AIRD & BERLIS LLP

Barristers and Solicitors

Scott A. Stoll
Direct: 416.865.4703
E-mail: sstoll@airdberlis.com

September 23, 2011

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2329
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Submissions of Haldimand County Hydro Inc.
Board File No.: EB-2011-0063

Please find attached two (2) hard copies of the Submissions of Haldimand County Hydro Inc. ("HCHI") for proceeding EB-2011-0063 pursuant to Procedural Order No. 3.

An electronic version of the Submissions has been filed through the Board's Regulatory Electronic Submission System ("RESS") today.

If there are any questions, please contact the undersigned at you convenience.

Yours truly,

AIRD & BERLIS LLP

Scott A. Stoll

SAS/hm
Encl.

cc: Jeong Tack Lee, Grand Renewable Wind LP
James Cho, Samsung Renewable Energy Inc.
George Vegh, McCarthy Tetrault LLP
Kirstyn Annis, McCarthy Tetrault LLP
Don Boyle, Corporation of Haldimand County
Woodward McKaig, Sullivan, Mahoney LLP

Frank Sommer, Haldimand Federation
Anne-Marie Reilly, Hydro One Networks Inc.
Carl Burrell, IESO
Glenn Zacher, Stikeman Elliott LLP
Nathan Armstrong
Bruce Genery
Lee & Geraldine Russell
Norm & Valerie Negus
Quinn Felker
Lonny Bomberry, Six Nations Council of the Six nations of the Grand River

ONTARIO ENERGY BOARD

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

AND IN THE MATTER of an application by Grand Renewable Wind LP (the "Applicant") for an order under section 92 and subsection 96(2) of the OEB Act granting leave to construct an electricity transmission line and related facilities.

SUBMISSIONS OF HALDIMAND COUNTY HYDRO INC.

PART I. INTRODUCTION

1) Haldimand County Hydro Inc. ("**HCHI**") is the licensed electricity distributor in Haldimand County where Grand Renewable Wind LP (the "**Applicant**" or "**Grand Renewable**") proposes to construct the transmission line and ancillary facilities (the "**Project**") that are the subject of this Application. The ancillary facilities include the interconnection station, two transition stations and a collector substation. Grand Renewable is in the process of developing a 153.1MW wind farm. The recently created independent Grand Renewable Solar LP[1] is proposing to construct a 100MW groundmount solar project and connect it to the Project. Both the wind farm and the solar farm will connect to the transformer station which connects to the transmission line.

2) The route selected by the Applicant for the 230kV transmission line is virtually all within the Haldimand County Road right-of-way ("**ROW**"). The transmission line is approximately 19km long with approximately 18.3km above ground on 28m high metal poles and the remainder is to be installed underground.

3) HCHI specifically requests:

   a) The Board, prior to granting leave to construct in this Proceeding, seek evidence from the Ontario Power Authority ("**OPA**") for a regional transmission plan that incorporates the two additional nearby projects, Summerhaven Wind Energy Centre

[1] At the time of the Application, Grand Renewable Solar LP was identified at Exhibit A, Tab 2, Schedule 1, para. 6 as a "yet-to-be-formed special purpose entity".

("**Summerhaven**") and the Port Dover and Nanticoke Windfarm ("**PDNW**") and the potential for a coordinated, common location transmission connection;

b) That any leave to construct that is granted include in the Order appropriate conditions to:

i) Minimize the impact and potential impact upon HCHI;

ii) Ensure the Applicant compensates HCHI for any costs/expenses incurred by HCHI as a result of the Project; and

c) A decision that the Applicant either requires a transmitter license or that the Board may upon request at some future date direct the Applicant to provide access to HCHI or Hydro One Networks Inc. ("**Hydro One**") provided such access is determined to be in the public interest.

4) The submissions will deal with the background and conduct of this proceeding; address the HCHI participation and position regarding this application; the issues identified by the Board and HCHI's submissions regarding the approach to the interpretation of the OEB Act.

PART II. BACKGROUND AND PROCEEDING

5) On February 28, 2011 the Applicant filed the Application with the Board. However, the Applicant went on to request the Board not commence the proceeding. An excerpt from the Applicant's letter is provided below:

> "While the Application is being filed today, the Applicant requests that Board delay issuing a letter of direction directing the Applicant to issue the Notice of Hearing and Application until the Applicant has confirmed certain preliminary stakeholder arrangements."

6) The Applicant indicated that at Exhibit A, Tab 2, Schedule 1, para. 19, that it planned to hold a second public information session in May 2011 and anticipated receiving a decision from the Ministry of the Environment regarding the renewable energy approval in September 2011.[2]

7) On April 13, 2011, six weeks after the original Application was filed, the Applicant filed an updated Application.

8) A map showing the approximate location of the transmission line was included at Exhibit B, Tab 3, Schedule 2. The map was devoid of any specific information regarding the alignment of the proposed transmission line within the municipal ROW or the extent of impact on the HCHI distribution system. The Application also included the cross-section of the tangent steel pole (Exhibit B, Tab 4, Schedule 5) which made no provision for joint use.

9) As such, HCHI was left to without sufficient information to understand how the project would impact HCHI and its ratepayers.

[2] Applicant Response to HCHI IR#5(f) anticipates filing the renewable energy approval in October 2011 and receiving a decision in January 2012.

10) HCHI applied for intervenor status which was granted by the Board. In response to the Notice of Application many individuals sought to participate in the proceeding. The Board issued a Decision and Order Granting Intervenor Status on July 12, 2011.

11) On April 29, 2011, HCHI filed a notice of motion, see attached **Tab A**[3], in both EB-2011-0027 and EB-2011-0063 requesting the Board conduct a generic proceeding regarding certain issues related to distribution, transmission and renewable generation. The Board acknowledged the importance of the issues raised by HCHI and indicated that many of the issues may be dealt with as part of the Regional Transmission Planning process. Further, the Board indicated that some issues were premature to consider in April 2011. An excerpt of the Board's Decision and Order on the Motion is provided below:

> "As a result, the panel is of the view that even if the Board was prepared to consider these issues on a generic basis, it would be premature to do so at this time.
>
> The Board notes that some or all of these issues may properly be considered as part of the Board's Regional Planning initiative, but makes no determination as to whether or to what extent the issues may be accommodated within the scope of that exercise."[4]

12) In HCHI's view, several of the potential issues that HCHI raised in its Notice of Motion have subsequently made their way into EB-2011-0027 and EB-2011-0063 and are before the Board as part of the leave to construct proceeding and the issues raised by the Board in Procedural Order No.3.

13) HCHI intervened in this proceeding to ensure that the proposed Project did not adversely impact HCHI, its distribution system or customers. Locating transmission facilities in close proximity to distribution facilities can lead to issues affecting reliability and quality of service in the form of stray voltage, induced currents, ground potential rise, arcing and additional restrictions for operating and maintaining the distribution facilities.

14) In EB-2011-0027 HCHI had retained Kinectrics, a technical consultant, to understand the potential issues from installing a 230kV transmission line in a municipal ROW in close proximity to its distribution system. HCHI filed evidence on May 30, 2011 (the "**Kinectrics Report**") prepared by Kinectrics which confirmed the very real potential that the transmission lines could adversely impact the distribution system. The Kinectrics Report analysed both a 2km and a 20km scenario of parallel transmission and distribution facilities.

15) This Application, EB-2011-0063, located within a municipal ROW has the high potential to raise many of the same concerns that were present in EB-2011-0027.

16) As this Proceeding has evolved, HCHI has raised issues that are of general importance to the regulatory framework governing the connection of renewable projects as recognized by the Board in Procedural Order No. 3 wherein the Board stated:

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[3] The Notice of Motion only is appended to these submissions. The remainder of the motion materials are not attached but are available on the Board's website.
[4] EB-2011-0027/EB-2011-0063/EB-2011-0127, Decision and Order on Motion.

This proceeding represents one of the first times since the enactment of the *Green Energy and Green Economy Act* that the Board has considered a leave to construct application from a renewable generation facility. Perhaps not surprisingly, there appears to be some level of disagreement amongst the parties regarding exactly what is within the scope of the proceeding. Although the Board has received a number of submissions (in the form of letters to the Board secretary's office) regarding parties' views on jurisdictional issues, this has not occurred in a structured manner and the Board is not prepared to make any rulings at this time. The Board is prepared, however, to move to the argument phase of the hearing.

Without seeking to limit the extent of parties' submissions, the Board would be assisted by argument addressing the following questions:

1. What are the responsibilities, if any, of the Applicant to provide access to its proposed Transmission Facilities?

2. Are broader transmission planning issues (i.e. beyond the Transmission Facilities proposed in the Application) relevant considerations in this proceeding? What responsibilities does the Applicant have, if any, with respect to broader transmission planning issues?

3. Does the fact that the proposed facilities will be located largely within a municipal right of way have any bearing on the Applicant's obligation regarding future requests for connection?

4. Does section 96(2) permit the Board to consider the impact of the proposed Transmission Facilities on the reliability of the current or future distribution system owned and operated by HCHI?

17) HCHI's concerns include reconciling the overall purpose of the Board and its applicability to the present leave to construct proceedings.

18) The Applicant's proposed project is located within a few kilometres of two other significant renewable energy generation projects: (1) Summerhaven Wind Energy Centre ("**Summerhaven**") and (2) the Port Dover and Nanticoke Windfarm ("**PDNW**"). Summerhaven is the subject of a separate leave to construct proceeding EB-2011-0027.

19) The IESO had strongly recommended that these two projects should have a common connection location for the connection to the Hydro One Networks Inc. transmission grid.

20) Further, the evidence of Hydro One Networks Inc. ("**Hydro One**") in EB-2011-0027, Hydro One Response to IR#2 , see attached **Tab B,** was that a common connection location for the Summerhaven and PDNW projects would cost approximately $10 million less than separately located connections. Hydro One's response to IR#4 included a list of benefits of a common connection.

21) In the response to HCHI IR#2(h), the Applicant stated that it had considered another route for connecting to the Hydro One transmission system that would be even closer than the current proposal to the Summerhaven and PDNW projects. This other route would appear

to provide a viable alternative connection but would need to be co-ordinated by the proponents of the 4 generation projects.

> "At the June meeting of the Applicant, the IESO, OPA, OEB, Hydro One and MEI, all parties expressed a preference for Option 1, Option 4, and Option 6. Option 1 was replaced with Option 5 since it was preferred by the Applicant to remain clear of the NextEra and Capital Power wind generation projects.....
>
> The short-listed three route options (4,5 and 6) were presented to the public at the first GREP Public Meeting in July 2010....."[5]

22) Option 1 would potentially achieve the goal of a coordinated regional transmission connection.

23) However, Option 1 was abandoned, prematurely in the view of HCHI, by the Applicant merely to avoid the Summerhaven and PDNW projects. The inference is the regulatory and contracting regime seemed to be driving renewable generators to behave solely in their own interest – which HCHI acknowledges is not necessarily inappropriate – but to evade a proper integrated planning process. Evading proper planning is not in the public interest. However, the purely private interest did not coincide with the broader public interest mandate or Board objectives incorporated into the OEB Act, section 1.

24) On August 2, 2011, the Applicant filed the final System Impact Assessment, dated May 5, 2011, and the Customer Impact Assessment dated March 23, 2011.

25) On August 25, 2011 HCHI submitted a letter (the "**August Letter**") asking the Board to consider making a request of the Minister of Energy to issue a directive pursuant to the OEB Act, section 28.6.

26) The August Letter included a map, see attached **Tab C**, which showed the transmission and connection facilities of the 4 generating facilities. It also included Option 1, slightly modified which avoid the municipal ROW ("**Modified Option 1**"). The Modified Option 1 would not only achieve a common connection consistent with a regional transmission planning approach but would not result in the unnecessary use of the municipal ROW for transmission facilities.

27) The current proposals have, combined, approximately 28km of 230kv transmission lines and 3 separate connection locations within a few kilometres of each other. The Modified Option 1 would have a single common connection location and less than 25km of transmission line.

