiction to do so.

[4] With respect, I disagree with each of these reasons. I would therefore allow the appeal and remit the stated case to the Divisional Court for disposition on the merits.

The Background to the Stated Case

[5] The Board is an administrative tribunal with a wide range of responsibilities. While s. 19(1) of the Act gives the Board authority to hear and determine all questions of law and fact in all matters within its jurisdiction, s. 32 permits it to seek the assistance of the Divisional Court on any question of law. That section reads as follows:

> 32(1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.
>
> (2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion.

[6] Section 92(1) of the Act requires that anyone seeking to construct an electricity transmission line obtain an order from the Board granting leave to construct. Section 90 is the counterpart for those seeking to construct a gas transmission line. Section 96 requires that in both cases, the Board make the order if it concludes that the proposed construction is in the public interest. Section 96 reads as follows:

> 96. If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

[7] Section 1 of the Act sets out certain broad objectives by which the Board must be guided in carrying out its responsibilities in relation to electricity. Section 2 does the same in relation to gas. Section 1 is in the following terms:

1. The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To facilitate competition in the generation and sale of electricity and to facilitate a smooth transition to competition.
2. To provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario.
3. To protect the interests of consumers with respect to prices and the reliability and quality of electricity service.
4. To promote economic efficiency in the generation, transmission and distribution of electricity.
5. To facilitate the maintenance of a financially viable electricity industry.
6. To facilitate energy efficiency and the use of cleaner, more environmentally benign energy sources in a manner consistent with the policies of the Government of Ontario.

[8] On June 23, 2000, O. Reg. 365/00 came into effect. It specifically defined "public interest" in s. 96 of the Act, but only for applications in respect of electricity, namely applications made pursuant to s. 92. Section 1 of the regulation says this:

. . . . . .

(2) In section 96 of the Act,

"the public interest" means the interests of consumers, as defined in Part V of the Act, with respect to the pricing, availability, reliability and quality of electricity service.

(3) Subsection (2) applies only in respect of applications under section 92 of the Act.

[9] On July 5, 2000, Hydro One Networks Inc. applied to the Board for an order for leave to construct an electricity transmission line which would run through the City of Ottawa. The subsequent hearing was one of the first held pursuant to s. 92 of the Act after the making of O. Reg. 365/00.

[10] The City intervened in the application in order to oppose the use of lattice towers as proposed by Hydro One. The City asked the Board to condition any order granting leave to construct on a requirement that steel poles be used rather than lattice towers to lessen the visual impact of the proposal in the urban areas of the city to be traversed by the line. The City advised that it would challenge the validity of O. Reg. 365/00 in so far as it purported to exclude this argument and limit the Board's jurisdiction to decide what was in the public interest in electricity applications in a way that did not apply to gas applications.

[11] Pollution Probe also intervened and advised that it wished to raise environmental considerations relating to the proposal, which O. Reg. 365/00 appeared to preclude, but which s. 1 of the Act appeared to expressly require the Board to consider.

[12] Hydro One took the position that the City's argument that steel poles should be required and Pollution Probe's environmental concerns were both beyond the Board's jurisdiction because of O. Reg. 365/00.

[13] After receiving submissions on how it should deal with this issue, the Board announced that it would be stating a case to the Divisional Court and would not itself hear arguments on the validity of the regulation. In addition, it accepted the agreement of the affected parties that to avoid delay, it should proceed to hear the Hydro One application on its merits while at the same time proceeding with the stated case.

[14] The Board heard evidence from November 22 to 24, 2000. On January 12, 2001, it released its order with reasons to follow. It granted leave to construct the line subject to certain conditions including the use of steel poles instead of lattice towers on part of the route through the City of Ottawa. While the Board has not yet issued its reasons, since it left the challenge to the applicability of O. Reg. 365/00 to the stated case, it may be presumed that the Board proceeded to make its order on the basis that the regulation did apply and concluded that it permitted the imposition of this condition.

[15] Also on January 12, 2001, the Board gave notice of the case stated for the opinion of the Divisional Court. After setting out the question posed, the notice described the background facts leading up to the stated case, most of which I have just recited.

[16] On January 26, 2001, the Attorney General for Ontario moved to quash the stated case.

[17] On February 7, 2001, Hydro One filed a notice of appeal of the order of the Board. Its first ground of appeal is that the Board exceeded its jurisdiction by ordering the construction of steel poles instead of lattice towers through the City of Ottawa in contravention of O. Reg. 365/00.

[18] On February 15, 2001, the Divisional Court issued its decision quashing the stated case. Its three reasons, which I recited above, are sufficiently succinct that they can be quoted in full.

> On January 12, 2001 the board released its order without reasons, granting the application subject to certain conditions. The board is *functus officio* with respect to this application. This in itself is sufficient ground to quash the stated case, since it was made within the proceedings of that subject case as outlined in the style of proceedings and the board was able to make its decision without the benefit of the court's opinion.

> Secondly however, in addition, the board has not made any findings of fact on these issues nor has it determined that these issues fall within or outside the scope of the "public interest" as defined by the subject regulation. In this case the City of Ottawa and others challenged the validity of the regulation. However, the board takes no position with respect to the application of the regulation. Statutory interpretation is best accompanied in the context of a concrete set of facts. While the majority of the Manitoba Court of Appeal in *Manitoba (Public Utilities Board) v. Manitoba (Attorney General)*, [1989] M.J. No. 491 answered the question, we are of the opinion that the view of Twaddle J.A. is the preferable approach. The stated case clause in that case was for all material purposes identical with section 32 of the *Ontario Energy Board Act*, here in the case before us. We find that the stated case is an academic and hypothetical one. We decline to give an opinion in such circumstances.
>
> Thirdly, further, the board has no jurisdiction to state a case asking if a regulation is valid. It has attempted to justify its approach by analogising with respect to two Charter cases: *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1992] 2 S.C.R. 5 and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 that it is not questioning the validity of the regulation, but rather only whether it has to apply it. The case before us is not a Charter case. In any event this seems to be a distinction without a functional difference. The board's jurisdiction under section 96 of the *Ontario Energy Board Act* is restricted to determining whether the proposed transmission line is in the public interest. When the board asks this court to determine the "applicability", but in substance the validity of the regulation, it is exceeding its jurisdiction as a creature of statute. Therefore, the court has no jurisdiction to decide the validity of the regulation within the context of this stated case.

[19] Pursuant to leave, the City of Ottawa has appealed to this Court. It is supported by the Board as intervenor and opposed by the Attorney General for Ontario as respondent.

Analysis

[20] The arguments raised by the parties all address one way or another the three issues dealt with by the Divisional Court. I propose to deal with each of these issues in turn.

[21] The first issue is whether s. 32(1) of the Act can be utilized by the Board only in the context of a particular application in which the Board requires the Divisional Court's opinion? In the context of this case, once having decided the Hydro One application, is the Board *functus officio* and no longer empowered to state a question for the opinion of the Divisional Court?

[22] In my view, s. 32(1) contains no such limiting condition. It contemplates that the Board may state a case in three circumstances: (1) when invited to do so by the Lieutenant Governor in Council; or (2) on its own motion; or (3) on request of any party to proceedings before it. The section ties neither of the first two circumstances to a proceeding before the Board. Both are in that sense free standing, and not required to be founded on a particular proceeding. This flexibility is consistent with the purpose of the

statutory provision, namely to provide the assistance of the Divisional Court on a question of law when the Board is of the view that this would be useful in connection with its statutory mandate.

[23] In this case there is no doubt that the stated case originated out of the Hydro One application and that the Board was able to go on to decide the application without the Divisional Court's assistance. However, there is also no doubt that the question stated for the Divisional Court's opinion is one of general application. The enacting of O. Reg. 365/00 has clearly resulted in some uncertainty about the extent of the Board's jurisdiction in hearing applications to construct electricity transmission lines in Ontario. Counsel for the Board made it plain in argument that the Divisional Court's opinion would be a great assistance to applicants, intervenors and the Board itself in such applications. I think s. 32(1) encompasses just such a circumstance. While the Board may be *functus officio* in relation to the Hydro One application, s. 32(1) nonetheless remains available to it where it determines that the opinion of the Divisional Court would be useful in connection with its statutory mandate. That is this case.

[24] This interpretation is consistent with the past application of the section. In *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333, 19 D.L.R. (4th) 753 (Div. Ct.), the Divisional Court gave its opinion on the Board's jurisdiction to award costs in response to a case stated by the Board that was unrelated to any particular application before it. The court considered that the matter was of such obvious importance to all those who had occasion to appear before the Board that it should not only answer the question stated, but should accord liberal rights of intervention to a number of parties to assist the court in reaching its opinion.

[25] In *Ontario (Energy Board) v. Consumers' Gas Co.* (1987), 59 O.R. (2d) 766, 39 D.L.R. (4th) 161 (Div. Ct.), the Divisional Court gave its opinion in response to a stated case where the Board had already issued reasons for decision on the question referred to the court. In doing so, the Divisional Court stated that the Board had jurisdiction to state the case, where it was seeking the Divisional Court's opinion not to facilitate its own decision, but to determine if it had decided the issue correctly.

[26] In *Manitoba (Public Utilities Board) v. Manitoba (Attorney-General)*, [1989] M.J. No. 491 (QL), 61 Man. R. (2d) 164 (C.A.), a majority of the Manitoba Court of Appeal acted under a provision very similar to s. 32 to offer its opinion on a case stated by the Manitoba Public Utilities Board although the latter had disposed of the rate approval application from which the stated case originated without requiring the court's opinion on the question.

[27] In dissent, Twaddle J.A. said [at p. 166 Man. R.] that "the statutory power to state a case is limited to stating a case on an issue which actually arises before the Board and which must be decided in order that a decision can be made." He reached this conclusion because he thought it essential to ensure that the question posed not be abstract, but be sufficiently grounded in fact. While no doubt this is a valid concern, it cannot justify reading into s. 32(1) the condition that a case may be stated only where the issue must be decided in a particular application before the Board. As I have said, the language of the section and its purpose are inconsistent with such a limitation.

[28] The respondent seeks support from two cases arising in the context of s. 28(4) of the *Federal Court Act*, R.S.C. 1985, c. F-7: *Re Public Service Staff Relations Act (Canada)*, [1973] F.C. 604, 38 D.L.R. (3d) 437 (C.A.) and *Re Rosen*, [1987] 3 F.C. 238, 80 N.R. 47 (C.A.). However, s. 28(4) is worded quite differently from s. 32(1). It provides that a federal board may *at any stage of its proceedings* refer any question of law to the Court of Appeal for determination. The presence of the underlined phrase in the relevant legislation explains the decisions in these two cases which confine such references to questions of law that must be determined for the purpose of dealing with the proceeding that is then before the referring tribunal. Without a proceeding before it, a federal board cannot state a case. There is no such constraint in the *Ontario Energy Board Act*.

[29] To summarize the first issue, I disagree with the Divisional Court and conclude that s. 32(1) does not require that the opinion sought be needed to assist the Board in deciding a particular application then before it.

[30] The second issue is whether the Board must make findings of fact on the question posed to the Divisional Court before the Court will entertain it.

[31] Again in my view, the simple answer is that s. 32(1) contains no such limitation.

[32] Having said that, I am sympathetic to the concern of Twaddle J.A. in *Manitoba (Public Utilities Board)*, *supra*, that the court must be provided with a sufficient factual context to answer the questions posed. But every stated case does not require the same level of factual detail for proper resolution. Here, the appellant argues that the question posed is a pure question of law requiring no facts beyond the background facts included by the Board in the stated case. The respondent does not challenge these facts, but says additional facts are necessary such as a description of the mischief that the Lieutenant Governor in Council was attempting to address with O. Reg. 365/00.

[33] While it is undoubtedly preferable that all necessary facts be included in the stated case, there is no reason why the record before the Divisional Court in this case cannot be supplemented by uncontested facts presented by affidavit. This is not like an appeal by way of stated case, where the record must remain as it was before the original trier.

[34] However, while it does not appear to be this case, if facts are contested, I think the Board must hear and decide those facts first. Its decision would then form the basis for the stated case. That is what happened in *Ontario Energy Board v. Consumers' Gas Co.*, *supra*.

[35] Undoubtedly, it will be open to the Divisional Court, when the stated case is remitted, to conclude that on the record before it, it is not possible to offer an opinion without additional facts. However, given the purpose of s. 32(1), I think that the Divisional Court will strive to answer the question if it can, to assist the Board in the discharge of its statutory mandate.

[36] In this case, however, the Divisional Court did not examine the factual context provided by the stated case to determine if it was sufficient to permit the question to be answered. Rather, it simply focussed on the absence of findings of fact by the Board as a reason to refuse to address the question stated for its opinion. In this I think it erred.

[37] The third issue is whether the Divisional Court was correct to quash the stated case on the basis that the Board was really asking if O. Reg. 365/00 was valid and had no jurisdiction to state such a case.

[38] With respect, I think that the Divisional Court erred in characterizing the question posed in the stated case as a request that the Court determine the validity of the regulation. The stated case poses the more limited question of whether the regulation is to be applied by the Board in hearing applications under s. 92 of the Act or whether, as asserted by the appellant, it is inconsistent with the Act and therefore not to be applied.

[39] The stated case does not seek a determination of whether the regulation is valid for all purposes. It simply asks whether the regulation is effective to determine the boundary of the Board's jurisdiction. In stating the case the Board seeks the assistance of the Divisional Court in defining the Board's jurisdiction in s. 92 applications, following the making of O. Reg. 365/00. The question posed is one which the Board could put to itself and equally one it could put to the Divisional Court by way of stated case. As Lamer C.J. said in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, at pp. 25-26 S.C.R.:

> It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

[40] In short, I think the question posed did not seek to determine the validity of O. Reg. 365/00, but was a question which the Board could state and the Divisional Court had the jurisdiction to answer.

[41] In conclusion, this appeal is not about the appropriate answer to the stated case, but only about whether the Divisional Court should address the question to see if it can offer an opinion. For the reasons given, I think the Divisional Court was wrong to stop short of this and quash the stated case. The appeal must therefore be allowed and the stated case remitted so that the Divisional Court can try, if possible, to help the Board and the parties that appear before it to get on with their task.

[42] Counsel for the appellant shall deliver brief written submissions on costs here and below and any proposed bill of costs within ten days from the date of this judgment. Counsel for the respondent may deliver a response, if any, within ten days thereafter.

Appeal allowed.

Haugan v. Whelan

Superior Court of Justice, Chilcott J. May 7, 2003

Mental health — Compulsory treatment — Consent and Capacity Board erring in confirming Community Treatment Order despite fact that patient would not satisfy criteria for order set out in s. 33.1(4)(c)(ii) of Mental Health Act until two months after he had discontinued treatment — Fact that patient was on "slippery slope" towards meeting criteria insufficient for issuance of Community Treatment Order — Order quashed — Mental Health Act, R.S.O. 1990, c. M.7, s. 33.1(4)(c)(ii).