28) The Applicant indicates at paragraph 50 of its submissions the following:

> "Transmission planning is carried out on an integrated basis which looks at broad system needs. It is led by the Ontario Power Authority, an independent agency which has a neutral perspective of transmission and generation opportunities and is capable of giving expert advice to the Board that is informed by it view of the public interest in system planning. As the Board noted, "The Board agrees that the starting point for transmission project development should be an informed, effective plan

[5] Applicant Response to HCHI IR#2(h).

> from the province's transmission planner, the OPA."[34] This role could be carried out through an IPSP or other Board proceeding specifically designed for that process. Any such proceeding will attract a range of participants and perspectives."

29) HCHI agrees that integrated transmission planning should occur.

30) HCHI agrees the Ontario Power Authority ("**OPA**") has a major role to play.

31) However, HCHI would note, the OPA has not progressed to receive consideration or approval an Integrated Power System Plan or a Long-Term Energy Plan and therefore must rely upon the authority and direction of the Minister of Energy to direct its activities. Further, the OPA only proposes the IPSP or LTEP, but must come before the Board to seek its approval.

32) As the approval body for the IPSP and leave to construct proceedings, the Board has a major role to play in integrated regional transmission planning..

33) HCHI would note that a regulated utility is required to submit a Green Energy Plan as part of its rate applications. The Green Energy Plan must be reviewed by the OPA and the utility is obligated to provide such evidence to the Board. Such Green Energy Plans include provisions for the coordination of the connection of renewable generating facilities which are typically of a modest capacity.

34) In a situation, such as the present where more than 400MW of renewable generation is seeking connection, the need for a proper review and coordination of the connection is far greater.

35) The only evidence in this Proceeding concerning the OPA is that it attended a meeting in June 2010 and was apparently in favour of 3 routes – including a route that appears to provide greater system benefits – Option 1 – that would at least achieve the co-ordination of the connection of Grand Renewable, Summerhaven and PDNW projects.

36) There is no evidence, to date, which supports the proposed route as the best alternative from a regional planning perspective.

PART III. HCHI POSITION REGARDING THE APPLICATION

37) HCHI does not support locating transmission facilities within a municipal right-of-way. The installation of transmission poles will inhibit the ability of public utilities such as HCHI that rely upon the right-way to provide service to their customers. The Applicant has indicated that it proposes install a 1.5metre diameter caisson[6] with each pole centred 2.2metres from the edge of the right-of-way. When one considers the clearance required around such facilities, approximately 3.75metres of the right-way are required for the transmission line. Where the Applicant intends to install underground transmission, the below grade impact is greater but the above grade impact reduced.

38) As such, HCHI believes the Applicant should be required to demonstrate that its proposal is superior to the abandoned Option 1 and the Modified Option 1.

[6] Applicant response to HCHI IR#1(c), Schedule A.

39) In the present situation, it appears to HCHI that the Applicant specifically discontinued an alternative route, Option 1, that would provide a more optimal transmission connection.

40) HCHI would note that this requirement is consistent with the Applicant Submission, paragraph 17, wherein the Board's consideration in a leave to construct includes:

"Is the proposed project needed and is its routing the best alternative?"

41) HCHI submits this fundamental question has yet to be addressed appropriately in this proceeding. HCHI would note that there has been no follow up opportunity to initial interrogatory phase and so no opportunity to further explain the decision to not consider the alternative.

42) It is HCHI's position there is no obligation upon the Board to grant leave to construct merely because a proposed project would appear to have acceptable impacts when considered in isolation. This would be an overly narrow reading of the public interest considerations as set out in the OEB Act, section 96(2), and potentially inconsistent with the Board's over-arching objectives in the OEB Act, section 1. HCHI will discuss the relationship between the Board's objectives and leave to construct provisions in Part VI below.

43) HCHI is of the view the Board not only has the jurisdiction but must necessarily have the authority to ensure that optimal or integrated planning is performed in establishing infrastructure. HCHI would note that there is a process for the construction of enabling transmission facilities in order permit the coordinated and rational development of the transmission grid while developing renewable generation. HCHI would submit that it would be inconsistent with the OEB Act for the OEB to have a process to ensure transmission facilities are developed appropriately in an enabling scenario but that the OEB would have no such authority in the present scenario.

44) In the present situation, HCHI indicated that the Applicant's "Option 1" appeared to provide a better solution in that it was consistent with the objectives of the Board and integrated system planning. However, HCHI would support the Modified Option 1 that would appear to be an even better alternative. The attached map shows the proximity of the proposed project to the transmission and connection facilities of the other two wind farms.

45) HCHI recognizes there may be situations where there is no alternative to locating the transmission facilities within the municipal ROW. In such situations HCHI is of the view that the transmission facilities should be installed underground to limit the interference with existing and future distribution facilities.

46) In the present circumstances HCHI is of the view that the Applicant should not at this time be granted leave to construct as requested for the current location. Any leave to construct approval should ensure that the facilities will further the broader public interest, without unduly burdening the private interest and should strive to have the least impact possible on HCHI's planned distribution facilities.

47) As such, HCHI submits that the current route should not be approved based upon the current evidence that has been presented. To be clear, HCHI did not just make up an alternative. This alternative was known to the Applicant and discussed with the IESO,

Hydro One, the OPA, the OEB and MOE and supported by such government ministries and agencies.

48) Further, in EB-2011-0027, the IESO strongly recommended a common connection location for the Summerhaven and PDNW projects. It would appear that Hydro One would also favour a common connection location. Given the proximity of the Grand Renewable project a common connection for all projects should have been considered in order to determine if the option provided the "best route available".

Part IV. Easement Agreement

49) In reviewing the Application, HCHI would note that the Applicant only requested approval of the form of agreement provided in Exhibit B, Tab 3, Schedule 2 ("**Ground Lease**") and not the form of agreement for the Haldimand ROW, Exhibit B, Tab 3, Schedule 3. Given the proposal seeks approval to use the Haldimand ROW for approximately 95% of its proposal, HCHI believes the request should, to be proper, include the Exhibit B, Tab 3, Schedule 3. Further, HCHI believes, for the reasons outlined below, that the Applicant should submit a revised Exhibit B, Tab 3, Schedule 3 consistent with its commitment to not seek exclusivity.

50) HCHI is of the view that an easement is an improper form of agreement for the Applicant to enter into with the municipality. A road user agreement providing rights consistent with the provision of the Electricity Act, section 41(2) through (9), see below, is more appropriate.

> 41. (2) The transmitter or distributor may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1) or a predecessor of subsection (1).
> (3) The transmitter or distributor may enter the street or highway at any reasonable time to exercise the powers referred to in subsections (1) and (2).
> (4) The powers of a transmitter or distributor under subsections (1), (2) and (3) may be exercised by an employee or agent of the transmitter or distributor, who may be accompanied by any other person under the direction of the employee or agent.
> (5) The exercise of powers under subsections (1), (2) and (3) does not require the consent of the owner of or any other person having an interest in the street or highway.
> (6) A person exercising a power of entry under this section must on request display or produce proper identification.
> (7) If a transmitter or distributor exercises a power of entry under this section, it shall,
> (a) provide reasonable notice of the entry to the owner or other person having authority over the street or highway;
> (b) in so far as is practicable, restore the street or highway to its original condition; and
> (c) provide compensation for any damages caused by the entry.
> (8) Subject to clause (7) (c), the transmitter or distributor is not required to pay any compensation in order to exercise its powers under subsections (1), (2) and (3), and the *Expropriations Act* does not apply in respect of anything done pursuant to those powers.

> (9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

51) First, an easement is to be registered against the property identification number and many ROWs do not have such information. It is unclear if such information is available in the present circumstances.

52) HCHI is of the view that there should be no exclusive rights granted to the Applicant. HCHI would note that neither it nor to its knowledge do any other utilities have exclusive rights. The Applicant has agreed to modify its documents to eliminate the exclusivity provisions.[7] HCHI would suggest that a revised draft of the Agreement should be provided by the Applicant for Board approval.

53) Given the statutory restrictions, the Community Vibrancy Fund should not be linked to any such discussion regarding the transmission line. The benefits of the Community Vibrancy Fund are beyond the scope of this leave to construct proceedings.

Part V. HCHI Participation in this Proceeding

54) The Applicant has indicated and insinuated that HCHI has not participated in this proceeding in a forthright manner and that it has been our objective to delay a decision in this proceeding. HCHI categorically disputes these statements and the record supports its position. The Applicant refers to the motion, a reference to surprising the Applicant with late evidence regarding the 27.6kV distribution upgrades and delays to support its position. Given the comments of the Applicant, HCHI feels it has no alternative but to respond directly to each issue.

55) HCHI submits it participation has been appropriate and has contributed to a proper consideration of the relevant issues.

a) Upgrade to 27.6kV

56) Grand Renewable carefully implies that it was not aware of HCHI's ongoing program to upgrade its distribution facilities until the interrogatory phase of the proceeding and that HCHI was tardy in raising such an issue at a late stage in the process.

57) In this proceeding, there was no earlier opportunity for an intervenor to raise an issue than during the first (and to date only) round of interrogatories of the Applicant.

58) HCHI would note there has been no provision in any procedural order for intervenors to file evidence.

59) Following meetings between HCHI and Grand Renewable in the fall of 2010 regarding the project HCHI confirmed its plans in this respect in a letter from HCHI to the Applicant's parent dated December 7, 2010, see **Tab D**. This information is not a recent revelation to the Applicant.

[7] Applicant Submissions, para. 30.

60) Further, these plans were also part of the EB-2011-0027 proceeding. Counsel for the Applicant in this proceeding was also counsel for the applicant, Summerhaven, in EB-2011-0027.

b) Delay

61) The inference that there has been any delay as a result of HCHI's actions in this proceeding or that the Applicant has been adversely impacted is not supported by the record.

62) The Applicant delayed the proceeding by approximately 6 weeks when it requested the Board to defer issue a letter of direction.

63) The Applicant has not yet conducted its second public consultation meeting as part of the renewable energy approval process. The submission of the renewable energy approval will occur at some, as yet unspecified future date. HCHI would note that the provincial government had previously indicated a 6 month processing time for such applications. Further, HCHI would note that due to delays in processing such applications beyond the six month period and other factors, the OPA had offered most generators the option to defer the date of commercial operation by 1 year. The Applicant has indicated that the renewable energy approval application is planned to be submitted in October 2011.[8]

64) As such, the leave to construct proceeding has not been the cause of any delay in the Applicant's project.

c) Issues – Notice of Motion and August Letter

56) HCHI raised issues of concern in both its Notice of Motion, see **Tab A**, and its August 25, 2011 letter to the Board (**Tab C**).

57) Each action was motivated to ensure that proper integrated regional planning occurs. The evidence in EB-2011-0027 from Hydro One is that there are significant additional costs resulting from the parties, Summerhaven and PDNW,

58) Based upon the issues raised, HCHI's submits its actions were entirely appropriate.

59) HCHI would note that its position advocated in the August Letter was supported by Hydro One and is consistent with the position of the IESO. HCHI would note that there is nothing in this proceeding that would serve to increase HCHI's rate base and it has no financial incentive to raise these issues.

PART VI. THE BOARD, ITS ROLE AND APPLYING THE STATUTORY TEST

60) In this section HCHI is providing submissions as to the proper approach to interpreting the relevant legislative provisions. The approach advocated by HCHI will help inform the approach HCHI has taken in responding to the four issues for which the Board is seeking comment.

[8] Response to HCHI IR#5(f).

61) The fundamental issue is involves the Board approach in a leave to construct process to balance the broader public interest and integrated planning with that of the private interest. HCHI submits that the private interests cannot supplant or displace the public interest. The Board is often required to balance such interests in proceedings and the courts have recognized that the Board has the statutory obligation to ensure the public interest is satisfied.

62) Further, HCHI submits that this analysis is already part of the Board's practice in considering whether the route selected was the best alternative.