The Consent and Capacity Board confirmed a Community Treatment Order made in respect of the appellant patient. The patient met all the criteria for a Community Treatment Order set out in s. 33.1(4) of the *Mental Health Act*, with the exception of the criteria required by s. 33.1(4)(c)(ii). The Board held that as substantial mental or physical impairment would start as soon as he stopped taking his medication, it was irrelevant that the appellant would not satisfy those criteria until some two months after he had discontinued treatment. The Board concluded that he was on the "slippery slope" towards satisfying the criteria at the moment treatment stopped. The appellant appealed.

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persons whose interests might be affected by the legitimation were cited as parties or have appeared for their interest. The suggestion that the Court might have attached a condition for the protection of the next of kin does not commend itself to their Lordships. In their opinion, the Court had no power to impose conditions of that kind. The Ordinance of 1814 gave the Court power to grant legitimation (as it has been in use to do) in terms of law, or, in other words, to grant the status of legitimacy, leaving it to the municipal law to determine what its effects are to be.

Then, as to the alleged non-disclosure of Paolo Antonio's marriage. The fact does not appear in the petition or the decree of Court, which, together with the notarial act, form the written record of the proceedings. The decree bears that the Court, before granting the prayer of the petition, had "obtained the necessary information," but what that information was nowhere appears. Presumably, such information comprehended full details as to the position of the father, and the condition of the family of which Paolo Antonio, then an infant six years of age, was about to be made a legitimated member. It is impossible to affirm that the Court was in ignorance of the fact, or even that it was probably ignorant. In these circumstances their Lordships are of opinion that the presumption omnia rite et solenniter acta applies. It would be contrary to all principle to set aside a decree affecting status, after the lapse of thirty-eight years, upon such slender and conjectural grounds. Besides, their Lordships are by no means satisfied that, if it were substantively proved that the Judge who gave the decree had no knowledge of Paolo Antonio's marriage, the decree ought therefore to be set aside. Having regard to the precedents already referred to, it does not appear to their Lordships that his knowledge of the fact would have raised any impediment to the granting of the decree.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed, with costs to be paid by the appellant.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondent: *Ward, Mills, Witham, & Lambert.*

[PRIVY COUNCIL.]

BANK OF TORONTO . . . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

J. C.* 1887 June 10, 11, 22, 29; July 9.

MERCHANTS' BANK OF CANADA . . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

CANADIAN BANK OF COMMERCE . . DEFENDANT;

AND

LAMBE . . . . . PLAINTIFF.

NORTH BRITISH MERCANTILE INSURANCE COMPANY, AND OTHERS . . } DEFENDANTS;

AND

LAMBE . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Canada—Distribution of Legislative Powers—British North America Act, 1867, *s.* 91, *cl.* 2, 3, 15, *s.* 92, *cl.* 2—*Direct Taxation.*

Held, that Quebec Act 45 Vict. c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the province, is intra vires of the provincial legislature.

A tax imposed upon banks which carry on business within the province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the province, is direct taxation within clause 2 of sect. 92 of the British North America Act, 1867, the meaning of which is not restricted in this respect by either clause 2, 3, or 15, of sect. 91.

Similarly, with regard to insurance companies taxed in a sum specified by the Act.

THE first three appeals were from three decrees of the Court of Queen's Bench (Jan. 23, 1885) reversing decrees of the Superior

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

Court for Lower Canada in the district of Montreal (May 12, 1883); the fourth appeal was from a decree of the Court of Queen's Bench (Jan. 23, 1885) affirming a decree of the Superior Court (May 23, 1884).

The several actions were brought by the respondent in his capacity of license inspector for the revenue district of Montreal against the several appellants to recover the amount of certain taxes imposed on the appellants by Quebec Act, 45 Vict. c. 22. With the fourth action thirty-seven other actions by the same plaintiff against thirty-seven other insurance companies had been consolidated. The question in all the cases was whether the Act in question was valid, which depended upon whether it was within the powers conferred upon the provincial legislatures by the British North America Act of 1867. The four appeals were not heard together; but as the question in issue was the same their Lordships intimated at the close of the appellant's arguments in the first case that they would either deliver judgment therein before hearing the later appeals or reserve judgment until they had heard two counsel in respect of all three appeals.

The facts are stated in the judgment of their Lordships.

W. H. Kerr, Q.C. (Canada), and *Kenelm Digby*, for the appellant in the first appeal.

Cohen, Q.C., and *W. W. Kerr*, for the appellant in the second appeal.

Blake, Q.C. (Canada), and *Jeune*, in the third appeal.

W. H. Kerr, Q.C. (Canada), and *W. W. Kerr*, in the fourth appeal.

Geoffrion, Q.C. (Canada), and *Fullarton*, for the respondent in all the appeals.

Kerr, Q.C., and *Digby*, in the first appeal contended that the judgment of the Supreme Court was wrong, and that 45 Vict. c. 22, was void.

The question of its validity turns on (1) the construction of

sect. 92 of the British North America Act, 1867, (2) on the further question whether even if the statute is primâ facie within the powers conferred by sect. 92 its subject-matter does not belong to the matters exclusively reserved to the Dominion parliament by sect. 91. In the latter case the provisions of sect. 92, if construed unfavourably to the appellant, are overborne by those of sect. 91, and the statute is invalid. Reference was made to *Attorney-General for Quebec* v. *Queen Insurance Company* (1); *Citizens Insurance Company* v. *Parsons* (2); *Dobie* v. *Temporalities Board* (3); *Russell* v. *The Queen* (4); *Hodge* v. *The Queen* (5); *Cushing* v. *Dupuy* (6). The statute is not within the powers conferred by sect. 92, § 2, for the following reasons:—

First, the taxation sought to be imposed by the statute is not within the province. The bank was incorporated by the Act of the parliament of Canada prior to the British North America Act, namely, by 18 Vict. c. 205, whereby it was provided that the head office of the bank should be at Toronto in the province of Ontario: see subsequent statutes affecting the bank, 20 Vict. c. 160, 31 Vict. c. 11, 33 Vict. c. 11, 34 Vict. c. 5. It is admitted that far the greater portion of the capital belongs to persons not residing in the province of Quebec. The provincial legislature can only have jurisdiction to impose taxes on property situated within the province, or on persons residing within the province. No other sense can be given to the words "within the province." The cases decided on the Income Tax Acts shew that the corporation in the present case cannot be considered as "within the province:" *Sulley* v. *Attorney-General* (7); *Attorney-General* v. *Alexander* (8): *Cesena Sulphur Co.* v. *Nicholson* (9); *Gilbertson* v. *Fergusson* (10).

Second, the tax is not a "direct tax" within the meaning of sect. 92, § 2. The question is, what did the legislature in 1867 mean by a direct tax. The tax imposed must be shewn to be a direct tax, and not either an indirect tax, or a tax falling under

(1) 3 App. Cas. 1090.
(2) 7 App. Cas. 96.
(3) 7 App. Cas. 136.
(4) 7 App. Cas. 829.
(5) 9 App. Cas. 177.
(6) 5 App. Cas. 409.
(7) 5 H. & N. 711; S. C. 29 L. J. (Ex.) 464.
(8) Law Rep. 10 Ex. 20.
(9) 1 Ex. D. 428.
(10) 5 Ex. D. 57; S. C. 7 Q. B. D. 562.

neither class: see Mill's Political Economy, book v., ch. 5. The tax is a tax on the right or privilege of carrying on the business of banking in the province and being a tax on a particular business as such must ultimately be paid by the customers of the bank: see Mill's Political Economy, book v., ch. 3; Smith's Wealth of Nations, book v., ch. 2; Fawcett's Manual of Political Economy, book iv., ch. 3; Littrè, Dict. s. v. Contributions. This is the test adopted in *Attorney-General for Quebec* v. *Queen Insurance Company* (1); *Attorney-General for Quebec* v. *Reed* (2). One of the principal characteristics of a direct tax is its generality—falling on all persons alike. It is in this sense that the term is used in the American constitution: see *Hylton* v. *United States* (3); *Veazie Bank* v. *Fenno* (4). Further, the provisions of the British North America Act shew that it was not intended to include a tax of this kind in the class of direct taxes. It is in the nature of a license tax, as mentioned in sect. 92, § 9, taxes of that kind not being classed by the legislature as direct taxes: see, too, *Severn* v. *The Queen* (5), where the judges held unanimously that a license tax was not a direct tax. The examination of the provisions of the British North America Act and of other English statutes contained in the judgment of Dorion, C.J., in the Court below, shews that the tax would, according to the views of the English legislature, be regarded as a license or excise tax, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term "direct taxes" in sect. 92, § 2.

Lastly, the subject-matter of the statute falls clearly within sect. 91, and therefore even if within the words of sect. 92 the powers of the Dominion are to prevail over the powers of the Province.

By sect. 91, § 2, the regulation of trade and commerce; § 3, the raising of money by any mode or system of taxation; § 14, the currency and coinage; § 15, banking and incorporation of banks; § 19, interest; § 20, legal tender, are reserved for the exclusive jurisdiction of the Dominion legislature. The Dominion has

(1) 3 App. Cas. 1090.
(2) 10 App. Cas. 141.
(3) 3 Dallas, 171.
(4) 8 Wallace, 534.
(5) 2 Supreme Court of Canada Rep. p. 70.

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exercised these powers by incorporating and regulating banks, providing for the amount of the debts which they may incur, the amount of reserve which they must hold in Dominion notes, and for the circulation of Dominion notes: see Statutes of Canada, 18 Vict. c. 205; 34 Vict. c. 5, §§ 14, 15, 16; 49 Vict. c. 6. It is submitted that it is impossible for the Dominion legislature to exercise these powers if banks as such are subject to taxation by the provincial legislatures. "The power to tax involves the power to destroy:" see *McCulloch* v. *Maryland* (1); *Osborn* v. *United States Bank* (2); *Railroad Co.* v. *Peniston* (3); Kent's Commentaries (by Holmes), vol. i. p. 426.

Cohen, Q.C., and *Blake*, Q.C., were subsequently heard for the appellants in the other cases in compliance with the above intimation from their Lordships.

The counsel for the respondent were not called upon.

1887 July 9.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the parliament of the Dominion and the legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated companies are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. It will be convenient first to deal with the case of the Bank of Toronto, which was argued first.

In the year 1882 the Quebec legislature passed a statute

(1) 4 Wheaton, 436.
(2) 9 Wheaton, 738.
(3) 18 Wallace, 5.

entitled "An Act to impose certain direct taxes on certain commercial corporations." It is thereby enacted that every bank carrying on the business of banking in this province; every insurance company accepting risks and transacting the business of insurance in this province; every incorporated company carrying on any labour, trade, or business in this province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed is a sum varying with the paid up-capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an Act of the then parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The bank resists payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposes it. Mr. Justice Rainville sitting in the Superior Court took that view, and dismissed an action brought by the government officer, who is the respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested its judgment were as follows:—That the tax is an indirect one; that it is not imposed within the limits of the province; that the parliament has exclusive power to regulate banks; that the provincial legislature can tax only that which exists by their authority or is introduced by their permission; and that if the power to tax such banks as this exists, they may be crushed out by it, and so the power of the parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, and that it is

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also a matter of a merely local or private nature in the province, and so falls within class 16 of the matters of provincial legislation. It has not been contended at the bar that the provincial legislature can tax only that which exists on their authority or permission. And when the appellants' counsel were proceeding to argue that the tax did not fall within class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of sect. 92 of the Federation Act, viz., "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in sect. 91 or in the other parts of the Act so to cut down the full meaning of the words of sect. 92 that they shall not cover this tax?

First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the

first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:—

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellant's counsel, nor only because

it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

Now whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of sect. 92 of the Federation Act.

There is nothing in the previous decisions on the question of

direct taxation which is adverse to this view. In the case of *Queen Insurance Co.* (1) the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of sect. 92, which relates to licenses. In *Reed's Case* (2) the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's Case* (3) the tax in question was one for licences which by a law of the legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be ultra vires, mainly on the grounds that such licences did not fall within class 9 of sect. 92, and that they were in conflict with the powers of parliament under class 2 of sect. 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a licence duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of sect. 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, nor to leave the

(1) 3 App. Cas. 1090. (2) 10 App. Cas. 141.
(3) 2 Sup. Court of Canada, 70.

amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province it is for the Legislature and not for Courts of Law to judge of its expediency.

Then is there anything in sect. 91 which operates to restrict the meaning above ascribed to sect. 92? Class 3, certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons* (1). Their Lordships there said (2): "So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the parliament in relation to matters falling within class 2, viz. the regulation of trade and commerce; and within class 15, viz., banking, and the incorporation of banks. Their Lordships think that this contention

(1) 7 App. Cas. 96. (2) 7 App. Cas. 108.

gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce" are indeed very wide, and in *Severn's Case* (1) it was the view of the Supreme Court that they operated to invalidate the licence duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parson's Case* (2), and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or interprovincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case* (2), they would be straining them to their widest conceivable extent.

Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

(1) 2 Sup. Court of Canada, 70. (2) 7 App. Cas. 96.

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Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament.

It only remains to refer to some of the grounds taken by the learned judges of the Lower Courts, which have been strongly objected to at the Bar. Great importance has been attached to French authorities who lay down that the impôt des patentes, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the provincial legislatures possess powers of legisla-

tion either inherent in them, or dating from a time anterior to the Federation Act and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondents' counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration. And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the Court of Queen's Bench. And they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other banks. The insurance company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The appellants in each case must pay the costs of the appeal.

Solicitors for the Bank of Toronto: *Ingle, Cooper, & Holmes.*

Solicitors for the Merchants' Bank of Canada: *Hewlett & Preston.*

Solicitors for the Canadian Bank of Commerce: *Champion, Robinson, & Poole.*

Solicitors for the Insurance Company: *Hollams, Son, & Coward.*

Solicitors for the respondent: *Simpson, Hammond, & Co.*

[PRIVY COUNCIL.]

NORTH-WEST TRANSPORTATION COMPANY, LIMITED, AND JAMES HUGHES BEATTY . . . . . } DEFENDANTS;

AND

HENRY BEATTY, ON BEHALF OF HIMSELF AND OTHERS . . . . . } PLAINTIFF.

J. C.*
1887
June 23, 24, 28, 30; *July* 21.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Sale by Director to Company—Ratification at General Meeting—Vendor's Right to vote as Shareholder.

Where a voidable contract, fair in its terms and within the powers of the company, had been entered into by its directors with one of their number as sole vendor:—

Held, that such vendor was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company.

APPEAL from a decree of the Supreme Court (April 9, 1886) reversing a decree of the Court of Appeal, Ontario (April 17, 1885), and affirming a decree of the Ontario Chancery Division (May 6, 1884) which set aside the sale in question by the appellant James Hugh Beatty, to the company. The judgment of the Chancellor at Toronto is reported in 6 Ontario Rep., 300. The main question in the case was whether a shareholder in a company is entitled to vote at a meeting of the company on a question in which he is personally interested.