63) The law has considered the concept of the Board's obligation and determined that the general public interest and the not the local interests or parochial interest govern the Board's actions and decisions. An excerpt from *Union Gas v. Dawn (Township)*[12], Mr. Justice Keith stated for the court, at p. 731 is provided below:

> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act.*
>
> These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served…
>
> Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.
>
> In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

64) HCHI submits that this balancing of interests and ensuring the broader public interest is served is still required even given the revisions to the OEB Act, section 96(2), that have occurred over the past decade.

65) The Applicant's contention that the Board is severely curtailed or restricted in a leave to construct proceeding is not correct and ignores the role, function and purpose of the Board in regulating the electricity industry as set out by statute and recognized by courts which suggest a broad mandate in furtherance of the public interest. Only when one takes a purposive approach to the Board's role can the proper interpretation be given to substantive provisions such as the leave to construct proceedings.

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[12] (1977), 15 O.R. (2d) 722, 2 M.P.L.R. 23 (Div. Ct.) at **Tab E.**

66) The OEB Act, section 1 obligates the Board to be guided by fundamental principals or objectives in carry out its responsibilities, including the responsibilities of deciding to grant leave to construct.

> **1.** (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 protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
>
> 3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
>
> 4. To facilitate the implementation of a smart grid in Ontario.
>
> 5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

67) HCHI would note that the inclusion of such a section is to be given significant weight in the manner in which the statute is to be interpreted. As Ruth Sullivan notes:

> "Purpose statements may reveal the purpose of the legislation either by describing the goals to be achieved or by setting out governing principles or norms. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they carry the authority and weight of duly enacted law. However, like definitions, and application provisions, purpose statements do not apply directly to the facts but rather give direction on how the substantive provisions of the legislation are to be interpreted and applied." [9]

68) Sullivan then goes on to state:

> "Purpose statements play an important role in the modern "program" legislation. Such legislation establishes a general framework within which administrative and legislative power are conferred to achieve particular goals or to give effect to

[9] Sullivan, Ruth, "Sullivan on the Construction of Statutes" Fifth Edition, LexisNexis Canada Inc., c.2008, page 388, **Tab F**.

> particular policies. Purpose statements set out these policies and goals. They give context to the entire Act."[10]

69) As such, when the Board is considering a leave to construct application, it should have regard to and be guided by the principles contained in section 1 of the OEB Act.

70) The Board should not attempt to ignore such principles when interpreting its role. The amendments to section 96(2) should not oust or pre-empt the Board's overall objectives and the Board should understand and read section 96(2) in keeping with the overall purpose of the OEB Act.

71) The OEB Act prohibits a person from constructing a transmission line without an order from the Board granting leave to construct. As such, parliament has indicated that certain infrastructure should not be constructed unless the Board is satisfied that such a project is consistent with the public interest.

72) The Applicant is proposing to construct approximately 19km of 230kV transmission line and a related transformer station and connection station and therefore requires the Board to grant leave.

> 92.(1) No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.

73) It is important to consider the history to the inclusion of the requirements in the evolution of section 96. In 1998, the enactment of the OEB Act as part of the *Energy Competition Act*, *1998* the Board's consideration of the public interest was not modified in the statute. The Board's consideration of the public interest for electricity projects was further informed by regulation.

> 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.

74) In 2003, in response to a dispute regarding certain environmental aspects of a leave to construct application and other governmental approvals, the OEB Act, section 96(2) was subsequently amended.

> 96. (1) 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. 1998, c. 15, Sched. B, s. 96.
>
> (2) In an application under section 92, the Board shall only consider the interests of consumers with respect to prices and the reliability and quality of electricity

[10] Sullivan, Ruth, "Sullivan on the Construction of Statutes" Fifth Edition, LexisNexis Canada Inc., c.2008, page 388, **Tab F**.

> service when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest. 2003, c. 3, s. 66.

75) The OEB Act, section 96(2) was further amended in 2009 to provide support for the use of renewable energy sources. However, this is not an unqualified support but rather where the project is consistent with the policies of the Government of Ontario which should be read to include the statutory objectives of the Board provided in the OEB Act, section 1.

> 96.(1) 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.
>
> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> > 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> >
> > 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

76) The amendments to highlight or emphasize the "price, quality of service and reliability" aspects were a result of a dispute over certain aesthetic environmental considerations of a proposed transmission line and the proper authority for consideration of such a dispute.

77) The question was "Should the Ministry of the Environment or the Ontario Energy Board have final decision-making responsibility for an element of the project that is not intimately connected to the function of the project?" The legislation makes it clear, that in such situations the Board should have deference to the Ministry of the Environment process. It does not oust the over-arching mandate of the Board to consider the public interest or, in the present case, broader planning issues.

78) HCHI submits that its approach to statutory interpretation and not reading the words of section 96(2) in an overly restrictive manner is supported by the words of Sullivan:

> "Judges are here advised not only to interpret legislation so as to promote its purpose but also suppress measures designed to avoid the impact of the legislation and to read words into the scheme, if necessary, to ensure that the legislature's true intent is accomplished."[11]

[11] Sullivan, Ruth, "Sullivan on the Construction of Statutes" Fifth Edition, LexisNexis Canada Inc., c.2008, page 256, see **Tab F**.

79) The courts have recognized at times that it is entirely proper to interpret a statute in this manner and not to give too literal or overly restrictive meaning to the words in a statute.

> "While...the expression "confiscated" is distasteful, one should not permit it to mislead us regarding the purpose of section 25(5). The function of the courts is not to give the legislature lessons intact. Their function, rather, is to attempt to discern what the legislature, however clumsily, was attempting to achieve by the language it used."[12]

80) Further HCHI takes the position that its method of interpretation is more favourable as it drives a solution consistent with the public interest and the Board's over-arching mandate. Where there are two possible interpretations of a statutory provision, the decision maker should opt for an interpretation that is consistent with the legislative intent as noted by Sullivan quoting Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Ltd*.:

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would only legislate for the purpose of bringing about an effective result."[13]

81) HCHI submits the evidence indicates that, from the perspective of the consumer and the public interest, a more optimal solution, Option 1 or the Modified Option 1, may be available and so the current proposal would not be the best alternative. The Applicant has not demonstrated how or why the current alternative is superior to the alternative. It seems antithetical to HCHI that a regulatory scheme to advance the public interest would endorse an inferior option for the very public the Board is intended to protect.

Part VII. Board Issues

1. What are the responsibilities, if any, of the Applicant to provide access to its proposed Transmission Facilities?

82) If a transmitter is not exempted from the obligation to obtain a license pursuant to section 57(b) of the OEB Act, then the section 26 of the *Electricity Act* requires the transmitter to provide non-discriminatory access in accordance with the provisions of that license.

> 26. (1) A transmitter or distributor shall provide generators, retailers and consumers with non-discriminatory access to its transmission or distribution systems in Ontario in accordance with its licence.

[12] *Air Canada v. British Columbia*, [1989] S.C.J. No. 44, [1989] 1 S.C.R. 1161 at 1193 (S.C.C.) see **Tab G**.
[13] Sullivan, Ruth, "Sullivan on the Construction of Statutes" Fifth Edition, LexisNexis Canada Inc., c.2008, page 257, see **Tab F**.

83) HCHI would submit that not having a license does not prohibit the imposition of an obligation to provide access. It is HCHI's position that even where the exemption exists; there may be situations where access can and should be ordered by the Board.

84) HCHI disagrees with the Applicant that O. Regulation 160/99, section 2.2.1, provides a complete bar to providing third party access.

> 2.2.1 Sections 26 and 28 of the Act do not apply to a transmitter or distributor that is exempted from clause 57 (a) or (b) of the *Ontario Energy Board Act, 1998* by section 4.0.1, 4.0.2 or 4.0.3.2 of Ontario Regulation 161/99.

85) The Applicant at paragraph 43, contends there are only 2 circumstances in which the Board's authority to grant access arise. This is incorrect. Section 2.2.1 only serves to clarify that non-discriminatory access is not required – it should not be given wider meaning.

86) First, the obligation to provide access is not merely provided by section 26 of the *Electricity Act* as section 25.36(1), see below, provides a positive obligation for transmitters to provide connection for renewable generators. The exemption provided by O. Reg. 160/99 is not applicable in these circumstances.

> 25.36(1) A transmitter or distributor shall connect a renewable energy generation facility to its transmission system or distribution system in accordance with the regulations, the market rules and any licence issued by the Board if,
> (a) the generator requests the connection in writing; and
> (b) the applicable technical, economic and other requirements prescribed by regulation or mandated by the market rules or by an order or code issued by the Board have been met in respect of the connection.

87) As such, it would appear there is access and non-discriminatory access.

88) It would be inconsistent with the overall legislative scheme for the Applicant to be obligated to provide a connection to a private interest building renewable generation but have no such obligation to serve a licensed utility that has an obligation to provide non-discriminatory access. As such, HCHI submits that non-discriminatory access is not required but that access may be required.

89) Furthermore, there is no suggestion that the Board's power to make an order under section 96 has been curtailed such that the Board would not have the authority to ensure as a condition of being able to build a transmission facility that there is some obligation to provide a connection or access. Again, such an order would have to be in furtherance of the Board's statutory objectives.

90) As such, while the transmitter may avoid having to provide non-discriminatory access, it does not remove the requirement to provide any access where the Board concludes such access is in the public interest.

2. Are broader transmission planning issues (i.e. beyond the Transmission Facilities proposed in the Application) relevant considerations in this proceeding? What

responsibilities does the Applicant have, if any, with respect to broader transmission planning issues?

91) Yes. The Board should not be required to approve a project that does not serve or is contrary to the public interest. While section 96(2) directs the Board to consider certain issues or factors, it does not oust or pre-empt the Board's over-arching mandate or objectives provided in section 1 of the OEB Act.

92) HCHI would note that regional planning for distribution and transmission is in its infancy which in part explains why there is some confusion around this issue. HCHI would note that the Board has initiated a regional transmission planning process and would suggest that the Applicant, where possible should be discussing its projects with area utilities. This is no different than seeking input from stakeholders as required by the environmental assessment or renewable energy approval process.

93) HCHI would note that on the natural gas side, applicants circulate the environmental report for a proposed pipeline to the Ontario Pipeline Coordinating Committee prior to submission to the Board. HCHI sees merit in a regime that connects regional planning with a formal mechanism to solicit and receive comment on future applications.

94) HCHI's position in this respect is consistent with the statement in paragraph 50 of the Applicant's submission, see below, and the Board's obligation to consider whether the route selected is the best alternative which the Applicant acknowledges is part of the Board's consideration.

> "Transmission planning is carried out on an integrated basis which looks at broad system needs. It is led by the Ontario Power Authority, an independent agency which has a neutral perspective of transmission and generation opportunities and is capable of giving expert advice to the Board that is informed by it view of the public interest in system planning. As the Board note, "The Board agrees that the starting point for transmission project development should be an informed, effective plan from the province's transmission planner, the OPA."[34] This role could be carried out through an IPSP or other Board proceeding specifically designed for that process. Any such proceeding will attract a range of participants and perspectives."

95) Finally, the electricity industry and the Board's mandate have a public interest component and the Applicant should be acting in furtherance of the public interest – not necessarily at the expense of the private interest but in a manner that ensure the public interest is not harmed by a project or will burden ratepayers unnecessarily.

3. Does the fact that the proposed facilities will be located largely within a municipal right of way have any bearing on the Applicant's obligation regarding future requests for connection?

96) HCHI submits that the use of public assets in the form of a municipal right of way is a factor for the Board to consider. Space within the ROW is a finite asset relied upon by utilities to serve the public.

97) Permitting a private single purpose interest to use that finite asset at no cost and to have no corresponding obligation to ensure the public interest is furthered would be inconsistent with the legislative scheme. HCHI would note that it has an obligation to provide non-discriminatory access as do natural gas distributors and other utilities. HCHI would also note that natural gas distributors are required to pay for the usage of the public ROWs.