The facts of the case are stated in the judgment of their Lordships.

The judgment of the First Court (19 Jan. 1884) was to this effect:—

"All suspicions of fraud or unfair dealings may be discarded

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD BAGGALLAY, and SIR RICHARD COUCH.

TAB J

Westbank First Nation *Appellant*

v.

British Columbia Hydro and Power Authority *Respondent*

and

The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General of British Columbia *Interveners*

INDEXED AS: WESTBANK FIRST NATION *v.* BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

File No.: 26450.

Hearing and judgment: June 21, 1999.

Reasons delivered: September 10, 1999.

Present: Lamer C.J. and Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Crown — Immunity — Taxation — Exemption of public lands — Indian band passing assessment and taxation by-laws pursuant to the Indian Act — Whether by-laws impose taxes — Whether by-laws constitutionally inapplicable to provincial utility — Constitution Act, 1867, s. 125.

Indians — Taxation — Money by-laws — Indian band passing assessment and taxation by-laws pursuant to Indian Act — Whether by-laws constitutionally inapplicable to provincial utility — Constitution Act, 1867, s. 125 — Indian Act, R.S.C., 1985, c. I-5, s. 83(1)(a).

Between 1951 and 1978, the respondent hydroelectric utility was granted from Her Majesty the Queen in Right of Canada eight permits to use and occupy various lands located on two Indian reserves in order to build electric transmission and distribution lines and to provide electrical energy to the residents of the reserves. In 1990, the appellant passed the *Westbank Indian Band Assessment*

Première nation de Westbank *Appelante*

c.

British Columbia Hydro and Power Authority *Intimée*

et

Le procureur général du Québec, le procureur général du Manitoba et le procureur général de la Colombie-Britannique *Intervenants*

RÉPERTORIÉ: PREMIÈRE NATION DE WESTBANK *c.* BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

N° du greffe: 26450.

Audition et jugement: 21 juin 1999.

Motifs déposés: 10 septembre 1999.

Présents: Le juge en chef Lamer et les juges Gonthier, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Couronne — Immunité — Taxation — Exemption des terres publiques — Règlements d'imposition et de taxation édictés par une bande indienne en vertu de la Loi sur les Indiens — Ces règlements imposent-ils des taxes? — Ces règlements sont-ils constitutionnellement inapplicables à une entreprise de service public provinciale? — Loi constitutionnelle de 1867, art. 125.

Indiens — Taxation — Règlements financiers — Règlements d'imposition et de taxation édictés par une bande indienne en vertu de la Loi sur les Indiens — Ces règlements sont-ils constitutionnellement inapplicables à une entreprise de service public provinciale? — Loi constitutionnelle de 1867, art. 125 — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 83(1)a).

Entre 1951 et 1978, l'entreprise hydroélectrique intimée a obtenu de Sa Majesté la Reine du chef du Canada huit permis d'utilisation et d'occupation de diverses terres situées dans deux réserves indiennes, en vue d'y construire des lignes de transmission et de distribution d'électricité destinées à alimenter en énergie électrique les résidants des réserves. En 1990, l'appelante a adopté

By-law and the *Westbank Indian Band Taxation By-law*, pursuant to its authority under s. 83(1)(*a*) of the *Indian Act*. The appellant passed additional by-laws from 1991 to 1995, under which the respondent was assessed $124,527.25 in taxes, penalties, and interest. The respondent refused to pay the assessed taxes, and did not appeal the assessment notices. The appellant brought an action to recover the unpaid amount. Summary judgment was granted to the respondent, which was upheld on appeal to the British Columbia Court of Appeal. The issue in this appeal is whether s. 125 of the *Constitution Act, 1867* prevents the appellant from applying its assessment and taxation by-laws to the respondent, an agent of the provincial Crown.

Held: The appeal should be dismissed.

Section 125 of the *Constitution Act, 1867* renders the impugned by-laws constitutionally inapplicable to the respondent. The by-laws are designed for the singular purpose of generating revenue for "local purposes". They were enacted pursuant to s. 83(1)(*a*) of the *Indian Act*, which authorizes "taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve". The by-laws themselves state that their purpose is "for raising a revenue for local purposes".

Section 125 of the *Constitution Act, 1867* is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It advances the goals of federalism and democracy by according a degree of operational space to each level of government, free from interference by the other. It prohibits one level of government from taxing the property of the other. However, it does not prohibit the levying of user fees or other regulatory charges properly enacted within the government's sphere of jurisdiction.

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125, several

le *Westbank Indian Band Assessment By-law* et le *Westbank Indian Band Taxation By-law*, en vertu du pouvoir que lui confère l'al. 83(1)*a*) de la *Loi sur les Indiens*. De 1991 à 1995, l'appelante a adopté des règlements supplémentaires en vertu desquels l'intimée a fait l'objet d'une cotisation de 124 527,25 $ à titre de taxes, de pénalités et d'intérêts. L'intimée a refusé de payer les taxes imposées et n'a pas fait appel des avis de cotisation. L'appelante a intenté une action en recouvrement du montant impayé. Le jugement sommaire rendu en faveur de l'intimée a été confirmé par la Cour d'appel de la Colombie-Britannique. Il s'agit en l'espèce de savoir si l'art. 125 de la *Loi constitutionnelle de 1867* empêche l'appelante d'appliquer ses règlements d'imposition et de taxation à l'intimée, un mandataire de la Couronne provinciale.

Arrêt: Le pourvoi est rejeté.

L'article 125 de la *Loi constitutionnelle de 1867* rend les règlements contestés constitutionnellement inapplicables à l'intimée. Ces règlements ont pour seul objet de produire un revenu à des «fins locales». Ils ont été adoptés conformément à l'al. 83(1)*a*) de la *Loi sur les Indiens*, qui autorise «l'imposition de taxes à des fins locales, sur les immeubles situés dans la réserve, ainsi que sur les droits sur ceux-ci, et notamment sur les droits d'occupation, de possession et d'usage». Les règlements eux-mêmes indiquent qu'ils visent à «prélever un revenu à des fins locales».

L'article 125 de la *Loi constitutionnelle de 1867* est l'un des moyens prévus par la Constitution pour assurer le bon fonctionnement du système fédéral canadien. Il favorise les fins du fédéralisme et de la démocratie en accordant un certain espace opérationnel à chaque palier de gouvernement, libre de toute intervention de la part de l'autre. Il interdit à un palier de gouvernement de taxer les biens de l'autre. Il n'interdit toutefois pas la perception de frais d'utilisation ou autres redevances de nature réglementaire qui sont validement édictés à l'intérieur du champ de compétence du gouvernement.

Même si, dans le contexte réglementaire actuel, beaucoup de redevances comportent des éléments de taxation et des éléments de réglementation, le tribunal doit principalement déterminer si, de par son caractère véritable, l'objet premier du prélèvement est: (1) de taxer, c.-à-d. percevoir des revenus à des fins générales, (2) de financer ou de créer un régime de réglementation, c.-à-d. être une redevance de nature réglementaire ou être accessoire ou rattaché à un régime de réglementation, ou (3), de recevoir paiement pour des services directement rendus, c.-à-d. être des frais d'utilisation. Pour déterminer

key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.

The levies are properly described as being, in pith and substance, taxation enacted under s. 91(3) of the *Constitution Act, 1867*. They are enforceable by law, imposed under the authority of the legislature, and levied by a public body for a public purpose. The appellant has not demonstrated that the levies are connected to a "regulatory scheme" which could preclude the application of s. 125. The charge does not form any part of a detailed code of regulation. No costs of the regulatory scheme have been identified, to which the revenues from these charges are tied. The appellant does not seek to influence the respondent's behaviour in any way with these charges. There is no relationship between the respondent and any regulation to which these charges adhere. Although the *Indian Act* is legislation in relation to "Indians, and Lands reserved for the Indians", this does not, in itself, create a "regulatory scheme" in the sense required by the Constitution.

As these taxes are imposed on the respondent, which it is conceded is an agent of the provincial Crown, s. 125 is engaged. The taxation and assessment by-laws are accordingly inapplicable to the respondent.

Cases Cited

Applied: *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Attorney-General of British Columbia v. Attorney-General of Canada* (1922), 64 S.C.R. 377, aff'd [1924] A.C. 222; **referred to:** *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Attorney General of Canada v. City of Toronto* (1892), 23 S.C.R. 514; *Attorney-General of Canada v. Registrar of Titles*, [1934] 4 D.L.R. 764; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Allard Contractors Ltd. v. Coquitlam (Dis-*

si la redevance contestée est une «taxe» ou un «prélèvement de nature réglementaire» pour les fins de l'art. 125, il faut poser plusieurs questions clés. La redevance est-elle: (1) obligatoire et exigible en vertu de la loi, (2) imposée sous l'autorité du législateur, (3) perçue par un organisme public, (4) pour une fin d'intérêt public, (5) sans aucun lien avec quelconque de régime de réglementation? Si la réponse à toutes ces questions est affirmative, le montant en question sera habituellement qualifié de taxe.

Les montants perçus sont, de par leur caractère véritable, qualifiés à juste titre de taxation en vertu du par. 91(3) de la *Loi constitutionnelle de 1867*. Ils sont exigibles en vertu de la loi, imposés sous l'autorité du législateur et perçus par un organisme public à une fin d'intérêt public. L'appelante n'a pas démontré que les prélèvements étaient liés à un «régime de réglementation» susceptible d'empêcher l'application de l'art. 125. Les redevances ne font pas partie d'un code de réglementation détaillé. Il n'a été identifié aucun coût qui découlerait du régime de réglementation et auquel seraient liés les revenus tirés de ces redevances. L'appelante ne tente pas d'influencer le comportement de l'intimée de quelque façon au moyen de ces redevances. Il n'y a aucun lien entre l'intimée et quelque réglementation que ce soit à laquelle ces redevances se rattachent. Bien que la *Loi sur les Indiens* porte sur «les Indiens et les terres réservées aux Indiens», cela ne crée pas en soi un «régime de réglementation» au sens où l'entend la Constitution.

Étant donné que ces taxes sont imposées à l'intimée que l'on admet être un mandataire de la Couronne provinciale, l'art. 125 s'applique, ce qui a pour effet de soustraire l'intimée à l'application des règlements de taxation et d'imposition en cause.

Jurisprudence

Arrêts appliqués: *Renvoi relatif à la taxe sur le gaz naturel exporté*, [1982] 1 R.C.S. 1004; *Attorney-General of British Columbia c. Attorney-General of Canada* (1922), 64 R.C.S. 377, conf. par [1924] A.C. 222; **arrêts mentionnés:** *M'Culloch c. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2; *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641; *Succession Eurig (Re)*, [1998] 2 R.C.S. 565; *Attorney General of Canada c. City of Toronto* (1892), 23 R.C.S. 514; *Attorney-General of Canada c. Registrar of Titles*, [1934] 4 D.L.R. 764; *Lawson c. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] R.C.S. 357;

trict), [1993] 4 S.C.R. 371; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Re Ottawa-Carleton (Regional Municipality) By-law 234-1992*, [1996] O.M.B.D. No. 553 (QL); *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536, aff'd (1997), 151 D.L.R. (4th) 575, leave to appeal refused, [1997] 3 S.C.R. vii; *Minister of Justice v. City of Levis*, [1919] A.C. 505; *Urban Outdoor Trans Ad v. Scarborough (City)* (1999), 43 O.R. (3d) 673; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 53, 91(3), (24), 92(2), (9), (13), 125.
Indian Act, R.S.C., 1985, c. I-5, ss. 28(2), 83(1)(*a*) [rep. & sub. c. 17 (4th Supp.), s. 10(1)].
Interpretation Act, R.S.C., 1985, c. I-21, s. 17.
Westbank Indian Band Assessment By-law (1990), s. 36(1).
Westbank Indian Band Property Taxation Bylaw (1994), ss. 2(1), 8(1), 28, 30, 35, 36.
Westbank Indian Band Taxation By-law (1990), ss. 2(1), 8(1), 41(1), 45, 46(1), 49.

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Magnet, Joseph E. *Constitutional Law of Canada*, vol. 1, 7th ed. Edmonton: Juriliber Limited, 1998.

APPEAL from a judgment of the British Columbia Court of Appeal (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, affirming a decision of the British Columbia Supreme Court (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, granting summary judgment to the respondent. Appeal dismissed.

Allard Contractors Ltd. c. Coquitlam (District), [1993] 4 R.C.S. 371; *Ontario Home Builders' Association c. Conseil scolaire de la région de York*, [1996] 2 R.C.S. 929; *Re Ottawa-Carleton (Regional Municipality) By-Law 234-1992*, [1996] O.M.B.D. No. 553 (QL); *Cape Breton Beverages Ltd. c. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536, conf. par (1997), 151 D.L.R. (4th) 575, autorisation de pourvoi refusée, [1997] 3 R.C.S. vii; *Minister of Justice c. City of Levis*, [1919] A.C. 505; *Urban Outdoor Trans Ad c. Scarborough (City)* (1999), 43 O.R. (3d) 673; *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3.

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Loi constitutionnelle de 1867, art. 53, 91(3), (24), 92(2), (9), (13), 125.
Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 17.
Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 28(2), 83(1)*a*) [abr. & rempl. ch. 17 (4e suppl.), art. 10(1)].
Westbank Indian Band Assessment By-law (1990), art. 36(1).
Westbank Indian Band Property Taxation Bylaw (1994), art. 2(1), 8(1), 28, 30, 35, 36.
Westbank Indian Band Taxation By-law (1990), art. 2(1), 8(1), 41(1), 45, 46(1), 49.

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Magnet, Joseph E. *Constitutional Law of Canada*, vol. 1, 7th ed. Edmonton: Juriliber Limited, 1998.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1997), 45 B.C.L.R. (3d) 98, 154 D.L.R. (4th) 93, 100 B.C.A.C. 92, [1998] 2 C.N.L.R. 284, qui a confirmé un jugement de la Cour suprême de la Colombie-Britannique (1996), 138 D.L.R. (4th) 362, [1997] 2 C.N.L.R. 229, qui avait rendu un jugement sommaire en faveur de l'intimée. Pourvoi rejeté.

Jack Woodward, Robert J. M. Janes and *Patricia Hutchings*, for the appellant.

Peter D. Feldberg, Anne Dobson-Mack and *Cydney J. Elofson*, for the respondent.

Monique Rousseau, for the intervener the Attorney General of Quebec.

Heather J. Leonoff, Q.C., for the intervener the Attorney General of Manitoba.

George H. Copley, Q.C., and *Jeffrey M. Loenen*, for the intervener the Attorney General of British Columbia.

The judgment of the Court was delivered by

GONTHIER J. —

I — Introduction

1 The issue in this appeal is whether s. 125 of the *Constitution Act, 1867* prevents Westbank First Nation from applying its assessment and taxation by-laws to B.C. Hydro, an agent of the provincial Crown. The answer to that question depends upon whether the by-laws enact a system of taxation, which is subject to s. 125, or some other form of regulation which is not subject to the application of s. 125. If the by-laws impose taxes, then they are constitutionally inapplicable to the provincial Crown or its agents. For the reasons that follow, it is my opinion that these by-laws are properly described as taxes, and as such, cannot be imposed on B.C. Hydro.

2 The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant

Jack Woodward, Robert J. M. Janes et *Patricia Hutchings*, pour l'appelante.

Peter D. Feldberg, Anne Dobson-Mack et *Cydney J. Elofson*, pour l'intimée.

Monique Rousseau, pour l'intervenant le procureur général du Québec.

Heather J. Leonoff, c.r., pour l'intervenant le procureur général du Manitoba.

George H. Copley, c.r., et *Jeffrey M. Loenen*, pour l'intervenant le procureur général de la Colombie-Britannique.

Version française du jugement de la Cour rendu par

LE JUGE GONTHIER —

I — Introduction

Le présent pourvoi porte sur la question de savoir si l'art. 125 de la *Loi constitutionnelle de 1867* empêche la Première nation de Westbank d'appliquer ses règlements d'évaluation et de taxation à B.C. Hydro, un mandataire de la Couronne provinciale. Pour y répondre, il faut déterminer si les règlements édictent un régime de taxation, qui est assujetti à l'art. 125, ou une autre forme de réglementation, qui ne l'est pas. Si les règlements imposent des taxes, ils sont alors, du point de vue constitutionnel, inapplicables à la Couronne provinciale et à ses mandataires. Pour les motifs qui suivent, je suis d'avis que ces règlements doivent être considérés comme imposant des taxes, et que, à ce titre, ils ne peuvent pas s'appliquer à B.C. Hydro.

Notre Cour a examiné à de nombreuses reprises et dans plusieurs contextes la façon de qualifier un prélèvement gouvernemental. Cette qualification est pertinente dans l'examen de la constitutionnalité d'un prélèvement provincial qui présente des aspects de taxation indirecte puisque, s'il s'agit d'une redevance de nature réglementaire ou d'une composante d'un régime de réglementation, les provinces ont compétence en vertu de la Constitu-

A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, *Constitutional Law of Canada* (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by the majority of this Court in *Re Exported Natural Gas Tax*, *supra*, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

On fait une distinction entre la simple «taxation» et la «réglementation», ou ce qui a été décrit comme des «redevances de nature réglementaire»: P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, à la p. 30-28; J. E. Magnet, *Constitutional Law of Canada* (7e éd. 1998), vol. 1, à la p. 481; G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (2e éd. 1981). La distinction entre, d'une part, les taxes et, d'autre part, les redevances de nature réglementaire, a été mise en évidence par une majorité de notre Cour dans le *Renvoi relatif à la taxe sur le gaz naturel exporté*, précité, aux pp. 1055, 1070, 1072 et 1075. Dans cette affaire, les juges majoritaires ont expliqué, à la p. 1070, qu'il fallait faire une distinction entre une taxe et une «taxe [imposée] essentiellement à des fins de réglementation ou [. . .] indissociable d'une réglementation plus générale». 23

It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

Il va sans dire que, pour que des redevances soient imposées à des fins de réglementation ou qu'elles soient «indissociable[s] d'une réglementation plus générale», il faut d'abord identifier un «régime de réglementation». Lorsque notre Cour a conclu à l'existence d'un «régime de réglementation», certains indices étaient présents. Les facteurs à examiner pour identifier un régime de réglementation comportent: (1) l'existence d'un code de réglementation complet et détaillé; (2) un objectif spécifique destiné à influencer certains comportements individuels; (3) des coûts réels ou dûment estimés de la réglementation; (4) un lien entre la réglementation et la personne qui fait l'objet de la réglementation, cette personne bénéficiant de la réglementation ou en ayant créé le besoin. Il ne s'agit que d'une liste de facteurs à examiner; il n'est pas nécessaire qu'ils soient tous présents pour conclure à l'existence d'un régime de réglementation. La liste n'est pas exhaustive non plus. 24

The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel

Le premier facteur à examiner est la nature de la réglementation elle-même. Les régimes de réglementation sont habituellement caractérisés par leur complexité et leur niveau de détail. Dans l'arrêt *Allard Contractors Ltd. c. Coquitlam (District)*, [1993] 4 R.C.S. 371, à la p. 409, le régime de réglementation avait été décrit comme un «code 25

TAB K

Matsqui Indian Band and Matsqui Indian Band Council *Appellants*

v.

Canadian Pacific Limited and Unitel Communications Inc. *Respondents*

and

Indian Taxation Advisory Board *Intervener*

and between

Siska Indian Band and Siska Indian Band Council, Kanaka Bar Indian Band and Kanaka Bar Indian Band Council, Nicomen Indian Band and Nicomen Indian Band Council, Shuswap Indian Band and Shuswap Indian Band Council, Skuppah Indian Band and Skuppah Indian Band Council and Spuzzum Indian Band and Spuzzum Indian Band Council *Appellants*

v.

Canadian Pacific Limited *Respondent*

and

Indian Taxation Advisory Board *Intervener*

INDEXED AS: CANADIAN PACIFIC LTD. *v.* MATSQUI INDIAN BAND

File No.: 23643.

1994: October 11; 1995: January 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

La bande indienne de Matsqui et le conseil de la bande indienne de Matsqui *Appelants*

c.

Canadien Pacifique Limitée et Unitel Communications Inc. *Intimées*

et

La Commission consultative de la fiscalité indienne *Intervenante*

et entre

La bande indienne Siska et le conseil de la bande indienne Siska, la bande indienne Kanaka Bar et le conseil de la bande indienne Kanaka Bar, la bande indienne Nicomen et le conseil de la bande indienne Nicomen, la bande indienne de Shuswap et le conseil de la bande indienne de Shuswap, la bande indienne Skuppah et le conseil de la bande indienne Skuppah et la bande indienne de Spuzzum et le conseil de la bande indienne de Spuzzum *Appelants*

c.

Canadien Pacifique Limitée *Intimée*

et

La Commission consultative de la fiscalité indienne *Intervenante*

RÉPERTORIÉ: CANADIEN PACIFIQUE LTÉE *c.* BANDE INDIENNE DE MATSQUI

N° du greffe: 23643.

1994: 11 octobre; 1995: 26 janvier.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Tribunals — Adequacy of tribunal — Issue of jurisdiction — Tribunals set up by First Nations bands to consider issue of assessment for lands located within reserve — Appeal process culminating with review by courts — Tribunal members without fixed salary and security of tenure — Claim that land not within reserve — Whether consideration of issue compelled to follow alternative appeal route or whether courts can grant immediate judicial review — Whether tribunals meeting criteria of independent judiciary — Indian Act, R.S.C., 1985, c. I-5, s. 83(1), (3) — Federal Court Act, R.S.C., 1985, c. F-7, ss. 18, 18.3(1), 18.5, 24(1).

Aboriginal law — Tribunals set up by First Nations bands to consider issue of assessment for lands located within reserve — Appeal process culminating with review by courts — Tribunal members without fixed salary and security of tenure — Claim that land not within reserve — Whether consideration of issue compelled to follow alternative appeal route or whether courts can grant immediate judicial review — Whether tribunals meeting criteria of independent judiciary.

Amendments to the *Indian Act* enabled First Nations bands to pass their own by-laws for the levying of taxes against real property on reserve lands. The appellant bands each developed taxation and assessment by-laws which were implemented following the Minister's approval. The Matsqui Band's assessment by-law provided for the appointment of Courts of Revision to hear appeals from the assessments, the appointment of an Assessment Review Committee to hear appeals from the decisions of the Courts of Revision and, finally, an appeal on questions of law to the Federal Court, Trial Division from the decisions of the Assessment Review Committee. The other bands provided for a single hearing before a Board of Review, with an appeal to the Federal Court, Trial Division. All the by-laws provided that members of the appeal tribunals could be paid, but did not mandate that they indeed be paid, and gave no tenure of office so that members might not be appointed

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Tribunaux administratifs — Caractère approprié d'un tribunal — Question de compétence — Tribunaux constitués par des bandes des premières nations pour examiner des questions d'évaluation des immeubles situés dans la réserve — Processus d'appel aboutissant à un contrôle par les cours de justice — Aucune rémunération fixe ni avantage d'inamovibilité pour les membres des tribunaux — Allégation que le terrain n'est pas situé dans la réserve — Pour faire examiner la question faut-il suivre une autre voie d'appel, ou les cours de justice peuvent-elles accorder immédiatement le contrôle judiciaire? — Les tribunaux satisfont-ils aux critères en ce qui concerne l'indépendance? — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 83(1), (3) — Loi sur la Cour fédérale, L.R.C. (1985), ch. F-7, art. 18, 18.3(1), 18.5, 24(1).

Droit des autochtones — Tribunaux constitués par des bandes des premières nations pour examiner des questions d'évaluation des immeubles situés dans la réserve — Processus d'appel aboutissant à un contrôle effectué par les cours de justice — Aucune rémunération fixe ni avantage d'inamovibilité pour les membres des tribunaux — Allégation que le terrain n'est pas situé dans la réserve — Pour faire examiner la question faut-il suivre une autre voie d'appel, ou les cours de justice peuvent-elles accorder immédiatement le contrôle judiciaire? — Les tribunaux satisfont-ils aux critères en ce qui concerne l'indépendance?

Des modifications apportées à la *Loi sur les Indiens* habilitent les bandes des premières nations à prendre des règlements administratifs prévoyant l'imposition de taxes sur les biens immeubles situés dans leur réserve. Chacune des bandes appelantes a élaboré des règlements de taxation et d'évaluation, qui sont entrés en vigueur après leur approbation par le ministre. Le règlement d'évaluation de la bande de Matsqui prévoit l'établissement de tribunaux de révision pour entendre les appels formés contre les évaluations, la constitution d'un comité de révision des évaluations pour entendre les appels formés contre les décisions des tribunaux de révision et, enfin, la possibilité d'en appeler des décisions du comité de révision devant la Section de première instance de la Cour fédérale sur une question de droit. Les autres bandes prévoient une seule audience devant une commission de révision et un appel devant la Section de première instance de la Cour fédérale. Chacun des règlements administratifs prévoit que les membres des tribunaux d'appel peuvent toucher une rémunération mais n'exige pas qu'une rémunération leur soit effectivement versée. De plus, les règlements ne prévoient pas l'in

to sit on future assessment appeals. Members of the bands could be appointed to the tribunals.

The appeals were heard concurrently at all levels and turned on essentially identical facts. Each appellant sent the respondent, Canadian Pacific Limited ("CP"), a notice of assessment in respect of the land forming its rail line which ran through the reserves. The Matsqui Band also sent a notice of assessment to the respondent, Unitel Communications Inc., which laid fibre optic cables on the CP land.

The respondents commenced an application for judicial review in the Federal Court, Trial Division, requesting that the assessments be set aside. CP claimed that its land could not be taxed by the appellant bands because it possessed fee simple in the rail line and the rail line therefore formed no part of the reserve lands. The appellants brought a motion to strike the respondents' application for judicial review on the grounds that: (a) the application was directed against a decision which could not be the subject of judicial review because of an eventual right of appeal to the Federal Court, Trial Division or, alternatively; (b) the assessment by-laws provided for an adequate alternative remedy — an eventual right of appeal to the Federal Court, Trial Division. The motions judge accepted the second of these arguments and struck out the respondents' application for judicial review. The Federal Court of Appeal allowed an appeal from this decision, set it aside and dismissed the appellants' motion to strike. At issue was whether the motions judge properly exercised his discretion to strike the respondents' application for judicial review, thereby requiring them to pursue their jurisdictional challenge through the appeal procedures established by the appellant bands. The determination of whether or not the land was "in the reserve" was not at issue.

Held (L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. dissenting): The appeal should be dismissed.

Adequacy of the Appeal Tribunals and the Exercise of Discretion on Judicial Review

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Administrative tribunals can examine the boundaries of their jurisdiction

movibilité, de sorte que les membres pourraient ne pas être désignés pour entendre d'autres appels en matière d'évaluation. Des membres des bandes peuvent être nommés membres des tribunaux.

Les appels ont été entendus en même temps à tous les paliers, les faits étant essentiellement identiques dans chaque cas. Chacune des bandes appelantes a envoyé un avis d'évaluation à l'intimée, Canadien Pacifique Limitée («CP»), concernant la bande de terrain parcourant les réserves sur laquelle CP a posé ses voies ferrées. La bande de Matsqui a en outre fait tenir un avis d'évaluation à l'intimée, Unitel Communications Inc., qui a installé des câbles de fibres optiques sur le terrain de CP.

Les intimées ont saisi la Section de première instance de la Cour fédérale d'une demande de contrôle judiciaire visant à faire annuler les évaluations. CP a fait valoir que son terrain ne pouvait être taxé par les bandes appelantes parce qu'elle possédait en fief simple le terrain en question, qui ne faisait donc pas partie de la réserve. Invoquant les moyens suivants, les appelants ont présenté une requête en annulation de la demande de contrôle judiciaire des intimées: a) la demande visait une décision qui ne peut faire l'objet d'un contrôle judiciaire en raison du droit de pouvoir ultérieurement interjeter appel devant la Section de première instance de la Cour fédérale, ou subsidiairement, b) les règlements d'évaluation prévoient un autre recours approprié, soit le droit d'appeler ultérieurement à la Section de première instance de la Cour fédérale. Le juge des requêtes, retenant le second moyen, a annulé la demande de contrôle judiciaire des intimées. La Cour d'appel fédérale a accueilli l'appel interjeté contre cette décision, qu'elle a infirmée, et a rejeté la requête en annulation présentée par les appelants. La question en litige est de savoir si le juge des requêtes a correctement exercé son pouvoir discrétionnaire d'annuler la demande de contrôle judiciaire des intimées, les obligeant ainsi à poursuivre leur contestation relative à la compétence par le biais des procédures de contestation établies par les bandes appelantes. La question de savoir si le terrain est situé «dans la réserve» ne se pose pas.

Arrêt (les juges L'Heureux-Dubé, Sopinka, Gonthier et Iacobucci sont dissidents): Le pourvoi est rejeté.

Le caractère approprié des tribunaux d'appel et l'exercice du pouvoir discrétionnaire en matière de contrôle judiciaire

Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci: Les tribunaux administratifs peuvent examiner les limites de leur com-

although their decisions in this regard lack the force of *res judicata*. Their determinations are reviewable on a correctness standard and will generally be afforded little deference. Here, the jurisdiction of the appeal tribunals includes both the classification of taxable property and the valuation of that property, as the words "assessment"/"*évaluation*" used in s. 83(3) of the *Indian Act* refer to the entire process undertaken by tax assessors. A purposive analysis favours this "process approach". Parliament clearly intended the bands to assume control over the assessment process on the reserves, since the entire scheme would be pointless if assessors were unable to engage in the preliminary determination of whether land should be classified as taxable and thereby placed on the taxation rolls.

The Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act* have concurrent jurisdiction to hear and decide the question of whether the respondents' land is "in the reserve". In keeping with the traditionally discretionary nature of judicial review, judges of the Federal Court, Trial Division have discretion in determining whether judicial review should be undertaken. In determining whether to undertake judicial review rather than requiring an applicant to proceed through a statutory appeal procedure, courts should consider: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The category of factors should not be closed, as it is for courts in particular circumstances to isolate and balance the factors that are relevant.

The adequacy of the statutory appeal procedures created by the bands, and not simply the adequacy of the appeal tribunals, had to be considered because the bands had provided for appeals from the tribunals to the Federal Court, Trial Division. Certain factors are relevant only to the appeal tribunals (i.e., the expertise of members, or allegations of bias) or to the appeal to the Federal Court, Trial Division (i.e., whether this appeal is *intra vires* the bands). In applying the adequate alterna-

pétence, même si leurs décisions à cet égard n'ont pas l'autorité de la chose jugée. Ces décisions sont susceptibles d'un contrôle selon la norme de l'absence d'erreur et, en règle générale, on fait preuve de peu de retenue à leur égard. En l'espèce, la compétence des tribunaux d'appel comprend à la fois la classification des immeubles imposables et l'estimation de leur valeur, car les mots «évaluation» et «*assessment*» employés au par. 83(3) de la *Loi sur les Indiens* visent l'ensemble du processus entrepris par les évaluateurs. L'analyse fondée sur l'objet amène à privilégier cette «démarche fondée sur le processus». De toute évidence, le législateur a voulu que les bandes prennent en main le processus d'évaluation dans les réserves, puisque le régime établi serait sans objet si les évaluateurs ne pouvaient déterminer préalablement si un terrain donné devrait être qualifié d'imposable et, en conséquence, porté sur les rôles de taxation.

La Section de première instance de la Cour fédérale et les tribunaux d'appel constitués en vertu du par. 83(3) de la *Loi sur les Indiens* ont une compétence concurrente pour décider si le terrain des intimées est situé «dans la réserve». En conformité avec le caractère traditionnellement discrétionnaire du contrôle judiciaire, les juges de la Section de première instance de la Cour fédérale jouissent d'un pouvoir discrétionnaire pour déterminer s'il y a lieu à contrôle judiciaire. Pour déterminer si elles doivent entreprendre le contrôle judiciaire plutôt que d'exiger que le requérant se prévale d'une procédure d'appel prescrite par la loi, les cours de justice doivent considérer la commodité de l'autre recours, la nature de l'erreur et la nature de la juridiction d'appel (c.-à-d. sa capacité de mener une enquête, de rendre une décision et d'offrir un redressement). Il ne faut pas limiter la liste des facteurs à prendre en considération, car il appartient aux cours de justice, dans des circonstances particulières, de cerner et de soupeser les facteurs pertinents.

Il y avait lieu d'examiner le caractère approprié des procédures de contestation que les bandes ont établies en vertu de la loi, et non pas simplement le caractère approprié des tribunaux d'appel parce que les bandes ont prévu que les décisions de ces tribunaux peuvent être portées en appel devant la Section de première instance de la Cour fédérale. Certains facteurs ne sont pertinents que relativement aux tribunaux d'appel (c.-à-d. l'expertise des membres ou les allégations de partialité) ou à l'appel à la Section de première instance de la Cour fédérale (c.-à-d. la question de savoir si les bandes ont compétence pour prévoir un tel appel). L'application du principe de l'autre recours approprié commande la prise

tive remedy principle, all these factors must be considered in order to assess the overall statutory scheme.

It was not an error for the motions judge to consider the policy underlying the scheme in determining how to exercise his discretion to undertake judicial review. He could reasonably conclude that, since the scheme was part of the policy promoting Aboriginal self-government, allowing the respondents to circumvent the appeal procedures would be detrimental to the overall scheme.

The bands have jurisdiction to create by-laws with appeals to the Federal Court, Trial Division. Section 18.5 of the *Federal Court Act* does not set down conditions for the creation of statutory appeals from decisions of federal tribunals; it only limits the judicial review powers of the Federal Court, Trial Division where a statutory right of appeal exists. Section 24(1) provides that the Trial Division has exclusive original jurisdiction to hear and determine all appeals that, under any Act of Parliament, may be taken to the court. The appeal procedures here fell squarely within this section because they were authorized "under" s. 83(3) of the *Indian Act.*

Parliament intended the bands to have considerable scope for creating appeal procedures through their by-laws, with the caveat that such procedures would be "subject to the approval of the Minister" (s. 83(1)). The Minister approved all of the by-laws at issue, clearly believing that the power to create appeals to the Federal Court, Trial Division was *intra vires* the bands. The courts should not narrow the scope of possible appeal procedures available to the bands.

The question to be determined was whether the appeal tribunals here were adequate fora; it was not necessary to consider whether they were better fora than the courts. They allowed for a wide-ranging inquiry into all of the evidence and were considered by Parliament to be equipped to deal with complex issues that might come before them. Section 18.3(1) of the *Federal Court Act* allows an appeal tribunal to seek the guidance of the

en considération de tous ces facteurs afin d'apprécier *globalement le régime législatif en question.*

Ce n'est pas à tort que le juge des requêtes a tenu compte des considérations de principe sous-jacentes au régime pour déterminer comment exercer son pouvoir discrétionnaire en matière de contrôle judiciaire. Il pouvait raisonnablement conclure que, comme le régime s'inscrit dans la politique de l'encouragement de l'autonomie gouvernementale des autochtones, permettre aux intimées de contourner les procédures de contestation nuirait à l'ensemble du régime.

Les bandes ont compétence pour prendre des règlements administratifs prévoyant le droit d'interjeter appel devant la Section de première instance de la Cour fédérale. L'article 18.5 de la *Loi sur la Cour fédérale* n'énonce pas de conditions auxquelles serait soumise la création dans un texte législatif d'un droit d'appel des décisions des tribunaux administratifs fédéraux; il ne fait que circonscrire les pouvoirs de contrôle judiciaire de la Section de première instance de la Cour fédérale lorsqu'un texte législatif confère un droit d'appel. Suivant le par. 24(1), la Section de première instance a compétence exclusive, en première instance, pour connaître des appels interjetés devant la cour aux termes d'une loi fédérale. Les procédures de contestation en l'espèce relèvent directement de ce paragraphe parce qu'elles sont autorisées «aux termes» du par. 83(3) de la *Loi sur les Indiens.*

Le Parlement a voulu que les bandes bénéficient d'une latitude considérable pour créer des procédures de contestation au moyen de leurs règlements administratifs, «sous réserve de l'approbation du ministre» (par. 83(1)). Le ministre a approuvé chacun des règlements administratifs en cause, étant de toute évidence d'avis que les bandes avaient compétence pour prévoir des appels à la Section de première instance de la Cour fédérale. Les cours de justice ne devraient pas réduire le choix des procédures de contestation dont disposent les bandes.

La question à trancher est de savoir si les tribunaux d'appel constituent des juridictions appropriées; il n'était pas nécessaire de se demander s'ils représentent une juridiction plus indiquée que les cours de justice. Les tribunaux d'appel peuvent procéder à une enquête de large portée sur la totalité de la preuve et, de l'avis du législateur, ils sont en mesure de régler les questions complexes dont ils peuvent être saisis. Le paragraphe 18.3(1) de la *Loi sur la Cour fédérale* autorise les tribunaux d'appel à demander l'assistance des cours de jus-

courts if it encounters legal, procedural or other issues which it cannot resolve.

It was reasonable for the motions judge to consider the following factors in exercising this discretion: (1) the tribunals were adequate for purposes of conducting a far-reaching and extensive inquiry at first instance; (2), the statutory appeal procedure provided an appeal from the tribunals to the Federal Court, Trial Division where a decision could be taken with the force of *res judicata*; and (3), the policy of promoting the development of Aboriginal governmental institutions favoured resolving the dispute within the statutory appeal procedures.

Per La Forest J.: The Federal Court, Trial Division and the appeal tribunals established under s. 83(3) of the *Indian Act* have concurrent jurisdiction to address the question whether the respondents' land is "in the reserve". The motions judge, however, did not exercise his discretion properly in deciding that the band appeal tribunal system constitutes an adequate alternative remedy in this context. Determining whether the respondents' land is "in the reserve" is a jurisdictional question that brings into play discrete and technical legal issues falling outside the specific expertise of the band appeal tribunals. It is ultimately a matter for the judiciary. The band appeal procedure is not an adequate remedy since any decision by a band appeal tribunal regarding this question will lack the force of *res judicata* and will be reviewable by the Federal Court, Trial Division on a standard of correctness. The respondents should be allowed the opportunity to have this jurisdictional question determined with the force of *res judicata* by the Federal Court at the outset without being compelled to proceed through a lengthy, and possibly needless, band appeal process.

Per McLachlin and Major JJ.: The adequate alternative remedies principle does not apply to a jurisdictional issue. Here, the assessment review board has jurisdiction to determine all questions relating to the valuation of land "within the reserve" but has no jurisdiction to determine whether a parcel of land is "within the reserve". Deciding whether land is "within the reserve" or not requires consideration of a variety of factors, such as real property law, survey results, and treaty interpretice s'ils se heurtent à des questions de droit, de procédure ou autres qu'ils ne peuvent résoudre.

Il était raisonnable que le juge des requêtes tienne compte des facteurs suivants dans l'exercice de son pouvoir discrétionnaire: (1) les tribunaux constituaient une juridiction appropriée pour mener en première instance une enquête approfondie; (2) la procédure de contestation établie en vertu de la loi permettait de porter la décision des tribunaux en appel devant la Section de première instance de la Cour fédérale, qui statue avec l'autorité de la chose jugée; (3) étant donné la politique consistant à favoriser le développement d'institutions gouvernementales propres aux autochtones, il était préférable que le litige se règle dans le cadre des procédures de contestation prévues par la loi.

Le juge La Forest: La Section de première instance de la Cour fédérale ainsi que les tribunaux d'appel constitués en vertu du par. 83(3) de la *Loi sur les Indiens* ont une compétence concurrente pour décider si le terrain des intimées est situé «dans la réserve». Le juge des requêtes n'a toutefois pas exercé comme il se doit son pouvoir discrétionnaire en concluant que les voies de contestation établies par les bandes représentent dans ce contexte un autre recours approprié. Déterminer si le terrain des intimées est situé «dans la réserve» constitue une question de compétence qui soulève des points de droit à la fois distincts et techniques débordant de l'expertise particulière des tribunaux d'appel des bandes. Il s'agit en dernière analyse d'une question qui est du ressort des cours de justice. La procédure de contestation établie par les bandes n'est pas un recours approprié puisque toute décision que pourra rendre un tribunal d'appel de bande relativement à cette question n'aura pas l'autorité de la chose jugée et sera susceptible de contrôle par la Section de première instance de la Cour fédérale, qui appliquera la norme de l'absence d'erreur. Il convient d'accorder aux intimées la possibilité d'obtenir que cette question de compétence soit réglée dès l'abord avec l'autorité de la chose jugée par la Cour fédérale, sans qu'elles ne soient contraintes de recourir à la longue procédure de contestation des bandes, qui risque de s'avérer inutile.

Les juges McLachlin et Major: Le principe de l'autre recours approprié ne s'applique pas à une question de compétence. En l'espèce, la commission de révision des évaluations a compétence pour trancher toute question concernant l'évaluation d'un immeuble situé «dans la réserve», mais n'a pas compétence pour déterminer si un immeuble est situé «dans la réserve». Pour décider si un immeuble se trouve «dans la réserve», il faut prendre en considération divers facteurs, tels que les règles de

tations, in which the board has no expertise and over which there is no evidence that Parliament had any intention to grant the board jurisdiction.

The board here would be deciding upon its jurisdiction when deciding whether or not the land was "within the reserve" as opposed to acting within its jurisdiction. A court, on an application for judicial review on this issue, could apply the standard of correctness. Where the fundamental issue of lack of jurisdiction is raised as the only issue, the respondent should not be compelled to proceed needlessly to the appeal tribunal because it is not an adequate alternative remedy in that it cannot determine the question. Rather, a party can either have the tribunal consider the jurisdictional matter (but this option is not mandatory) or have recourse directly to court on the jurisdictional matter.

Institutional Impartiality

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Impartiality refers to the state of mind or attitude of the decison-maker whereas independence involves both the individual independence of members of the tribunal and the institutional independence of the tribunal. Institutional impartiality and institutional independence were both at issue here. With respect to impartiality, if no reasonable apprehension of bias arises in the mind of a fully informed person in a substantial number of cases, allegations of an apprehension of bias cannot be brought on an institutional level but must be dealt with on a case-by-case basis. This determination must be made having regard for a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them.

No apprehension of bias arose from want of structural impartiality. It is appropriate to have band members sit on appeal tribunals to reflect community interests. A pecuniary interest that members of a tribunal might be alleged to have, such as an interest in increasing taxes to maximize band revenue, is far too attenuated and remote to give rise to a reasonable apprehension of bias at a structural level. No personal and distinct interest in money raised exists on the part of tribunal members, and any potential for conflict between the interests of members of the tribunal and those of parties appearing before them was speculative at this stage. Any allegations of

droit applicables en matière immobilière, les relevés d'arpentage et les interprétations de traités, à l'égard desquels la commission n'a aucune expertise, et rien n'indique que le législateur ait eu l'intention de lui donner compétence à leur sujet.

La commission en l'espèce statuerait sur sa compétence en déterminant si le terrain en cause est situé «dans la réserve», plutôt que d'agir conformément à sa compétence. La cour de justice saisie d'une demande de contrôle judiciaire relativement à cette question pourrait appliquer la norme de l'absence d'erreur. Lorsque se pose seulement la question fondamentale d'incompétence, la partie intimée ne devrait pas être tenue de s'adresser inutilement au tribunal d'appel, car cela ne constitue pas un autre recours approprié étant donné que ce dernier n'a pas compétence pour régler la question. Une partie peut soit soumettre la question de compétence au tribunal d'appel (ce qui n'est toutefois pas obligatoire), soit en saisir directement les cours de justice.

L'impartialité institutionnelle

Le juge en chef Lamer et les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci: L'impartialité désigne l'état d'esprit ou l'attitude du décideur, tandis que l'indépendance comprend à la fois l'indépendance de chaque membre du tribunal et l'indépendance institutionnelle du tribunal. L'impartialité institutionnelle et l'indépendance institutionnelle sont toutes les deux en cause en l'espèce. En ce qui concerne l'impartialité, si une personne pleinement informée n'éprouvait aucune crainte raisonnable de partialité dans un grand nombre de cas, on ne saurait alléguer qu'il y a crainte de partialité sur le plan institutionnel, et la question doit se régler au cas par cas. Il s'agit d'une détermination à faire en tenant compte d'un certain nombre de facteurs, y compris, mais sans s'y restreindre, le risque de conflit entre les intérêts des membres des tribunaux et ceux des parties qui comparaissent devant eux.