98) HCHI submits that the reliance upon a public asset is another factor that would indicate a broader interpretation of the legislative scheme.

99) HCHI also takes the position that the Board should give priority to the interests of the entity serving the public interest in allocating the municipal ROW.

4. Does section 96(2) permit the Board to consider the impact of the proposed Transmission Facilities on the reliability of the current or future distribution system owned and operated by HCHI?

100) Section 96(2) permits the Board to consider the impact of the proposed Transmission Facilities on the reliability of the current and future distribution system of HCHI. Even if one were to narrowly read section 96(2) there is no restriction that prohibits the consideration of the impact on all utilities. HCHI would submit that the broader consideration is consistent with the legislative scheme and current practice.

101) Projects are not evaluated solely upon the criteria of the current infrastructure but also the planned infrastructures.

102) The System Impact Assessment and Customer Impact Assessment are intended to ensure that the impacts of the new connection on both the transmitter and other customers of the transmitter are known and understood. As such, there is a basis in the current practise for considering the impacts on distributors, a customer of Hydro One, of the proposed project.

103) Grand Renewable is proposing that the transmission facilities be constructed overhead on one side of the road and HCHI facilities will be moved and buried on the other side of the road. HCHI will be burdened with additional costs which HCHI is unable to quantify at this time.

PART VIII. CONCLUSIONS

65) HCHI specifically requests:

a) The Board, prior to granting leave to construct in this Proceeding, seek evidence from the OPA for a regional transmission plan that incorporates the two additional nearby projects, Summerhaven and PDNW and the potential for a coordinated, common location transmission connection;

b) That any leave to construct that is granted include in the Order appropriate conditions to:

i) Minimize the impact and potential impact upon HCHI;

ii) Ensure the Applicant compensates HCHI for any costs/expenses incurred by HCHI as a result of the Project; and

c) A decision that the Applicant either requires a transmitter license or that the Board may upon request at some future date direct the Applicant to provide access to HCHI or Hydro One provided such access is determined to be in the public interest.

66) It would appear to HCHI that common sense and proper statutory interpretation would lead to an integrated planning approach that would better serve the public interest without unduly impacting the private interest of the Applicant.

67) Given public interest and importance of the issues raised by HCHI and the considerable expense incurred by HCHI, it respectfully requests permission to make submissions in respect of costs in this Proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 23, 2011

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street
Suite 1800
Toronto, Ontario
M5J 2T9

Scott Stoll (LSUC #45822G)
Tel: 416.865.4703
Fax: 416.863.1515

Counsel for the Intervenor Haldimand County Hydro Inc.

TAB "A"

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 Summerhaven Wind LP for an Order granting leave to construct a new transmission line and associated facilities for the Summerhaven Wind Energy Centre.

AND IN THE MATTER of an Application by Grand Renewable Wind LP for an Order or Orders granting Leave to Construct new Transmission Facilities within Haldimand County, Ontario.

NOTICE OF MOTION OF THE INTERVENOR

HALDIMAND COUNTY HYDRO INC.

Pursuant to the Ontario Energy Board's Rules of Practice and Procedure (the "**Rules**"), Haldimand County Hydro Inc. ("**HCHI**") will make a motion to the Board for the matter described herein on a date to be determined by the Board at the Board's office located at 2300 Yonge Street, Toronto, Ontario. HCHI does not have a preference for an oral or written consideration of this motion.

THIS MOTION IS FOR:

1) An order or orders of the Board to:
   a) Defer any final decision in EB-2011-0027 and EB-2011-0063 until the Board has conducted a generic proceeding to decide issues of general applicability to the development of transmission lines in municipal rights-of-way ("**ROW**") and to establish principles for distributors, generators and transmitters to guide the methods and

expectations for connections to and expansion of the grid and the efficient delivery of electricity;

b) To establish procedures for the publication, notice, participation and scheduling such proceeding; and

c) Provide such other relief as the Board deems just and reasonable.

THE GROUNDS FOR THIS MOTION

2) Haldimand County Hydro Inc. ("**HCHI**") has been granted intervenor status in EB-2011-0027 and has applied for intervenor status of EB-2011-0063. The Applicants in each proceeding are proponents of wind power projects and have applied for leave to construct 230kV transmission lines in Haldimand County to connect their wind power facilities to the Hydro One Networks Inc. ("**HONI**") transmission network.

3) Each Applicant has proposed to construct significant segments of the proposed transmission line within municipal road allowances. Further, each Applicant has asserted a right to locate the proposed transmission line within the municipal right-of-way pursuant to section 41 of the *Electricity Act, 1998,* S.O.1998, c.15, (Schedule A) (the "**Electricity Act**").

4) HCHI acknowledges that other stakeholders may have an interest in the expansion of the transmission system but HCHI has restricted its comments to issues of interest to HCHI and electricity distributors.

Issues of General Concern

5) Each of the Applications will not connect to the HCHI distribution system but, if approved as currently proposed to use the municipal ROW, will have an impact upon HCHI and potentially, HCHI's ratepayers. The Applications are of importance to the electricity industry and include the following distributor utility related generic issues:

a) Can the OEB order the transmission line to be located underground? And if so, under what circumstances would the OEB make such an order?

b) Are transmitters and distributors permitted to locate poles on both sides of municipal ROWs?

c) If the answer to (b) is "no", are transmitters and distributors required to enter into joint use pole agreements? If so, is what space requirements are to be provided for future users and what form of agreements or rights are to included in such an arrangement?

d) In EB-2011-0063, a form of easement agreement for the municipality is provided. The access to municipal ROWs through the use of an easement agreement may impact the existing rights of electricity distributors and potentially other utilities. Other utilities have rights of access to municipal ROWs but do not have easements. What is the appropriate form and content of land rights that should be granted by a municipality to transmitters in these situations?

e) If the proposed transmission line has the potential to impact the distributor in respect of operating and maintenance costs, how does the distributor properly recover such costs?

f) If the proposed transmission line requires or has the potential to require the distributor to purchase additional capital assets, such as a vehicle, is such an expenditure to be recovered from the generator/transmitter?

g) What quality of service and reliability impacts may result from overhead transmission lines, such as induction and stray voltage;

h) How does the Board's exclusive authority granted by section 19(6) of the OEB Act, see below, reconcile with the Ministry of the Environment's authority to issue a Renewable Energy Approval pursuant to section 47.3 of the *Environmental Protection Act* ("**EPA**")?

> *19(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.*

6) HCHI has provided the preliminary list of issues but is not suggesting these are the only issues and that a proper issues list should be developed during the generic proceeding.

7) HCHI feels that these issues, if not considered in a generic forum, will be revisited on multiple occasions in the future due to the potential for additional generation projects connecting to the transmission grid given the applications and contracts for such projects.

Additional Leave Applications are Likely

8) HCHI is of the view that addition leave to construct proceedings for transmission lines to be located in municipal ROW will arise in the future.

9) HCHI would note that in EB-2011-0063, the Applicant has confirmed its intention to construct several similar facilities at Exhibit A, Tab 1, Schedule 1, page 3, item 11 where it stated:

> "In particular, the Project will contribute a total of 253.1 MW of clean, renewable energy to the provincial electricity grid, and forms part of the Applicant's commitment, in conjunction with its affiliates, to develop 2500 MW of renewable energy in Ontario over the next five years."

10) On April 8, 2010 the Ontario Power Authority ("**OPA**") announced the awarding of 184 Feed-In Tariff Contracts ("**FIT Contracts**"). A copy of the List of Contracts may be found at Exhibit "**A**" to the Affidavit of Mr. Lloyd Payne. The OPA's list of launch projects includes 11 wind power projects that each have a contract capacity of 30MW or more (in some cases more than 100MW) and will likely require a transmission connection. In addition, there are several other wind and solar projects with contract capacities larger than 10MWs which appear to be located in close proximity to several other projects and there may be clusters of projects that require connection to the transmission grid.

11) On April 8, 2010, the OPA issued a second list of projects which were not awarded FIT Contracts but are awaiting the results of the Economic Connection Test ("**FIT Applications ECT**"). This list of projects included 47 wind projects - each with contract capacities in

excess of 30MWs. Again, there are several other wind and solar projects with contract capacities larger than 10MWs which appear to be located in close proximity to other projects and may require connection to the transmission grid. A copy of the list of projects awaiting economic connection test results may be found at Exhibit "**B**" to the Affidavit of Mr. Lloyd Payne. Several of these projects also required an "Enabler Line".

12) On February 24, 2011 the OPA announced the second round of large scale projects to receive FIT Contracts ("**FIT Contracts Second Round**"). This announcement included 3 wind projects with a contract capacity in excess of 30MW. A copy of the list of projects for FIT Contracts – Second Round may be found at Exhibit "**C**" to the Affidavit of Mr. Lloyd Payne.

13) Further, the OPA has other generation procurement processes underway which have and may continue to result in new connections to the transmission system.

Other Jurisdictions, Proper Planning and Expansion of the Grid

14) HCHI is aware that certain jurisdictions, such as British Columbia and Virginia, have taken steps to review the issue of locating transmission lines in ROW. Attached as Exhibit "**D**" to the Affidavit of L. Payne is a copy of the report prepared for the British Columbia Ministry of Transportation titled "*Effects of High Voltage Transmission Line in Proximity of Highways*". This report provides a survey and recommendations regarding the practice of locating transmission lines near highways. This report is available on the Ministry of Transportation website at:

http://www.th.gov.bc.ca/publications/eng_publications/electrical/transmission_line_study.pdf

15) Virginia has also considered the issue of above-ground and underground transmission lines through the Virginia Joint Commission on Technology and Science.

16) However, HCHI is not aware of such guidance for Ontario's more than 80 distributors and 6 regulated transmitters.

17) HCHI is of the view that the request for a generic proceeding is consistent with and would further the Board's agenda for rational, efficient regional planning. A wind power proponent is concerned primarily with obtaining the lowest cost effective manner of connecting the wind project, not the most cost effective long-range evolution of the electricity grid. As such, the incorporation of these types of projects into a regional planning framework would be of benefit to distributors and ratepayers.

18) HCHI would note that on April 1, 2011, the Board announced a consultative proceeding, EB-2011-0043 to provide a framework for regional planning. The purpose of the proceeding is:

> This consultation is intended to develop a regulatory framework for regional planning, having regard to the principles articulated in earlier TSC consultations as well as the following:
>
> - that an optimized solution is desirable as being the lowest cost in the long term;
> - that a coordinated solution is desirable as allowing for a consideration of broader needs and for involvement by a larger set of stakeholders; and
> - that cost responsibility for optimized solutions is attributed in an appropriate manner.

19) The Summerhaven Wind Energy Centre is located in close proximity to the Port Dover and Nanticoke Wind Farm and the IESO recommended that a joint connection facility be utilized. Certainly, a coordinated regional plan would have benefits to ratepayers, utilities and generators.

20) Historically transmission lines have been located in dedicated utility ROW. However, HCHI is of the view that locating transmission facilities in municipal ROW will increasingly be a preferred option and quite possibly the default option for generators as:

a) The *Electricity Act* section 41 provides:

> ***41.*** *(1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it*

considers necessary for the purpose of its transmission or distribution system, including poles and lines.

b) The generator has fewer landowners with whom to negotiate;

c) There is no ability to tax such facilities where locating such lines on private property would require payment to the landowner thus lowering costs for the generator; and

d) It is expected that constructing in a previously disturbed ROW will raise fewer environmental issues.

21) HCHI is of the view that the policy and circumstances of the current market have evolved as the transmission lines associated with generation do not serve the ratepayers in the same manner as that of the traditional rate regulated transmission companies. When the market first opened in 2002 there were fewer than 6 licensed electricity transmitters. New transmitters were licensed to serve remote communities, a furtherance of the general public interest.

22) Traditional rate regulated transmission companies have obligations to provide access to load and generator customers which differ from those of the single purpose transmission asset for a wind power facility. The influx of transmitters may also raise issues regarding the further expansion of the electricity grid and issues of open access to transmission.