Il n'existe aucune crainte de partialité découlant de l'absence d'impartialité structurelle. Il convient que des membres de bande soient membres des tribunaux d'appel afin que les intérêts de la collectivité y soient représentés. L'intérêt pécuniaire que les membres d'un tribunal pourraient avoir, par exemple l'intérêt à augmenter l'impôt afin de maximaliser les recettes de la bande, est vraiment trop minime et trop éloigné pour donner lieu à une crainte raisonnable de partialité sur le plan structurel. Les membres du tribunal n'ont aucun intérêt personnel et distinct dans les sommes perçues, et tout risque de conflit entre les intérêts des membres du tribunal et ceux

bias which might arise should be dealt with on a case-by-case basis.

Institutional Independence

Per L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ.: The reasons of Lamer C.J. were agreed with on all issues, except the issue of lack of institutional independence, as a ground for finding the motions judge erred in exercising his discretion to refuse judicial review.

First, the issue of bias was not properly raised at first instance. Second, appellate courts must defer to the exercise of the motion judge's discretion to strike out unless the conclusion is unreasonable or has been reached on the basis of irrelevant or erroneous considerations, a wrong principle or as a result of insufficient or no weight having been given to a relevant consideration. The discretion to exercise judicial review is not being assessed *de novo* in this Court. The motions judge here did not err in declining to consider the question of reasonable apprehension of lack of institutional independence at this stage.

The essential conditions of institutional independence in the judicial context need not be applied with the same strictness in the case of administrative tribunals. Conditions of institutional independence must take into account their operational context. This context includes that the band taxation scheme was part of a nascent attempt to foster Aboriginal self-government. This contextual consideration applies to assessing whether the bias issue was premature and extends to the entire exercise of judicial discretion. Furthermore, before concluding that the by-laws in question deprive the band taxation tribunals of institutional independence, they should be interpreted in the context of the fullest knowledge of how they are applied in practice. The reasonable person, before making a determination of whether or not he or she would have a reasonable apprehension of bias, should have the benefit of knowing how the tribunal operates in actual practice. Case law has tended to consider the institutional bias question after the tribunal has been appointed and/or actually rendered judgment. It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing

des parties qui comparaissent devant eux tient, à ce stade-ci, de la conjecture. Toute allégation de partialité qui pourrait être avancée doit être traitée au cas par cas.

L'indépendance institutionnelle

Les juges L'Heureux-Dubé, Sopinka, Gonthier et Iacobucci: L'opinion du juge en chef Lamer est acceptée à tous les égards, sauf en ce qui concerne l'absence d'indépendance institutionnelle comme motif permettant de conclure que le juge des requêtes a commis une erreur en exerçant son pouvoir discrétionnaire de manière à refuser le contrôle judiciaire.

En premier lieu, la question de la partialité n'a pas été soulevée comme il se doit en première instance. En second lieu, les cours d'appel doivent faire preuve de retenue à l'égard de l'exercice du pouvoir discrétionnaire qu'a le juge des requêtes de prononcer l'annulation, à moins que la conclusion ne soit déraisonnable ou qu'elle ne soit fondée sur des considérations non pertinentes ou erronées, ou sur un principe erroné, ou à moins qu'elle ne résulte de ce qu'une importance insuffisante, voire nulle, a été attachée à une considération pertinente. Il ne s'agit pas en l'occurrence d'examiner à nouveau l'exercice du pouvoir discrétionnaire en matière de contrôle judiciaire. En l'espèce, le juge des requêtes n'a pas commis d'erreur en refusant de se pencher, à ce stade, sur la question de la crainte raisonnable de l'absence d'indépendance institutionnelle.

Les conditions essentielles de l'indépendance institutionnelle dans le contexte judiciaire n'ont pas à être appliquées avec autant de rigueur aux tribunaux administratifs. Les conditions de l'indépendance institutionnelle doivent tenir compte du contexte opérationnel. Ce contexte comprend le fait que le régime de taxation établi par les bandes s'inscrit dans le cadre d'un début de tentative de favoriser l'autonomie gouvernementale des autochtones. Cette considération d'ordre contextuel s'applique à la détermination de savoir si la question de la partialité est prématurée et s'étend à toute la question de l'exercice du pouvoir discrétionnaire par le juge. En outre, avant de conclure que les règlements en cause privent d'indépendance institutionnelle les tribunaux de taxation des bandes, il convient de les interpréter à la lumière de la connaissance la plus étendue possible de la façon dont ils s'appliquent dans les faits. Avant de déterminer si elle craindrait raisonnablement la partialité, la personne raisonnable devrait avoir l'avantage de savoir comment le tribunal en question agit dans les faits. On constate une tendance dans la jurisprudence à aborder la question de la partialité institutionnelle après que le tribunal a été constitué ou qu'il a en fait rendu jugement. Il

éléments may very well provide a significantly richer context for objective consideration of this institution and its relationships.

Per Lamer C.J. and Cory J.: Allegations of bias arising from the want of institutional independence cannot be avoided by simply deferring to the exercise of discretion by the motions judge. A lack of sufficient institutional independence in the bands' tribunals is a relevant factor which must be taken into account in determining whether the respondents should be required to pursue their jurisdictional challenge before those tribunals. Although the larger context of Aboriginal self-government informs the determination of whether the statutory appeal procedures established by the appellants constitute an adequate alternative remedy, this context is not relevant to the question of whether the bands' tribunals give rise to a reasonable apprehension of bias at an institutional level. Principles of natural justice apply to the bands' tribunals and are not diluted by a federal policy of promoting Aboriginal self-government.

Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. Natural justice requires that a party be heard by a tribunal that not only is independent but also appears to be so. The principles for judicial independence accordingly apply in the case of an administrative tribunal functioning as an adjudicative body. A strict application of the principles for judicial independence is, however, not always warranted. Therefore, while administrative tribunals are subject to these principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) depends on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office. Cases dealing with the security of the person require a high level of independence and warrant a stricter application of the applicable principles. Here, the bands' administrative tribunals are

ne serait pas prudent de formuler des conclusions définitives sur le fonctionnement de cette institution en se fondant uniquement sur le libellé des règlements administratifs. La connaissance de la réalité opérationnelle de ces éléments manquants pourrait offrir un contexte nettement plus riche dans lequel peut être entrepris un examen objectif de l'institution en question et des rapports qui la caractérisent.

Le juge en chef Lamer et le juge Cory: On ne saurait éluder les allégations de partialité résultant de l'absence d'indépendance institutionnelle simplement en déférant à la décision qu'a rendue le juge des requêtes dans l'exercice de son pouvoir discrétionnaire. Si les tribunaux des bandes n'ont pas suffisamment d'indépendance institutionnelle, il s'agit là d'un facteur pertinent qui doit être pris en considération pour déterminer si les intimées devraient être tenues de poursuivre leur contestation en matière de compétence devant ces tribunaux. Bien que le contexte plus large de l'autonomie gouvernementale des autochtones entre en jeu dans la question de savoir si les procédures de contestation établies par les appelants en vertu de la loi constituent un autre recours approprié, ce contexte n'est pas pertinent lorsqu'il s'agit de savoir si les tribunaux des bandes suscitent une crainte raisonnable de partialité institutionnelle. Les principes de justice naturelle s'appliquent aux tribunaux des bandes et la politique fédérale visant à favoriser l'autonomie gouvernementale des autochtones n'entraîne aucune dérogation à ces principes.

L'indépendance judiciaire est un principe reconnu depuis longtemps dans notre droit constitutionnel; elle fait également partie des règles de justice naturelle même en l'absence de protection constitutionnelle. La justice naturelle exige qu'une partie reçoive une audience devant un tribunal qui non seulement est indépendant, mais qui le paraît. Les principes en matière d'indépendance judiciaire s'appliquent en conséquence dans le cas d'un tribunal administratif lorsque celui-ci agit à titre d'organisme juridictionnel. Toutefois, l'application stricte des principes en matière d'indépendance judiciaire ne se justifie pas toujours. Par conséquent, bien que les tribunaux administratifs soient assujettis à ces principes, le critère relatif à l'indépendance institutionnelle doit être appliqué à la lumière des fonctions que remplit le tribunal particulier dont il s'agit. Le niveau requis d'indépendance institutionnelle (c.-à-d. l'inamovibilité, la sécurité financière et le contrôle administratif) dépend de la nature du tribunal, des intérêts en jeu et des autres signes indicatifs de l'indépendance, tels les serments professionnels. Lorsque la sécurité de la personne est en cause, un haut niveau d'indépendance s'impose et une application plus stricte

adjudicating disputes about property taxes and a more flexible approach is clearly warranted.

Even given a flexible application of the principles for judicial independence, a reasonable and right-minded person, viewing the whole procedure in the assessment by-laws, would have a reasonable apprehension that members of the appeal tribunals are not sufficiently independent. Three factors lead to this conclusion: (1) the complete absence of financial security for members of the tribunals; (2) the complete absence of security of tenure (in the case of Siska), or ambiguous and therefore inadequate security of tenure (in the case of Matsqui); and (3) the fact that the tribunals, whose members are appointed by the Band Chiefs and Councils, are being asked to adjudicate a dispute pitting the interests of the bands against outside interests. Effectively, the tribunal members must determine the interests of the very people, the bands, to whom they owe their appointments. These three factors in combination lead to the conclusion that the tribunals lack sufficient independence in this case; any one factor in isolation would not necessarily lead to the same conclusion.

Although the allegations of an absence of institutional impartiality were premature, the allegations surrounding institutional independence were not. The two concepts are quite distinct. It is mere speculation to suggest that members of the tribunals will lack impartiality, since it is impossible to know in advance of an actual hearing what these members think. In assessing the institutional independence of the appeal tribunals, however, the inquiry focuses on an objective assessment of the legal structure of the tribunals, of which the by-laws are conclusive evidence. The by-laws merely afford the Band Chiefs and Councils the discretion to provide institutional independence. It is inappropriate to leave issues of tribunal independence to the discretion of those who appoint tribunals.

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By Lamer C.J.

Applied: *R. v. Lippé*, [1991] 2 S.C.R. 114; **considered:** *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403; *Terrasses Zarolega Inc. v. Régie*

des principes pertinents se justifie. En l'espèce, les tribunaux administratifs des bandes règlent les différends en matière d'impôt foncier, de sorte qu'une plus grande souplesse est manifestement justifiée.

Même dans l'hypothèse de l'application souple des principes en matière d'indépendance judiciaire, une personne sensée et raisonnable qui considérerait dans son ensemble la procédure prévue dans les règlements d'évaluation craindrait raisonnablement que les membres des tribunaux d'appel ne soient pas suffisamment indépendants. Trois facteurs conduisent à cette conclusion: (1) il n'y a absolument aucune sécurité financière pour les membres des tribunaux; (2) ou bien l'inamovibilité n'est pas du tout prévue (dans le cas de la bande Siska), ou bien elle ne l'est que de façon ambiguë et, partant, inadéquate (dans le cas de la bande de Matsqui); (3) les tribunaux, dont les membres sont nommés par les chefs et conseils de bande, se voient appelés à statuer sur un litige où les intérêts des bandes s'opposent à des intérêts étrangers. Dans les faits, les membres des tribunaux ont à se prononcer sur les intérêts de celles-là même (les bandes) auxquelles ils doivent leur nomination. La combinaison de ces trois facteurs mène à la conclusion que les tribunaux d'appel ne sont pas suffisamment indépendants en l'espèce; un seul de ces facteurs, pris isolément, n'aurait pas nécessairement entraîné la même conclusion.

Bien que les allégations quant à l'absence d'impartialité institutionnelle soient prématurées, celles concernant l'indépendance institutionnelle ne le sont pas. Il s'agit de deux concepts tout à fait distincts. C'est de la pure conjecture que de taxer de partialité les membres des tribunaux, car il est impossible de savoir ce qu'ils pensent avant que l'audience n'ait effectivement lieu. Toutefois, en appréciant l'indépendance institutionnelle des tribunaux d'appel, l'accent doit être mis sur un examen objectif de leur structure juridique, que les règlements administratifs établissent de façon concluante. Les règlements ne font que conférer aux chefs et conseils de bande le pouvoir discrétionnaire d'accorder l'indépendance institutionnelle. Il ne convient pas que la question de l'indépendance d'un tribunal soit assujettie au pouvoir discrétionnaire de ceux qui en nomment les membres.

Jurisprudence

Citée par le juge en chef Lamer

Arrêt appliqué: *R. c. Lippé*, [1991] 2 R.C.S. 114; **arrêts examinés:** *Abel Skiver Farm Corp. c. Ville de Sainte-Foy*, [1983] 1 R.C.S. 403; *Terrasses Zarolega*

des installations olympiques, [1981] 1 S.C.R. 94; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to:** *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *MacBain v. Lederman*, [1985] 1 F.C. 856; *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552; *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

By Major J.

Considered: *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; **referred to:** *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230.

By Sopinka J. (dissenting)

Harelkin v. University of Regina, [1979] 2 S.C.R. 561; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Alex Couture Inc. v. Canada (Attorney-General)* (1991), 83 D.L.R. (4th) 577, leave to appeal refused, [1992] 2 S.C.R. v; *MacBain v. Lederman*, [1985] 1 F.C. 856; *Mohammad v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363.

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Loi sur les Indiens, L.R.C. (1985), ch. I-5 [mod. ch. 17 (4e suppl.)], art. 2(1)*a*), 83(1)*a*), (2), (3), (4), (5), (6).
Loi sur l'évaluation, L.R.N.-B. 1973, ch. A-14.
Municipal Board Act, S.S. 1988-89, ch. M-23.2.
Property Assessment By-law [règlement Matsqui], art. 27 A), B), C), D), 32 A)(1), (2), (3), (4), G), J), 35 A)(1), (2), (3), (4), B), C), 49 A), annexe 10.

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APPEAL from a judgment of the Federal Court of Appeal, [1993] 2 F.C. 641, 153 N.R. 307, [1994] 1 C.N.L.R. 66, allowing an appeal from a judgment of Joyal J., [1993] 1 F.C. 74, 58 F.T.R. 23, striking out an application for judicial review. Appeal dismissed, L'Heureux-Dubé, Sopinka, Gonthier and Iacobucci JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1993] 2 C.F. 641, 153 N.R. 307, [1994] 1 C.N.L.R. 66, qui a accueilli l'appel interjeté contre un jugement du juge Joyal, [1993] 1 C.F. 74, 58 F.T.R. 23, qui avait annulé une demande de contrôle judiciaire. Pourvoi rejeté, les juges L'Heureux-Dubé, Sopinka, Gonthier et Iacobucci sont dissidents.