23) As such, the analysis and balancing of interests under section 41 may differ today given the different circumstances and policy objectives of the Province and mandate of the Ontario Energy Board.

Scope of Authority for Leave to Construct

24) The Board's scope of authority for leave to construct is limited by section 96(2) of the OEB Act, which is reproduced below:

96. (1) 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.

(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

25) HCHI is of the view the Board must consider the impacts upon HCHI and HCHI's ratepayers even though the transmission system is not connecting to HCHI electricity distribution system.

26) The Board is to consider the quality of service in its review of a leave to construct application. Also, HCHI would suggest that standard incident response capabilities imposed by the Board would lead to a consistent known standard which all such generators, transmitters and distributors would need to meet.

27) In HCHI's limited review of renewable energy approvals much of the information pertains to the wind turbines and very little appears to be related to the transmission lines. HCHI is concerned that without sufficient standards and guidance from the Board issues may arise to the potential detriment of ratepayers.

28) HCHI is concerned that a potential conflict between the Board's power and the Minister of the Environment's power under section 47.3 of the EPA may arise and that the development of guiding principles would reduce or avoid the likelihood of such a conflict.

Other

29) Locating transmission facilities within municipal ROW may impact other utilities and could lead to additional congestion in ROW as well as issues of grounding related to induced or stray voltage.

30) The municipal ROW is a public asset and the use of it by private generators raises different policy considerations in determining the appropriate course of action. For example, how are the rights balanced against the rights of other users of the ROW and those of ratepayers?

31) HCHI has retained Kinectrics, a consulting firm with considerable expertise in the area, to provide technical assistance to its participation in the Applications, and if appropriate, the generic proceeding.

32) HCHI has brought this motion for an orderly consideration of the issues that may arise for the connection of generation projects and the use of municipal ROW. It is felt that a considered approach to the general issues will result in a more efficient review of future specific projects rather than having a specific situation create rules of general application which are given precedential significance with the considered approach of establishing industry standards.

MATERIALS TO BE RELIED UPON

33) HCHI will rely upon the following materials:

a) The Affidavit of Mr. Lloyd Payne sworn April 28th, 2011;

b) The evidentiary record to date in the proceedings EB-2011-0027 and EB-2011-063;

c) The *Ontario Energy Board Rules of Practice and Procedure*;

d) The Board's decisions in other such similar matters; and

e) Such other materials as counsel may advise and this Board will permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

HALDIMAND COUNTY HYDRO INC.

By its Counsel
Scott Stoll

Aird & Berlis LLP
Suite 1800, Box 754
BCE Place
181 Bay Street
Toronto, Ontario M5J 2T9

Tel: (416) 865-4703
Fax: (416) 863-1515
Email: sstoll@airdberlis.com

TO:

THE ONTARIO ENERGY BOARD

Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor, P.O. Box 2319
2300 Yonge Street
Toronto Ontario
M4P 1E4

Tel: 416-481-1967
Fax: 416-440-7656
E-mail:

AND TO: **The Applicant**
Grand Renewable Wind LP
c/o Grand Renewable Wind GP Inc.
55 Standish Court
Mississauga, ON L5R
Attention: Mr. Jeong Tack Lee
Tel: 905-285-1851
Fax: 905-285-1852
Email: leejt@samsung.com

AND TO: **Counsel of the Applicant**
George Vegh
McCarthy Tetrault LLP
Toronto Dominion Bank Tower
66 Wellington Street West
Box 48, Suite 5300
Toronto, ON M5K 1E6

Tel: 416-601-7709
Fax: 416-868-0673
Email: gvegh@mccarthy.ca

AND TO: Kristyn Annis
McCarthy Tetrault LLP
Toronto Dominion Bank Tower
66 Wellington Street West
Box 48, Suite 5300
Toronto, ON M5K 1E6

Tel: 416.601.7624
Fax: 416.868.0673
Email: kannis@mccarthy.ca

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TAB “B”

Hydro One Networks Inc.
8th Floor, South Tower
483 Bay Street
Toronto, Ontario M5G 2P5
www.HydroOne.com

Tel: (416) 345-5700
Fax: (416) 345-5870
Cell: (416) 258-9383
Susan.E.Frank@HydroOne.com

Susan Frank
Vice President and Chief Regulatory Officer
Regulatory Affairs

hydro one

BY COURIER

June 21, 2011

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2700,
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

EB 2011-0027 – Summerhaven Wind LP Leave to Construct a New Transmission Line – Hydro One Networks' Responses to IESO's Interrogatories

Please find attached the responses provided by Hydro One Networks to Interrogatory questions in the above-mentioned proceeding.

A copy of this cover letter and the attached responses have been filed in text-searchable electronic form through the Ontario Energy Board's Regulatory Electronic Submission System and the confirmation slip is also enclosed.

Sincerely,

ORIGINAL SIGNED BY SUSAN FRANK

Susan Frank

Independent Electricity System Operator (IESO) INTERROGATORY #1 List 1

Interrogatory

1. Please provide an estimate of the planned construction timelines for each of the connection configuration options that were considered for connecting the Summerhaven and Nanticoke Port Dover wind projects to Hydro One's transmission system.

Response

During Hydro One's planning stages for both projects, which began in June, 2010 with the filing by both proponents of separate SIA/CIA applications with the IESO, two options were considered: initially, two separate stations, and later a common station. The construction timeline to implement either option would take approximately 100 weeks, with the common station option requiring approximately 2 weeks more for engineering. These timelines assume that all the required approvals are available, including the proponents' Renewable Energy Approval ("REA") and any OEB approvals related to leave to construct and land acquisition.

In the case of the common option, it was recognized in the planning discussions that the time to obtain these approvals would be lengthened, given that both proponents had already begun approvals processes based on having separate stations, and switching to an alternative approach would require amending and re-filing those applications. The incremental time to obtain the required approvals is estimated at a minimum of 9 – 12 months. More detail is provided in later responses.

Independent Electricity System Operator (IESO) INTERROGATORY #2 List 1

Interrogatory

2. Please provide an estimate of the likely costs to provincial transmission customers that are associated with each of the connection configuration options that were considered.

Response

Estimated Network Pool Costs ($M)	
Two Separate Stations	$40.0
One Common Station	$30.0

The estimate provided for the two separate stations is a detailed engineering estimate. The estimate provided for the common station is lower quality, as detailed engineering work on that option was not carried out because it was not selected.

In addition to the above costs borne by provincial transmission customers, additional costs would be incurred for the line work and connection facilities, both of which would be borne by the proponents.

Independent Electricity System Operator (IESO) INTERROGATORY #3 List 1

Interrogatory

3. Of the connection configuration options considered, please confirm whether Hydro One recommended or had any preference for connecting the two wind projects to its transmission system.

Response

After initially raising the option of a common station with the proponents on Sept. 2, 2010, in a subsequent meeting between Capital Power, NextEra Energy, the IESO and Hydro One held on September 27, 2010, Hydro One proposed a common connection station as the preferred alternative.

That meeting took place just after a draft SIA had been issued on September 24, 2010, to one of the proponents. The draft SIA included the IESO's initial recommendation concerning a common station.

The key planning milestones for the projects, all of which occurred in 2010, are shown below:

- SIA/CIA Applications Declared Completed: June 16 & June 25 (Summerhaven & Port Dover)
- Draft SIA issued to proponents: Sept 24 & Oct 3
- Draft CIA issued to proponents: Oct 7 & Oct 14
- Final SIA/CIA Package issued: Nov 8 & Nov 15

In an attempt to mitigate the expected delays to the proponents' schedules associated with switching from the separate to the common station option at a fairly late date in the planning process, and after considerable planning and approvals work (REA, OEB, land, etc.) had already been undertaken on separate stations, Hydro One proposed exploring the possibility of providing a temporary connection. Had a temporary connection been feasible, changing to the common station option could likely have occurred within the required timelines. However, further review by both Hydro One and the IESO identified reliability concerns with this temporary connection, which concerns rendered the common station option infeasible.

On Oct. 21, 2010, one of the proponents advised Hydro One that its preference was to move ahead with the separate stations option, and the planning focus proceeded on that basis from that time.

Independent Electricity System Operator (IESO) INTERROGATORY #4 List 1

Interrogatory

4. If Hydro One recommended or have a preference with respect to question 3 above, to the extent possible, please identify and discuss any efficiency that will be achieved from implementation of the preferred option.

Response

Hydro One's rationale for proposing a common connection station was that it would provide the following benefits:

- lower overall capital cost;
- enhanced reliability;
- reduced environmental impact;
- more efficient use of Hydro One Engineering and Construction Resources; and
- lower future OM&A costs (e.g. maintenance)

Hydro One continues to believe that absent other considerations, a common station would be preferable for the above reasons. However, as the situation now exists and with a temporary connection not available as discussed in Response 3 above, the common-station option would have adverse impacts on the overall schedule and costs of both proponents and Hydro One. In Hydro One's case, engineering activities would be delayed by nine months if a decision were now made to change to a common station. In addition, a significant portion of the engineering work that has been carried out to date on the two separate stations would need to be redone.

For one or both of the proponents, schedule impacts could include the following:

- Filing and processing of a Section 92 application
- Time to redo required field studies (seasonally dependent) and prepare and process an amendment to the REA
- Time to amend the SIA and CIA
- Acquisition of property rights for the additional transmission right-of-way required to connect to a common station
- Construction of the additional transmission line

As noted earlier, the minimum time to complete the steps above is estimated at 9 – 12 months.

The proponents have advised that they could also incur other cost and schedule impacts if a common station option were now to be implemented.

TAB "C"

AIRD & BERLIS LLP
Barristers and Solicitors

Scott A. Stoll
Direct: 416.865.4703
E-mail: sstoll@airdberlis.com

August 25, 2011

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, Box 2329
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Transmission Optimization – Jurisdictional Issues
Board File No.: EB-2011-0027 and EB-2011-0063

We are counsel to Haldimand County Hydro Inc. ("**HCHI**") the local electricity distributor in the County of Haldimand in the above-noted proceedings. We are writing in respect of the current approvals process for renewable energy projects that require the construction of transmission lines which creates silos of responsibility for the Ontario Energy Board ("**OEB**"), the Independent Electricity System Operator ("**IESO**"); the Ministry of the Environment ("**MOE**"), Ministry of Energy and Infrastructure ("**MEI**") and the Ontario Power Authority ("**OPA**").

I want to be clear that HCHI supports the development of clean renewable power and does not oppose any of the wind or solar projects that have been proposed to be constructed. However, HCHI has a concern that the current jurisdiction of the various approval organizations is such that the overall public interest is not being properly served by permitting or worse, effectively mandating, a sub-optimal development of transmission resources.

This situation is evident in the lack of coordination in respect of 3 projects, the Port Dover and Nanticoke Wind Farm ("**PDNW**"), the Summerhaven Wind Energy Centre ("**SWEC**") and the Grand Renewable Wind Project ("**GRWP**"). The SWEC and GRWP have applications currently underway at the OEB seeking leave to construct the transmission lines, proceeding EB-2011-0027 and EB-2011-0063 respectively. In response to interrogatories, see attached, it appears that the current process may actually discourage, rather than encourage, developing a preferred solution.

The current situation gives rise to the following issues: (a) optimizing the connection to the transmission grid; (b) optimizing the routing and expansion of the transmission grid; and

(c) obligations of entities that rely upon the municipal rights of way for their business without charge but may not have any obligation to act in the public interest.

Given the issues raised by the various parties regarding jurisdiction, responsibility, timing of approvals and contractual constraints, HCHI would suggest that a Ministerial Directive pursuant to section 28.6 of the *Ontario Energy Board Act, 1998*,[1] reproduced below, may provide a solution that could adequately address the interests and concerns of the various parties and result in a technically superior, more cost effective and environmentally less impactful resolution.

> 28.6 (1) The Minister may issue, and the Board shall implement directives, approved by the Lieutenant Governor in Council, requiring the Board to take such steps as are specified in the directive relating to the connection of renewable energy generation facilities to a transmitter's transmission system or a distributor's distribution system.
>
> (2) A directive issued under subsection (1) may require the Board to amend the licence conditions of distributors, transmitters and other licensees to take the actions specified in the directive in relation to their transmission systems, distribution systems or other associated systems, including enhancing, re-enforcing or expanding their transmission system or distribution system.

HCHI ask the Board to consider whether it could or should request the Minister to issue a directive as permitted by the section 28.6 of the *Ontario Energy Board Act* to empower the various agencies to develop a better solution for the connection of PDNW, SWEC and GRWP.

Connection

Attached to this letter is a map showing the proposed transmission lines for the SWEC and GRWP. PDNW does not require a transmission line but will also connect to the existing Hydro One Networks Inc. ("**HONI**") transmission system. The map shows the three proposed connection locations to the transmission system occurring within a total distance of less than 15km of each other. The IESO in its System Impact Assessment strongly recommended that PDNW and SWEC have a common connection location. Whether the connection to the same or a different circuit is preferred will be left to the technical experts with the IESO, HONI and the proponents.

The proponents of the SWEC and PDNW have indicated that for reasons of complying with the terms of the OPA contract and consideration of the renewable energy approval it is not possible for them to alter their current proposals and have a combined connection location. The IESO, in particular disagrees with the proponents' position. If the in-service date or process review driving decisions and actions is somewhat arbitrary then HCHI feels

[1] S.O. 1998, c.15 Schedule B.

it is appropriate to question if there is another solution that can address the needs of the various parties.

HONI acknowledged the use of two separate connection stations for SWEC and PDNW will cost significantly more to construct, operate and maintain. It is also apparent from the record that SWEC and PDNW relied upon issues surrounding the OPA contract and the MOE's time to review the renewable energy approval to justify the less than optimal proposal. Given the Board's statutory objectives[2] regarding cost effectiveness and the rational expansion and development of the transmission system, HCHI is of the view that a regulatory gap may currently exist and, if not corrected, could result in decisions that may be less than optimal.

During the course of the OEB proceeding for SWEC, EB-2011-0027, it is apparent that the IESO did not feel it had the jurisdiction to force SWEC and PDNW to a common connection despite the technical superiority of a common connection. Specifically, the IESO noted in EB-2011-0027 in its June 22, 2011 submissions at paragraph 8 the following:

> "It is expected that there will be numerous similar situations going forward, especially given the number of projects that are currently in the pipeline and planned. The IESO's current mandate doesn't specifically empower it to enforce or impose an optimum connection alternative or solution in respect of connection assessment proposals that are carried out by the IESO. Given this gap in the planning process, the IESO would encourage the Board to take a holistic approach to its review and consideration of this issue, with the aim of providing a "balanced" outcome in this proceeding, but more importantly, provide clearer guidance for how such issue should be dealt with in the future when parties are faced with such situations. Also, the IESO encourages the Board, as deemed necessary, to consider the most appropriate regulatory mechanism by which this should be instituted."

During interrogatories in EB-2011-0063, GRWP indicated that it avoided an option that would have located it closer to SWEC. In response to HCHI IR#2(f), GRWP stated:

> "The Applicant does not have the legal right to extend the Summerhaven transmission line. Furthermore, Summerhaven and the Applicant are connecting to different circuits. These circuits were identified in their respective applications to the Feed-in-Tariff program and bind the Applicant and Summerhaven to these particular interconnection points."

Precisely HCHI's point, the existing procurement and regulatory approval system does not cause the desired behavior, the rational expansion of the transmission grid, or maximize the public interest. The provincial regulatory system should encourage efficiency and the optimization of infrastructure.

[2] *Ontario Energy Board Act*, section 1.

Transmission Routing

HCHI's second concern is the selection of routing for transmission lines associated with these renewable energy projects. There is no regulatory body that has direct authority to ensure there is a coordinated approach to transmission projects. In fact it appears from the responses of GRWP that the regulatory system forces entities to avoid cooperation. Of particular note is GRWP response, EB-2011-0063, HCHI IR#2(h) reproduced below:

> "At the June meeting of the Applicant, the IESO, OPA, OEB, Hydro One and MEI, all parties expressed a preference for Option 1, Option 4, and Option 6. Option 1 was replaced with Option 5 since it was preferred by the Applicant to remain clear of the NextEra and Capital Power wind generation projects, generally located in the land area south of Haldimand Road 20 and Concession 7. The initial six route options are shown on the Line Routes map attached hereto as **Schedule B.** In summary, Options 1 and 2 were ruled out to avoid conflict with the NextEra and Capital Power projects."

As evident from the above response, GRWP acknowledged it attended a meeting with representatives of MEI, HONI, the OPA, the IESO and the OEB in June 2010 where such entities expressed a preference for certain transmission options, including a project identified as Option 1 which would be in close proximity to SWEC and PDNW. However, Option 1 was never presented to the public for the reasons stated above. HCHI is of the view that the GRWP discarded Option 1 with a variation to have the line located at approximately the mid-concession, as opposed to within the road allowance, provides a better solution than currently proposed.

The current proposals would result in 3 separate connection locations to the transmission grid and close to 30km of 230kV transmission system. A more coordinated approach would have a single connection location with approximately 22km of transmission line, albeit with two circuits on certain segments of the transmission line. HCHI fail to understand how an option that is preferred by all of the regulatory bodies and appears to provide a technically superior, less costly and less environmentally impactful infrastructure is not mandated or even fostered and encouraged by the regulatory regime.

Public Interest

Both SWEC and GRWP asserted a right to use the municipal right-of-way for the proposed transmission lines and both are asserting that they are exempt from the requirement to obtain a transmission license from the OEB. The Board's role in reviewing the route of a project is established by section 96 of the *Ontario Energy Board Act* and section 41 of the *Electricity Act*.[3]

Section 41 of the *Electricity Act* includes the following provisions:

[3] *Electricity Act, 1998*, S.O. 1998, c.15, Schedule A.

> 41. (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.
>
> (9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.
>
> (10) Subsection (9) does not apply if section 92 of the *Ontario Energy Board Act, 1998* applies.

The Board's jurisdiction to approve a location pursuant to the *Electricity Act* sub-section 41(9) is only restricted by the general purposes and objectives of the OEB. This is unlike the explicit restrictions in section 96 of the *Ontario Energy Board Act* which restrict the scope of the OEB's consideration of leave to construct transmission facilities. In EB-2011-0027 and EB-2011-0063 section 92 does apply and so the Board is called upon to determine extent and manner of its authority given the two statutory imperatives. The Board, arguably, does not have the same jurisdiction to determine the routing where leave to construct is sought as section 96 restricts the consideration of the Board to one of the enunciated criteria.

In the present proceedings EB-2011-0027 and EB-2011-0063, the proponents have applied for two routes. However, when viewed together, it appears that a more optimal solution is available but it appears that absent a Ministerial Directive the Board's authority is circumscribed such that achieving the optimal result may not be possible.

A second issue is whether such organizations should be licensed or regulated by the OEB as a transmitter rather the current situation of being a generator that happens to own transmission and not subject to the same level of regulation by the OEB. Many entities are of the view that the absence of being a licensed transmitter removes any obligation to provide a connection point to a third party. This can hinder the development and expansion of the transmission and distribution system.

HCHI's distribution system requires additional transformer capacity to service the Dunnville area. The proposed GRWP transmission line is located an area that could provide a solution to HCHI's need. However, in the present situation, if there is no obligation on the part of GRWP to connect HCHI then HCHI will be forced into a sub-optimal resolution.

These sections were included in the *Electricity Act* as part of the original restructuring of the electricity industry as part of Bill 35 in 1998. As you are aware, this pre-dates the shift to encourage generation and the widespread development of renewable generation

throughout the province so it unlikely the legislature anticipated that the existing situation would develop.

Concluding Comments

The rational, efficient expansion of the transmission system is integral to the economic well-being of Ontario. In considering the proximity of these projects a technically, financially and environmentally superior project could be developed and should be implemented. However, the various entities appear powerless to ensure such a solution is implemented.

The statutory objectives in the *Ontario Energy Board Act*, section 1, provide overarching considerations for the OEB in making decisions to ensure the public interest is fulfilled. These include the promotion of economic efficiency in generation and transmission of electricity and the use of renewable generation. However, it appears the OEB is unable to ensure the public interest will be best served in the absence of a direction from the Minister.

Therefore, HCHI ask the OEB to consider whether it could or should request the Minister to issue a directive, as permitted by the section 28.6 of the *Ontario Energy Board Act*, to empower the various agencies to develop a better solution for the connection of the PDNW, SWEC and GRWP.

Yours truly,

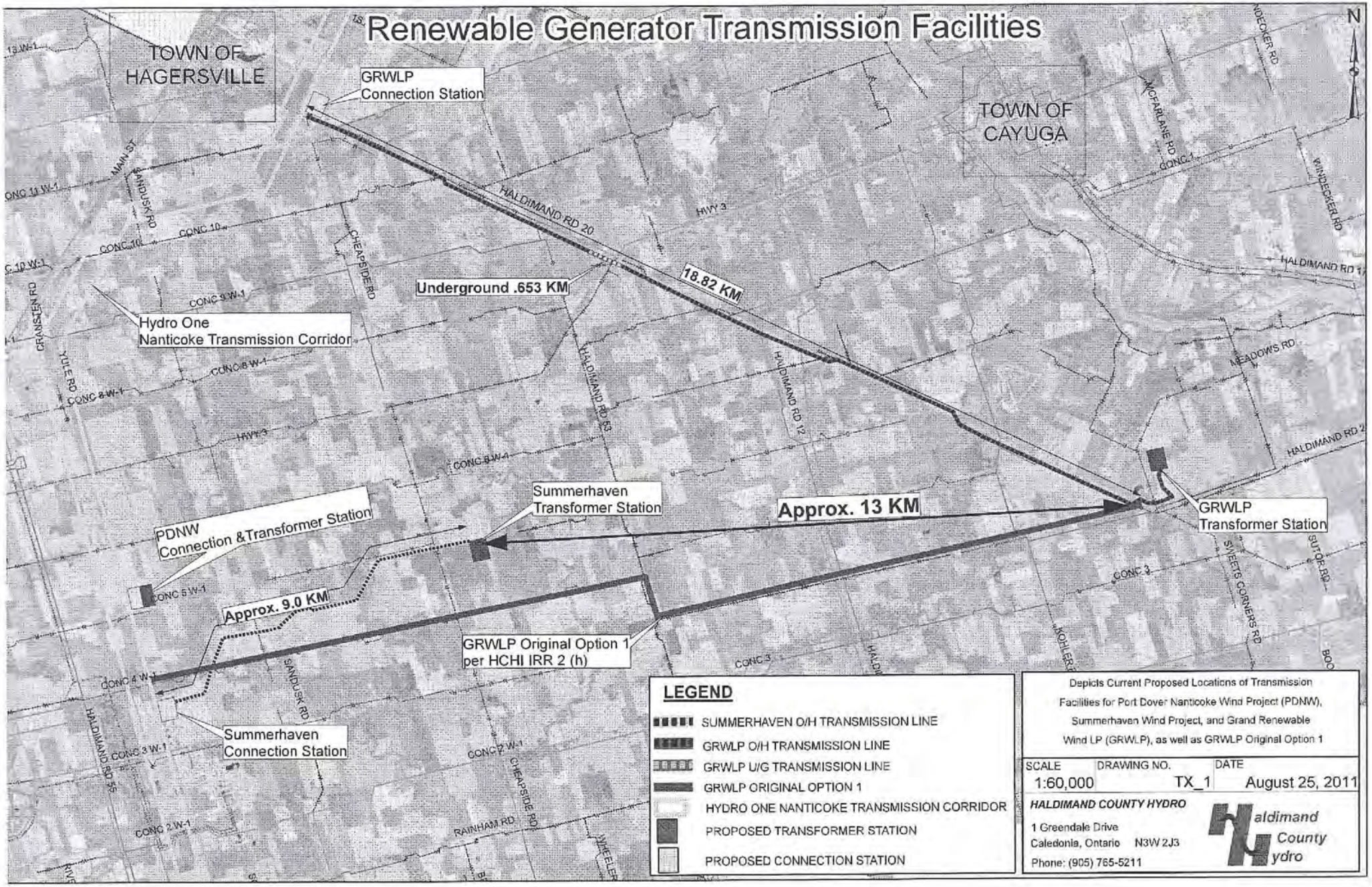
AIRD & BERLIS LLP

Scott A. Stoll

SAS/hm
Encl.