Arthur Pape and *Alisa Noda*, for the appellants Matsqui Indian Band and Matsqui Indian Band Council.

Arthur Pape et *Alisa Noda*, pour la bande indienne de Matsqui et le conseil de la bande indienne de Matsqui.

John L. Finlay and *Fiona C. M. Anderson*, for the appellants Siska Indian Band and Siska Indian Band Council, Kanaka Bar Indian Band and Kanaka Bar Indian Band Council, Nicomen Indian Band and Nicomen Indian Band Council, Shuswap

John L. Finlay et *Fiona C. M. Anderson*, pour les appelants la bande indienne Siska et le conseil de la bande indienne Siska, la bande indienne Kanaka Bar et le conseil de la bande indienne Kanaka Bar, la bande indienne Nicomen et le con

Indian Band and Shuswap Indian Band Council, Skuppah Indian Band and Skuppah Indian Band Council, Spuzzum Indian Band and Spuzzum Indian Band Council.

Norman D. Mullins, Q.C., and *W. A. S. Macfarlane*, for the respondents.

Leslie J. Pinder, for the intervener.

The judgment of Lamer C.J. and Cory J. was delivered by

LAMER C.J. —

I. Factual Background

In 1988, amendments to the *Indian Act*, R.S.C., 1985, c. I-5, as amended by R.S.C., 1985, c. 17 (4th Supp.), came into force which enable Indian bands to establish their own by-laws for the levying of taxes against real property on their reserve lands. These amendments came about after extensive consultations and negotiations between the federal and provincial governments, and representatives of Aboriginal peoples.

The appellants are Indian bands with reserves in British Columbia. Their cases have been heard concurrently at all levels and turn on essentially identical facts. In 1992, pursuant to the new tax assessment provisions of the *Indian Act*, the appellants each developed taxation and assessment by-laws which were implemented following the approval of the Minister of Indian Affairs and Northern Development. The appellant Matsqui Band's assessment by-law provides for the assessment of all real property within the reserve, the preparation of an assessment roll, the giving to all persons concerned of notices of assessment, the appointment of Courts of Revision to hear appeals from the assessments, the appointment of an Assessment Review Committee to hear appeals from the decisions of the Courts of Revision and, finally, an appeal on a question of law to the Federal Court, Trial Division from the decisions of the

seil de la bande indienne Nicomen, la bande indienne de Shuswap et le conseil de la bande indienne de Shuswap, la bande indienne Skuppah et le conseil de la bande indienne Skuppah, la bande indienne de Spuzzum et le conseil de la bande indienne de Spuzzum.

Norman D. Mullins, *c.r.*, et *W. A. S. Macfarlane*, pour les intimées.

Leslie J. Pinder, pour l'intervenante.

Version française du jugement du juge en chef Lamer et du juge Cory rendu par

LE JUGE EN CHEF LAMER —

I. Les faits

En 1988, sont entrées en vigueur des modifications apportées à la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, modifiée par L.R.C. (1985), ch. 17 (4e suppl.). Ces modifications, qui habilitent les bandes indiennes à prendre des règlements administratifs prévoyant l'imposition de taxes sur les biens immeubles situés dans leur réserve, ont fait suite à de longues consultations et négociations entre les gouvernements fédéral et provinciaux et les représentants des peuples autochtones. 1

Les appelantes sont des bandes indiennes dont les réserves sont situées en Colombie-Britannique. Leurs causes ont été entendues simultanément à tous les paliers et portent sur des faits essentiellement identiques. En 1992, conformément aux nouvelles dispositions de la *Loi sur les Indiens* concernant l'évaluation en matière de taxation, chacune des appelantes a élaboré des règlements de taxation et d'évaluation, qui sont entrés en vigueur après leur approbation par le ministre des Affaires indiennes et du Nord canadien. Le règlement d'évaluation de l'appelante la bande de Matsqui prévoit l'évaluation de tous les biens immeubles situés dans la réserve, la préparation d'un rôle d'évaluation, la remise d'avis d'évaluation à toutes les personnes concernées, l'établissement de tribunaux de révision pour entendre les appels formés contre les évaluations, la constitution d'un comité de révision des évaluations pour entendre les 2

the intent of the legislator rather than on interpretation of" isolated provisions.

B. *May the appeal tribunals established under the Indian Act determine whether the respondents' land is "in the reserve"?*

In this case, the respondents are challenging the jurisdiction of band tax assessors. Section 83(1)(*a*) of the *Indian Act* allows Aboriginal bands to tax land "in the reserve". Land which is not in the reserve cannot be taxed, and is therefore beyond the jurisdiction of the tax assessors. As with all taxation schemes, tax assessors must make a preliminary determination that something is subject to taxation. In this case, the respondents' land was placed on the taxation rolls of the appellant bands because tax assessors made a preliminary determination that the land was "in the reserve".

It is not controversial that the Federal Court, Trial Division is authorized to review the determination by the assessors that the respondents' land is "in the reserve". Sections 18.1(1), (3) and (4) of the *Federal Court Act* clearly authorize the Federal Court, Trial Division to undertake judicial review on jurisdictional matters. This gives statutory effect to the principle, stated by Beetz J. in *Bibeault*, *supra*, at p. 1086 that where what is at issue is a legislative provision limiting the powers of a tribunal, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

What is controversial between the parties in this case is the question of whether the appeal tribunals themselves may entertain questions going to jurisdiction. The respondents argued forcefully that jurisdictional issues can only be determined by superior courts, and not by administrative bodies.

It is now settled that while the decisions of administrative tribunals lack the force of *res judi-*

sur l'interprétation» de dispositions législatives isolées.

B. *Les tribunaux d'appel constitués en vertu de la Loi sur les Indiens peuvent-ils déterminer si le terrain des intimées est situé «dans la réserve»?*

En l'espèce, les intimées contestent la compétence des évaluateurs de la bande. Or, l'al. 83(1)*a*) de la *Loi sur les Indiens* autorise les bandes indiennes à imposer les immeubles situés «dans la réserve». Ceux qui se trouvent à l'extérieur de la réserve ne sont pas imposables et ne relèvent donc pas de la compétence des évaluateurs. Comme c'est le cas sous n'importe quel régime de taxation, les évaluateurs doivent d'abord décider qu'un bien est assujetti à l'impôt. En l'espèce, le terrain des intimées a été porté aux rôles de taxation des bandes appelantes parce que les évaluateurs avaient décidé à titre préliminaire que ce terrain était situé «dans la réserve». 20

La Section de première instance de la Cour fédérale est, sans conteste, autorisée à contrôler la décision des évaluateurs selon laquelle le terrain des intimées est situé «dans la réserve». En effet, les par. 18.1(1), (3) et (4) de la *Loi sur la Cour fédérale* habilitent clairement la Section de première instance à entreprendre le contrôle judiciaire relativement à des questions de compétence. On y retrouve donc l'expression législative du principe, formulé par le juge Beetz dans l'arrêt *Bibeault*, précité, à la p. 1086, selon lequel, si le litige porte sur une disposition législative qui limite les pouvoirs d'un tribunal, une simple erreur lui fait perdre compétence et donne ouverture au contrôle judiciaire. 21

En ce qui concerne les parties en l'espèce, la question en litige est de savoir si les tribunaux d'appel peuvent eux-mêmes connaître de questions touchant la compétence. Les intimées ont soutenu énergiquement que ces questions sont du ressort exclusif des cours supérieures et ne relèvent pas de la compétence des juridictions administratives. 22

Or, il est maintenant établi que les décisions des tribunaux administratifs n'ont certes pas l'autorité 23

cata, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

24 In *Abel Skiver Farm Corp. v. Town of Ste-Foy*, [1983] 1 S.C.R. 403, the question before this Court concerned whether the appellant's lands were "lands under cultivation" within the meaning of s. 523 of Quebec's *Cities and Towns Act*, and thereby entitled to special tax treatment. Assessors for the town decided that the lands did not fall into the special category. Although the *Cities and Towns Act* included a special appeal procedure, the appellant sought to proceed directly to the courts for a determination of whether his lands were "under cultivation". Thus, this case bears important similarities to the case at bar. Beetz J. reached the following conclusion at p. 437:

> In my view, these provisions are sufficiently general to allow a taxpayer like the appellant to complain of the roll as drawn up on the ground that the roll deprives it of the exemption to which it is entitled under s. 523 of the *Cities and Towns Act*, and the members of the council or the board of revision must take this complaint under consideration.
>
> With such a complaint before them, the members of the council or the board of revision cannot avoid making a decision without compromising the integrity of their administrative functions. They must therefore respond in order to exercise the latter in accordance with the law, as much as they are able to do and as everyone must do.
>
> However, they cannot make an error in this regard, because their administrative authority depends on the correctness of the reply which they give to these questions of law. If they make an error, they remain subject to the superintending and reforming power of the Superior Court.
>
> Further, when they respond, they exercise a function which is incidental to their administrative duties, and it does not follow from the fact that they must comply with the law and have occasion to express that law that they must do so as would a court of law. Their response accordingly does not have the final nature of *res judicata*.

de la chose jugée, mais que ces tribunaux peuvent néanmoins examiner les limites de leur compétence. Évidemment, leurs décisions à cet égard ne doit être entachée d'aucune erreur et, en règle générale, les cours de justice ne font pas preuve de beaucoup de retenue à l'égard de telles décisions.

Dans l'arrêt *Abel Skiver Farm Corp. c. Ville de Sainte-Foy*, [1983] 1 R.C.S. 403, notre Cour devait déterminer si la terre de l'appelante était une «terre en culture» au sens de l'art. 523 de la *Loi des cités et villes* du Québec, et devait, de ce fait, bénéficier d'un traitement fiscal particulier. Les estimateurs de la ville ont décidé que la terre en question ne tombait pas dans la catégorie spéciale. Bien que la *Loi des cités et villes* prévoyait une procédure d'appel particulière, l'appelante a tenté de saisir directement les cours de justice pour qu'elles décident si sa terre était ou non «en culture». Il s'agit donc d'une affaire qui présente des analogies importantes avec la présente espèce. Le juge Beetz est arrivé à la conclusion suivante, à la p. 437:

> À mon avis, ces textes sont suffisamment généraux pour permettre à un contribuable comme l'appelante de se plaindre du rôle tel que préparé au motif que ce rôle le prive de l'exemption à laquelle il a droit en vertu de l'art. 523 de la *Loi des cités et villes*, et les membres du conseil ou du bureau de revision doivent prendre cette plainte en considération.
>
> Saisis d'une pareille plainte, les membres du conseil ou du bureau de revision ne peuvent s'abstenir de statuer sans compromettre l'intégrité de leurs fonctions administratives. Ils doivent donc répondre afin d'exercer celles-ci en observant la Loi, autant qu'il leur est possible et comme il incombe à tous.
>
> Mais ils ne peuvent se tromper à ce sujet car leur compétence administrative dépend de l'exactitude de la réponse qu'ils apportent à ces questions de droit. S'ils se trompent, ils demeurent assujettis au pouvoir de surveillance et de contrôle de la Cour supérieure.
>
> D'autre part, quand ils répondent, ils exercent une fonction incidente à leurs fonctions administratives et, du fait qu'ils doivent observer la Loi et ont l'occasion de l'exprimer, il ne s'ensuit pas qu'il leur appartient de la dire comme une cour de justice. Leur réponse n'a donc pas le caractère définitif de la chose jugée.

TAB L

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Order CRTC 2010-168

Route reference : 2009-411

Ottawa, 22 March 2010

Reference to the Federal Court of Appeal – Commission's jurisdiction under the *Broadcasting Act* to implement a negotiated solution for the compensation for the fair value of private local conventional television signals

In A group-based approach to the licensing of private television services, *Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010, the Commission set out its determinations with respect to a group-based approach to the licensing of private local television services, including the determination that a value for program distribution regime is necessary to ensure the fulfillment of the policy objectives set out in section 3 of the* Broadcasting Act *(the Act). However, the Commission did not determine the legal issue as to whether it has the jurisdiction under the Act to implement a negotiated solution for compensation for the fair value of private local conventional television signals. Consequently, the Commission determined that it would refer the matter to the Federal Court of Appeal. Accordingly, in this order, the Commission refers this question to the Court for hearing and determination and requests disposition of the matter on an expedited basis.*

Introduction

1. Section 3(2) of the *Broadcasting Act* (the Act) states that the Canadian broadcasting system constitutes a single system that is to be regulated by a single independent public authority, the Canadian Radio-television and Telecommunications Commission. Section 5(1) of the Act requires the Commission to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) of the Act."

2. The Commission is given broad powers under the Act to fulfill its mandate, including the power to issue broadcasting licences on such conditions as it deems appropriate for the implementation of the broadcasting policy set out in section 3(1) of the Act and to require broadcasting distribution undertakings (BDUs) to carry, on such terms and conditions as it deems appropriate, programming services specified by the Commission. The Commission is also given the power by section 10 of the Act to make regulations respecting a number of subjects including: the carriage of any foreign or other programming services by distribution undertakings; the resolution, by way of mediation or otherwise, of any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertaking; and such other matters as it deems necessary for the furtherance of its objects.

3. In fulfilling this mandate, the Commission has created a comprehensive regulatory regime to ensure that each part of the broadcasting industry contributes to the fulfillment of the policy objectives in the Act. For example, the Commission has:

- imposed a series of obligations on programming undertakings, including quotas for the exhibition of, or expenditure on, Canadian programming;
- constructed rules regarding what programming services BDUs are required or permitted to distribute, including a requirement that certain BDUs distribute local television stations and other services as part of the basic package provided to all customers (i.e., mandatory carriage);
- mandated wholesale fees for the distribution of particular specialty services, with a rate that is, in some cases, set by the Commission or, in other cases, negotiated between the parties; and
- created a system to protect the exclusive broadcast rights of local television stations in their markets by requiring a BDU to delete a programming service it distributes that is comparable to that of the local television station (i.e., program deletion) and, in some circumstances, substitute the comparable programming of the local television station being broadcast simultaneously over the deleted signal (i.e., simultaneous substitution).

4. The Commission applies these existing regulatory obligations to a different extent in different circumstances in a manner that is fluid and continues to adapt to changing circumstances. For example, the Commission has permitted parties, by conditions of licence, to negotiate alternative solutions to the program deletion obligations, which have been incorporated into the regulatory regime.

The Proceeding

5. In *Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television*, Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009 (as revised by Broadcasting Notice of Consultation CRTC 2009-411-3, 11 August 2009), the Commission initiated a proceeding to examine a group-based approach to the licensing of television services, including an examination of whether or not a negotiated solution for the compensation for the fair value of local conventional television signals is appropriate. In the course of the proceeding, the Commission received 289 comments addressing these issues. The Commission also received approximately 12,000 comments as part of a campaign organized by Rogers Communications Inc.