cc: Participants in EB-2011-0063
Participants in EB-2011-0027
Minister Duguid

10793688.1


Renewable Generator Transmission Facilities
TOWN OF HAGERSVILLE
TOWN OF CAYUGA
GRWLP Connection Station
HALDIMAND RD 20
18.82 KM
Underground .653 KM
Hydro One Nanticoke Transmission Corridor
Summerhaven Transformer Station
Approx. 13 KM
GRWLP Transformer Station
PDNW Connection &Transformer Station
Approx. 9.0 KM
GRWLP Original Option 1 per HCHI IRR 2 (h)
Summerhaven Connection Station
HWY 3
CONC 10 W-1
CONC 9 W-1
CONC 8 W-1
CONC 5 W-1
CONC 4 W-1
CONC 3 W-1
CONC 2 W-1
CONC 3
MAIN ST
SANDUSK RD
CHEAPSIDE RD
HALDIMAND RD 53
HALDIMAND RD 12
MEADOW'S RD
SWEETS CORNERS RD
SUTOR RD
KOHLER
RAINHAM RD
WHEELER
MCFARLANE RD
WINDECKER RD
YULE RD
CRANSTEN RD
N
LEGEND
SUMMERHAVEN O/H TRANSMISSION LINE
GRWLP O/H TRANSMISSION LINE
GRWLP U/G TRANSMISSION LINE
GRWLP ORIGINAL OPTION 1
HYDRO ONE NANTICOKE TRANSMISSION CORRIDOR
PROPOSED TRANSFORMER STATION
PROPOSED CONNECTION STATION
Depicts Current Proposed Locations of Transmission Facilities for Port Dover Nanticoke Wind Project (PDNW), Summerhaven Wind Project, and Grand Renewable Wind LP (GRWLP), as well as GRWLP Original Option 1
SCALE 1:60,000
DRAWING NO. TX_1
DATE August 25, 2011
HALDIMAND COUNTY HYDRO
1 Greendale Drive
Caledonia, Ontario N3W 2J3
Phone: (905) 765-5211
Haldimand County Hydro

Interrogatory Responses #2

A. Does the Applicant have any responsibility for coordination of transmission facilities with other wind generation proponents in order to ensure these are constructed in the most cost efficient manner from the perspective of costs absorbed by the transmission pool?

> While the Applicant does not have a formal responsibility to coordinate construction of transmission facilities, the Applicant is always looking for ways to reduce costs and partner with other generators in the area. Based on the geographic location of the Project, it does not appear that coordination with other transmission facilities is possible. This position is supported by the IESO and Hydro One Networks Inc., neither of which has suggested joint facilities.

B. Does the Applicant have any responsibility for coordination of transmission facilities with other wind generation proponents or transmitters (licensed or unlicensed) in order to ensure these are constructed with due regard to optimizing the reliability of the transmission network?

> The Applicant is not responsible for optimizing the reliability of the transmission network, but relies on the IESO to carry out this task. The Applicant will meet all conditions established by the IESO and Hydro One in the SIA and the CIA respectively.

C. Does the Applicant consider itself bound to connect third parties that request connection to the proposed transmission system? If not, why not? If the response depends upon whether the third party request is from a distributor, generator or transmitter, please provide a complete explanation for the different treatments.

> Please see Board Staff IRR# 10 10(i) and 10 (iii). (See Appendix A)

D. Which agency or corporate entity is most responsible for coordination of wind and other generation proponents to ensure that transmission facilities are planned and constructed in the most cost effective and reliable manner?

> The Applicant does not believe that this question falls within the scope of this leave to construct hearing, however the applicant relies on a number of agencies in developing its Project including the Ontario Energy board, which administrative body relies on the IESO and Hydro One Networks Inc.

E. What is the estimated cost of the transmission interconnection station and what portion of this estimate is expected to be contributed by the Applicant?

The Applicant does not have a current estimate of the total costs of the Interconnection Station. However, the applicant will be absorbing 100% of the costs of the Interconnection Station, as per the Transmission System Code.

F. Has the Applicant considered the possibility of extending the Summerhaven transmission line as described in the Preamble above? If yes was this option discussed with Summerhaven, the IESO or Hydro One? If so what reasons were given for or against this alternative?

The Applicant does not have the legal right to extend the Summerhaven transmission line. Furthermore, Summerhaven and the Applicant are connecting to different circuits. These circuits were identified in their respective applications to the Feed-in-Tariff program and bind the Applicant and Summerhaven to these particular interconnection points.

G. If the Applicant has not considered the possibility of extending the Summerhaven transmission line or has not discussed this possibility with the IESO or Hydro One why has this not occurred?

Please refer to HCHI IRR 2(f).

H. Did the Applicant consider other alternatives to the currently proposed transmission project? Please describe each such alternative, why it was not chosen and whether such alternative would have provided improved reliability and quality of service for customers as compared to the current proposal in this Proceeding.

Route selection began by first establishing the end points. The end Point of Common Coupling (PCC) with the Ontario electricity grid was broadly established as a PCC to a 230 kV transmission circuit originating out of the Nanticoke GS, heading northward to Hagersville, east of Haldimand Rd 55, east of Highway 6 and east of Hagersvile. The starting point of the Collector Substation was broadly defined as being located central to the wind and solar siting area and more specifically, close to the Solar Project at the intersection of Mt. Olivet Rd and Haldimand Rd 20. A meeting was held with the IESO, OPA, OEB, Hydro One and MEI in June 2010 and the IESO expressed a preference for the PCC to be made electrically to Circuit N5 of the transmission corridor originating from the Nanticoke GS and at a location that was farther, rather than closer to the Nanticoke GS for protection and control reasons.

Initially, 6 transmission line routes were identified for consideration. Originating at the Collector Substation near Mt Olivet Rd and Haldimand Rd 20, these routes were:

- Option 1: Concession 4 from Haldimand Road 20 to Haldimand Road 55 including a short section along Haldimand Rd 53;
- Option 2: Concession 4 from Haldimand Road 20 to Haldimand Road 53, northward along Haldimand Rd 53 and westward along Concession 7;
- Option 3: Haldimand Rd 20 to Concession 7, westward along Concession 7 to Haldimand Rd 55;
- Option 4: Haldimand Rd 20 to Concession 9, westward along Concession 9 to Haldimand Road 55;
- Option 5: Haldimand Rd 20 to the abandoned Railway corridor, just west of Nelles Corners, westward along the Railway corridor to Haldimand Rd 55;
- Option 6: Haldimand Road 20 from Mount Olivet Road to Hagersville.

At the June meeting of the Applicant, the IESO, OPA, OEB, Hydro One and MEI, all parties expressed a preference for Option 1, Option 4, and Option 6. Option 1 was replaced with Option 5 since it was preferred by the Applicant to remain clear of the NextEra and Capital Power wind generation projects, generally located in the land area south of Haldimand Road 20 and Concession 7. The initial six route options are shown on the Line Routes map attached hereto as **Schedule B.** In summary, Options 1 and 2 were ruled out to avoid conflict with the NextEra and Capital Power projects. Option 3 was also ruled out due to the close proximity to the other projects but also because the number of residents along Concession 7 and the continuous presence of 16kV Haldimand County Hydro overhead infrastructure. These criteria were considered to have a much lower impact on any of the other three remaining Option 4, 5, and 6.

The short-listed three route option (4,5, and 6) were presented to the public at the first GREP Public Meeting in July 2010. A feasibility study had been completed to examine the technology to be employed for the Transmission Line. Preliminary Transmission Line structure concepts were developed. The route selection criteria were also established. Considerations for a private right-of-way route option were explored at this time. The three line route options needed to be narrowed down to a preferred line route option.

Route selection criteria identified included:

- Safety
- Design Technology and Construction Requirements

- Land Ownership and Right of Way considerations
- Environmental Considerations
- Geotechnical Considerations
- Operations and Maintenance
- Time to Construct
- Cost

There is an interdependence of the selection criteria based on the technology used so it was important to determine whether the Transmission Line would be overhead on steel lattice structures or monopole structures vs underground buried cables. The study completed in July presented a comparison of overhead vs underground technology and these results are summarized in Table 1 attached hereto as Schedule C. The feasibility study assumed an ideal 20 km Transmission Line length and also assumed that land acquisition was not a constraint.

It was conclude that if the Transmission Line was to be overhead, it would be best if it followed the Haldimand Rd 20 line route Option 1 and/or Option 6. If the Transmission Line was to be underground, it would be best if the shortest line route was chosen or Option 6 to minimize cost impact to the Project.

Each of the three short-listed route Options were compared by the selection criteria. Issues that made the Applicant pass on Option 4 were failure to meet the CSA clearance requirements on the abandoned ROW. The width of the ROW was only 20 m and, in some areas, only 15 m. Hence, the line route failed the safety criteria for the portion of the route along the abandoned railway ROW.

In the case of Option 5, the same issue as Option 4 was present. The width of the existing Concession 9 ROW is 20 m. The Transmission Line design did not meet the clearances required under the governing CSA Standard and as a result, the line route option failed the safety criteria for the portion of the route along Concession 9.

The last remaining Option, 6, along Haldimand Rd 20, for its entire length, met the safety requirements except where the Transmission Line passes through Nelles Corners. In this case, the required clearances are not met and the Applicant has proposed to bury the Transmission Line in the ROW through Nelles Corners. An alternate route overhead was considered via Dry Lake Road and the abandoned Railway but in both cases the width of the existing ROW was only 20 m and the safety criteria was not met.

Appendix A

Response to Board Staff IRR# 10 (i) and 10(iii)

Please indicate whether the Applicant intends to apply for a transmission licence. If the answer is negative i.e., that the Applicant intends to apply for an exemption from obtaining a transmitter licence, please provide responses to the following:

(i) On what basis can the Board ensure that the TSC provisions and obligations are binding on the Solar Project?

The Applicant is relying on section 4.0.2 of Reg. 161/99 of the TSC to be exempt from obtaining a transmitter licence. This exemption is consistent with both the terms of Reg. 161/99 and past practice at the Board.

Based on such exemption, the Applicant would not be subject to section 3.0.5 of the TSC and therefore the TSC would not be applicable as between the relationship between the Applicant and Grand Renewable Solar LP since the Applicant would not be a licensed transmitter.

As a private party connecting to the Facility, which is essentially a gen-tie or line tap, Grand Renewable Solar LP would not be subject to the TSC. Specifically, under the TSC, and subject to exceptions that are not applicable here, generators are required to construct their own connection facilities (see.s.6.3.3). This is what the Applicant is doing here.

However, pursuant to section 4.1.1 of the TSC, the Applicant and Grand Renewable Solar LP would enter into a connection agreement, similar to the form of connection agreement set out in Appendix 1 – Version B of the TSC.

From a reliability perspective, the Board can rely on the requirements of the SIA and CIA to ensure that all reliability standards will be met, as well as the numerous codes and standards applicable to transmitters. As owner and operator of the Facility, the Applicant will be required to meet the criteria set out in the SIA and CIA, respectively. The SIA in particular references the relevant sections of the TSC that must be complied with in order for the Applicant to commission the Facility.