6. Among the issues raised during the proceeding was whether the Commission has the jurisdiction under the Act to implement a negotiated solution for compensation for the fair value of private local conventional television signals. BDUs presented a legal

opinion that such a regime would establish a new copyright in the signals of private local television stations and is therefore *ultra vires* the powers of the Commission. Local television stations presented legal opinions that such a regime falls within the Commission's jurisdiction under the Act to supervise and regulate the broadcasting system.

7. In *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010 (Broadcasting Regulatory Policy 2010-167), the Commission set out its determinations regarding the proceeding on a group-based approach to private local television licensees, including the determination that a negotiated solution for the compensation for the fair value of private local conventional television programming services is necessary for the fulfillment of the policy objectives set out in section 3 of the Act. The Commission also provided the following outline of how such a regime would function:

    1. Licensees of private local television stations would choose whether i) they will negotiate with BDUs for the value of the distribution of their programming services, failing which they will be able to require deletion of the programming they own, or for which they have the exhibition rights, from all signals distributed in their market, or ii) they will continue to benefit from existing regulatory protections.

    2. Licensees of private local television stations would make their choice by a date set by the Commission, and this choice would be valid for a fixed term of three years.

    3. If a licensee of a private local television station chose option i):

        a) It would forego all existing regulatory protections related to the distribution of local television signals by BDUs, whether imposed by regulation or by condition of licence, including mandatory distribution and priority channel placement on analog basic, and simultaneous substitution.

        b) BDUs would be required, at the request of private local television stations, to delete any program owned by the licensee of that local television station or for which it has acquired exclusive contractual exhibition rights.

        c) Deletions would be exercised against the signal of any programming undertaking distributed by the BDU, whether foreign or domestic, affiliated or not, including that of the private local television station making the request.

        d) It could negotiate with a BDU for a fair value in exchange for the distribution of its programming service in lieu of the deletion rights set out in b) and c). This compensation could be monetary, non-monetary (e.g., simultaneous or non-simultaneous substitution, carriage arrangements, marketing and promotion), or both, and could be negotiated on an individual station basis or as part of a broader negotiation with entire ownership groups.

e) Parties to the negotiation would be given a fixed period after the date on which the licensee of a private local television station chose option i) to conclude negotiations, during which the existing regulatory protections would continue to apply. This period which could be shortened or extended by agreement between the parties.

f) The Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request.

4. If the licensee of a private local television station chose option ii), all regulatory protections for private local television stations in force at the time the choice is made, and as amended during the term in which that choice is valid, would remain in force. These would include, where provided by regulation or by condition of licence: mandatory carriage, priority channel placement on analog basic, program deletion, simultaneous or non-simultaneous substitution, and any payments to individual stations or funds approved by the Commission in lieu of these obligations, including payments for carriage of distant signals as provided for in Broadcasting Public Notice 2008-100.

8. In Broadcasting Regulatory Policy 2010-167, the Commission did not determine the legal issue as to whether or not it has the jurisdiction under the Act to implement such a regime. Rather, the Commission stated that it would refer the matter to the Federal Court of Appeal for determination. Consequently, the decision to implement the regime will only be concluded after the Court has ruled on this reference.

9. With respect to its determination to refer this matter to the Federal Court of Appeal, the Commission stated the following in its regulatory policy:

> There is, however, a significant potential impediment to the implementation by the Commission of this market-based resolution. In response to Broadcasting Notice of Consultation 2009-411, the Commission was presented with two legal opinions, both worthy of consideration. One submitted that the Commission had the requisite authority to introduce a regime of broadcast regulation that would have the effect of requiring appropriate negotiation, such as those described above, between broadcasters and BDUs; the other took the position that BDUs have a continuing right to disseminate the broadcaster's over-the-air signal without negotiation or remuneration by virtue of the provisions of the *Copyright Act*.
>
> While the Commission has found that it is necessary to provide the licensees of private local television stations with the right to negotiate a fair value for the distribution of their programming services by BDUs, it

recognizes that there is a valid dispute between parties over the Commission's legal authority to impose such a regime. Therefore, given the importance of the question to the ability of the Commission to ensure that the objectives of the Act are met, and the continuing need for certainty in dealing with the approaching group licensing renewals, the Commission has decided to refer the question of its jurisdiction to the Federal Court of Appeal (the Court). The Commission will request disposition of the issue on an expedited basis.

Order

10. Pursuant to section 18.3 and section 28(2) of the *Federal Courts Act*, the Commission therefore orders that the following question of law be referred to the Federal Court of Appeal for hearing and determination and requests disposition of the matter on an expedited basis:

> Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act,* to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

Procedure

11. The Commission expects to receive directions on procedure from the Federal Court of Appeal. The Court's directions on procedure will be available at the Court, and copies can be obtained from the Commission on request.

Secretary General

TAB M

SUPREME COURT OF CANADA

CITATION: R. *v.* Conway, 2010 SCC 22

DATE: 20100611
DOCKET: 32662

BETWEEN:

Paul Conway
Appellant
and
Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health
Respondents
- and -
Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 104)
Abella J. (*McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring*)

R. *v.* CONWAY

Paul Conway *Appellant*

v.

Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health *Respondents*

and

Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society *Interveners*

Indexed as: R. *v.* Conway

2010 SCC 22

File No.: 32662.

2009: October 22; 2010: June 11.

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

Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of

Charter — If so, whether accused entitled to remedy sought — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental heath centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the treatment impasse plaguing C's detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does,

and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn

a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under s. 24(1) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to s. 24(1) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

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Considered: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986] 1 S.C.R. 981; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; **referred to:** *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family and Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835;

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Swain*, [1991] 1 S.C.R. 933; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

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APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), 2008 ONCA 326, 90 O.R. (3d) 335, 293 D.L.R. (4th) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Marlys A. Edwardh, *Delmar Doucette*, *Jessica Orkin* and *Michael Davies*, for the appellant.

Hart M. Schwartz and *Amanda Rubaszek*, for the respondent Her Majesty the Queen.

Janice E. Blackburn and *Ioana Bala*, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and *Elichai Shaffir*, for the intervener the Ontario Review Board.

Paul Burstein and *Anita Szigeti*, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., *Mark G. Underhill* and *Alison Latimer*, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and *Diane Nielsen*, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

ABELLA J. —

[1] The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

[2] There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2).

Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

[3] When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

[4] The first relevant wave of cases started in 1986 with *Mills v. The Queen*, [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*Carter v. The Queen*, [1986] 1 S.C.R. 981; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Smith*, [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director*

of Child, Family and Community Service) v. L. (T.), 2009 BCPC 293, 73 R.F.L. (6th) 455, aff'd 2010 BCSC 105 (CanLII)).

[5] The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. Although *Slaight* did not — and does not — offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 38-40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383, at paras. 20-24).

[6] The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. The legacy of these cases — the *Cuddy Chicks* trilogy — is in their conclusion that specialized 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 (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004]

2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board;* 2005 SCC 16, [2005] 1 S.C.R. 257).

[7] The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

Background

[8] Paul Conway is 56 years old. As a child, he was physically and sexually abused by close relatives. During his twenties, Mr. Conway was twice convicted of assault.

[9] In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

[10] Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

[11] In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's

Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

[12] Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(*b*), 2(*d*), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

> Mr. Conway states that there is little regard for the living conditions under which he is detained and that these factors have a negative impact on his mental and physical health. These conditions include:
>
> a. Construction noise, fumes and dust associated with the renovation of the unit directly below him which affect his peace, tranquillity and convalescence;
> b. Failure to respect his rights, individuality, and expressions of same;
> c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of call restrictions including when he is speaking with legal counsel;
> d. Unfair treatment by staff which manifests in differential treatment towards him compared with other NCR accused individuals detained on the unit; and
> e. Failure to provide for his needs and advocacy for his expressed needs;

. . .

Mr. Conway is currently incarcerated and is subject to infringements on his liberty, safety, dignity and security of his person without due process of the law, including:

a) environmental pollution;

b) noise pollution;

c) arbitrary actions by staff;

d) threats of attack and attacks by inpatients;

e) hostility by staff against him;

f) threats of the use of chemical and mechanical restraints;

g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including emotional, physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health problems and emotional distress;

h) failure to provide an environment which allows him to feel safe on a daily basis;

i) failure to provide an environment where the Rule of Law prevails;

j) failure to provide an environment where Mr. Conway is afforded procedural fairness in respect of any restriction of his liberties;

k) failure to provide an environment which is free of racism;

l) failure to provide [an] environment which is cross-culturally sensitive; and

m) such other and further infringements and violations as counsel may advise and the Board may permit;

These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can benefit therapeutically from the environment.

[13] After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

[14] He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested, but did not formally order, that CAMH establish a "renewed treating team" for Mr. Conway, enrol him in anger management and sexual assault prevention programs, and investigate whether he had sustained brain damage in a car accident more than 30 years ago.

[15] As for Mr. Conway's application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway's *Charter* claims.

[16] Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights.

[17] Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway's detention. This issue was remitted back to the Board.

[18] This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

[19] Section 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[20] We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

[21] The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

[22] All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent

jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

[23] This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The Mills Cases

[24] In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts

and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

[25] The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(*b*) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach *(Mellino*; *Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus,* those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

[26] In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

> Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me that they may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdiction to grant and as they consider appropriate and just in the circumstances. [p. 631]

[27] In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting

damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

[28] For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the "essential character" of Weber's claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to "[a]ny allegation that an employee has been subjected to unfair treatment". Weber's *Charter* claims were therefore found to be within the arbitrator's exclusive jurisdiction:

> [W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.
>
> . . .
>
> . . . it is not the name of the tribunal that determines the matter, but its powers. . . . The practical import of fitting *Charter* remedies into the existing system of tribunals, as McIntyre J. notes, [*in Mills*] is that litigants have "direct" access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

[29] Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

[30] The *Weber* "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Québec (Human Rights Tribunal)*; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

[31] The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board's structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.'s view, inconsistent with the intent and specific provisions

of the Parole Board's statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J. concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

[32] Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

> There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the trilogy should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to enforce a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a specific applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provision will not be applied on *Charter* grounds. [para. 64]

[33] Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude

information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

[34] More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, the issue was whether a provincial court judge with jurisdiction under Ontario's *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the *Charter*. McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

> [W]here a legislature confers on a court or tribunal a function that involves the determination of matters where *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. [para. 75]

[35] This approach "promotes direct and early access to *Charter* remedies in forums competent to issue such relief" (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court's role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under s. 24 of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

> Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the 'fullest account of the facts available'. . . .This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

[36] McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

> [F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 82]

[37] McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

[38] In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the

Charter. Again, only the third step of the *Mills* test was considered, and again the tension on display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

> whether Parliament or the legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

[39] Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

[40] This review of *Mills*' progeny gives rise to three observations. First, this Court has

accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin* eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slaight cases

[41] The cases flowing from *Slaight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere. In 1989, *Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to order an employer to write a content-restricted reference letter for an employee and to limit the employer's response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(*b*) of the *Charter*. This Court agreed that the

employer's s. 2(*b*) rights were violated, but a majority concluded that the arbitrator's order was justified under s. 1 of the *Charter*.

[42] Lamer J. explained that it was "not . . . open to question" that the adjudicator's orders were subject to the *Charter*:

> The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis in original; pp. 1077-78.]

[43] *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue) said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188).

[44] In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination,

arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

> [S]tatutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton . . . *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*. [para. 3]

[45] In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

[46] In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2.

L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

[47] The following year, in *Blencoe*, the Court was asked to determine whether the provincial Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

> The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy. . . . The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.
>
> Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the

Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

[48] Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

> The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

[49] While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are "of no force or effect" under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations*

Act, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

[50] La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to "provide a final and conclusive settlement of a dispute". To fulfill this mandate, arbitrators acting under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, an arbitrator must decline to apply it just as a court would.

[51] La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the

benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

[52] In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(*d*) and 15 of the *Charter*, and sought to have it declared to be of no force and effect pursuant to s. 52(1).

[53] In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

> It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial

> determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the *Labour Relations Act.* [Emphasis added; p. 18.]

[54] After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, La Forest J. observed:

> What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle. [Emphasis added; p.19.]

[55] La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

[56] In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that s. 31

of the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

[57] On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues .

[58] In 1996, the constitutional jurisdiction of another statutory body — the Canadian Human Rights Commission — came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. Section 15(*c*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the "normal age of retirement for employees . . . in [similar] positions". The complainants challenged the constitutionality of s. 15(*c*). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

[59] *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it "must be able to address constitutional issues" (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

[60] La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, "logic" demanded that it lacked the ability to assess the constitutionality of the *Canadian Human Rights Act* (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; the tribunals' loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

[61] Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

[62] In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the

Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., "best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*" (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that "administrative tribunals empowered to decide questions of law may consider *Charter* questions" (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

> [c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*. [para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the "'normal age of retirement' defence", since both bodies were empowered to decide questions of law.

[63] In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

[64] Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

[65] Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

[66] As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation", Gonthier J. concluded that "forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings" (para. 29).

[67] In his view, a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. . . .The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

[68] Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

- Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.
- Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

[69] Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals

Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

[70] The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

[71] Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

[72] Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

[73] *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission).* Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act,* R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982.* The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

[74] Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982.* The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

[75] The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

[76] In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French Language*, R.S.Q., c. C-41, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

> As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

[77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

> [E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and

> law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-604; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the

tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies" (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it .

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to this Case

[83] The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

[84] The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused

who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* — the Board's statutory scheme — which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

[85] The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions.

[86] Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542.2(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia*

(Forensic Psychiatric Institute), [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko,* at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

[87] Part XX.1 introduced a new verdict — "not criminally responsible on account of mental disorder" — into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

[88] The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 29). It is well established that the review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the

paramount concern, an NCR patient's liberty interest has been held to be the Board's "major preoccupation" within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 19). The Board fulfills its "primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

[89] Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

> Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> (*a*) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
>
> (*b*) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
>
> (*c*) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board must consider the four statutory criteria:

the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

[90] The Board has a "necessarily broad" discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must "take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system" (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(*a*); *Winko*, at para. 62). On the other hand, if the Board finds that the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

[91] A patient is not a significant threat to public safety unless he or she is a "real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

[92] Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(*b*) and (*c*)). The appropriateness

of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community (s. 672.54(*b*), (*c*); *Penetanguishene*, at paras. 51 and 56).

[93] The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

[94] Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

[95] The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)),

guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report — The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not to be too quick to overturn" a review board's "expert opinion" on how best to manage a patient's risk to the public (*Owen*, at para. 69; *Winko*, at para. 61).

[96] Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

[97] I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital

authority provide an NCR patient with particular treatment (ss. 672.54(*a*) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

[98] Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

> Treatment . . . is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition. . . .
>
> Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour — the mental illness. . . .
>
> Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response.

[99] The Board's duty to protect public safety, its statutory authority to grant absolute

discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all point to Parliament's intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and lead to the conclusion that it would not be appropriate and just in Mr. Conway's current circumstances for the Board to grant him an absolute discharge.

[100] The same is true of Mr. Conway's request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55); it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).

[101] A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

[102] Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

[103] Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

[104] I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

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