Furthermore, pursuant to the SIA, the registration of the generation facilities (i.e. the Solar Project and the Wind Project) will need to be completed through the IESO's Market Entry process, the connection applicant (i.e. in this case, the

Applicant) will be required to demonstrate to the IESO that all requirements identified in this SIA report have been satisfied.[1]

(iii) As a privately owned line, does GRW see the possibility that there may be requests for additional connections?

The Applicant does not anticipate that there will be requests for additional connections based on the fact that the geographic area surrounding the Facility will be substantially used by the Solar Project and the Wind Project. In particular, due to cumulative noise impacts, it would not be possible to build another wind farm under current regulations. A typical 10 MW solar farm only requires on average 100 acres to be developed, however any such farm would have to meet the current regulatory requirements for agricultural land.

Furthermore, the Transmission Line is 230 kV, which is only large enough to support the power derived from the Solar Project and the Wind Project.

In the event that requests were made in the future, the Applicant would consider such requests in the context of the regulatory environment at the time and the commercial terms being offered by the third party (for example, and agreement to cover the costs related to transmission infrastructure upgrades).

[1] Final System Impact Assessment, dated May 5, 2011, at p. .

TAB “D”

HALDIMAND COUNTY HYDRO INC.
1 Greendale Drive
Caledonia, ON
N3W 2J3
Tel: (905) 765-5344
Toll Free: (877) 872-2570
Fax: (905) 765-5316

December 7, 2010

Mr. Adam Rosso, P. Eng., M.Sc.
Manager, Business Development
Samsung Renewable Energy Inc.
55 Standish Court
9th Floor
Mississauga ON L5R 4B2

Dear Mr. Rosso:

Re: Grand Renewable Energy Park

Further to the meetings held October 22, 2010 and November 9, 2010 between Haldimand County Hydro and Samsung Renewable Energy Inc. (the Generator) it will be beneficial to establish some high level principles to identify responsibilities and guide the design, construction, and coexistence of the Generator's 34.5 kV collector lines along road rights-of-way and Haldimand County Hydro's distribution lines (to be constructed for operation at 27.6 kV). Accordingly the following principles have been identified to-date by Haldimand County Hydro and may be included in future agreement(s):

Line Construction & Cost Responsibility

1. The Generator will install at its expense all the necessary poles for the full extent of its collector lines along municipal roadways (estimated at 116 km of line).

2. The new pole lines will be constructed on the same side of the road as the existing Haldimand County Hydro lines where these currently exist, unless there is some exceptional purpose in doing otherwise as determined by Haldimand County Hydro.

3. The exact location of the pole line between the edge of the roadway and the edge of the right-of-way shall be determined in cooperation with Haldimand County Hydro for various reasons including the necessity to minimize power interruptions.

4. The Generator will ensure the entire pole line is designed to accommodate two Haldimand County Hydro 27.6 kV circuits in addition to up to two 34.5 kV circuits of the Generator.

5. Where the municipal right-of-way contains an existing Haldimand County Hydro primary distribution line, the Generator shall install, at its expense, a new replacement primary line (including new attachment hardware, 46 kV insulators, and conductor) on the new poles. New phase conductor(s) will be 556 MCM dahlia type and new neutral conductor will be 336 MCM linnet type. The neutral conductor will be consistently installed at an elevation of 25 feet above the crown of the adjacent road.

6. Where the municipal right-of-way contains an existing Haldimand County Hydro transformer and secondary line the Generator will install a new transformer (to be supplied by Haldimand County Hydro at its expense) and spun buss secondary conductor (to be supplied by the Generator at its expense).

7. Haldimand County Hydro will physically energize its new circuit and transfer its customers, all at the expense of the Generator. The Generator will provide a deposit before any physical work begins in an amount to be estimated by Haldimand County Hydro and the actual charges shall be deducted from this deposit as work proceeds. Any cost variation from the deposit will be paid by or refunded to the Generator.

8. After Haldimand County Hydro has completed the transfer of customers to any particular new line section and de-energized the old line, the Generator will remove the old line, including conductor, hardware, insulators, poles, etc., and dispose of these materials at its expense, except transformers which shall be removed by the Generator and returned to Haldimand County Hydro at its Caledonia yard. The Generator will also fill all old pole holes with an appropriate material and restore the property condition similar to adjacent areas.

9. The Generator will negotiate directly with joint use of pole participants Bell Canada, Shaw Cable, etc. for the transfer of joint use of pole assets and the Generator will pay all associated costs.

10. For greater certainty, the Generator will incur direct costs associated with its replacement of Haldimand County Hydro assets and the Generator will be responsible for all costs incurred directly by Haldimand County Hydro in conjunction with the Generator's project including, but not limited to, engineering, consultants, legal, materials, internal labour, and resources.

Stranded Assets

11. Once the extent and location of the overlap (currently estimated at 44 km) of Haldimand County Hydro existing lines and the Generator's new lines is known, Haldimand County Hydro will estimate the value of its existing lines to be removed and the Generator will pay Haldimand County Hydro this value before any physical work begins in order that Haldimand County Hydro is held whole financially and not harmed as a result of the presence of the Generator.

12. Ownership of all poles on municipal rights-of-way and the Haldimand County Hydro 27.6 kV circuits will be transferred by the Generator to Haldimand County Hydro at no cost to Haldimand County Hydro and will be treated as contributed capital by Haldimand County Hydro.

Accounting Records

13. The Generator will track its costs for the purchase and installation of all poles on municipal rights-of-way as well as the cost for the purchase and installation of hardware, insulators, and primary and secondary conductor for the Haldimand County Hydro circuits in accordance with the code of accounts utilized by Haldimand County Hydro and provide these details to Haldimand County Hydro within one (1) month after the end of each calendar year as the project progresses.

Agreements & Easements

14. The Generator will negotiate and sign a Joint Use of Poles Agreement with Haldimand County Hydro for the ongoing use of the poles for the collector circuits of the Generator, similar in form and content to existing Joint Use of Poles Agreements in Ontario.

15. All necessary easements on private property for guy wires, tree trimming, and any other purpose shall be negotiated by the Generator, at its expense, and registered in the name of Haldimand County Hydro.

16. The Generator and the Distributor will enter into an agreement to be developed by the Distributor to effectively include the abovementioned principles as well as other conditions including, but not limited to, standards and drawing requirements, certification of line work, representations and warranties, liability and indemnification.

In addition to the above noted principles the Generator and Haldimand County Hydro may need to address ongoing emergency maintenance of the Generator's 34.5 kV circuits including the hardware, insulators, and conductor. Damages, however caused, cannot be allowed to delay or interfere with the restoration of power to customers and the safety of the public or Haldimand County Hydro employees. If the Generator does not have qualified staff in the vicinity to respond immediately to make emergency repairs, the Generator may wish to consider an agreement under which Haldimand County Hydro could make such emergency repairs.

Haldimand County Hydro has verbally expressed its opposition to the installation of transmission lines within and along road rights-of-way within Haldimand County (other than approximately perpendicular crossings of roadways) and confirms this position accordingly.

We would be happy to meet to discuss any aspect of these principles and look forward to receiving information updates as soon as designs for the collector lines are developed.

Yours truly,
HALDIMAND COUNTY HYDRO INC.

Paul Heeg
Engineering Manager

PH: nm

TAB "E"

Union Gas Ltd. v. Township of Dawn
Tecumseh Gas Storage Ltd. v. Township of Dawn

15 O.R. (2d) 722

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

KEITH, MALONEY AND DONOHUE, JJ.

22ND FEBRUARY 1977.

Municipal law -- By-laws -- Township passing comprehensive zoning by-law -- Approved by Ontario Municipal Board -- One section of by-law dealing with location of gas pipelines -- Whether by-law intra vires township -- Whether Ontario Municipal Board had jurisdiction to approve by-law -- Planning Act, R.S.O. 1970, c. 349, s. 35 -- Ontario Energy Board Act, R.S.O. 1970, c. 312.

Planning legislation -- Zoning by-laws -- Township passing comprehensive by-law -- Approved by Ontario Municipal Board -- One section of by-law dealing with location of gas pipelines -- Whether by-law intra vires township -- Whether Ontario Municipal Board had jurisdiction to approve by-law -- Planning Act, R.S.O. 1970, c. 349, s. 35 -- Ontario Energy Board Act, R.S.O. 1970, c. 312.

In accordance with the powers given to municipal councils by s. 35 of the Planning Act, R.S.O. 1970, c. 349, an agricultural township in south-western Ontario passed a comprehensive zoning by-law which was later amended. Both by-laws came before the Ontario Municipal Board for approval and were approved. A particular section of the zoning by-law, as amended, dealt with the locations in which, inter alia, gas pipelines could be constructed within the municipality. On appeal by two gas companies from the Municipal Board's approval of this section of the by-law, held, the appeal should be allowed. The by-law was ultra vires the municipality and the Municipal Board, therefore, was without jurisdiction to approve it.

The local problems of the township were insignificant when viewed in the perspective of the need for energy to be supplied to millions of residents of Ontario beyond the township borders. A potential not only for chaos but for the total frustration of any plan to serve this need would be created if by reason of powers vested in each municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. The Ontario Energy Board Act, R.S.O. 1970, c. 312, as amended, makes it clear that all matters relating or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands

and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act. These are all matters that are to be considered in the light of the general public interest and not local or parochial interests.

Furthermore, the maxim generalia specialibus non derogant applied. The Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and this must be classified as special legislation. The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as is contained in the Ontario Energy Board Act.

[Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co., [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, apld; City of Ottawa v. Town of Eastview et al., [1941] S.C.R. 448, [1941] 4 D.L.R. 65, 53 C.R.T.C. 193, refd to]

APPEAL from a decision of the Ontario Municipal Board approving two municipal zoning by-laws.

J. J. Robinette, Q.C., and L. G. O'Connor, Q.C., for appellant, Union Gas Limited.

P. Y. Atkinson, for appellant, Tecumseh Gas Storage Limited.

W. B. Williston, Q.C., and J. A. Campion, for respondent, Township of Dawn.

T. H. Wickett, for Ontario Energy Board.

The judgment of the Court was delivered by

KEITH, J.:-- Pursuant to leave granted by this Court on November 24, 1975, upon application made in accordance with s. 95(1) of the Ontario Municipal Board Act, R.S.O. 1970, c. 323, the following questions are submitted to this Court for its opinion:

(a) Is section 4.2.3. of By-law 40 of the Township of Dawn as amended, ultra vires of the respondent municipality

(b) Is the Ontario Municipal Board therefore without jurisdiction to approve the respondent's By-law 40 as amended including section 4.2.3. thereof

The Township of Dawn in the County of Lambton, a rural agricultural township in south western Ontario, passed its first comprehensive zoning by-law on June 18, 1973 (By-law 40), and amending By-law 52 on September 3, 1974.

These two by-laws came before the Ontario Municipal Board on April 16 and 24, 1975, for approval. In addition to the parties appearing in this Court, two other parties interested in the effect of these by-laws were represented at the Municipal Board hearings, but the Ontario Energy Board, one of the most vitally interested parties, inexplicably was not.

The relevant sections of the by-law, as amended, read as follows:

1.1 Section 1 -- Introduction

Whereas the Council has authority to regulate the use and nature of land, buildings and structures in the Township of Dawn by by-law subject to the approval of the Ontario Municipal Board and deems it advisable to do so.

1.2 Now therefore the Council of the Corporation of the Township of Dawn enacts as follows:

Title

2.1 This by-law shall be known as the "Zoning By-law" of the Township of Dawn.

Penalty

3.3.1. Every person who contravenes by-law is guilty of an offence and liable upon conviction to fine of not more than three hundred (300) dollars for each offence, exclusive of costs. Every such fine is recoverable under the Summary Convictions Act, all the provisions of which apply except that the imprisonment may be for a term of not more than twenty-one (21) days.

3.3.2. Where a person, guilty of an offence under this by-law has been directed to remedy any violation and is in default of doing such matter or thing required, then such matter or thing may be done at his expense, by the Corporation of the Township of Dawn and the Corporation may recover the expense incurred in doing it by action or the same may be recovered in like manner as municipal taxes.

Section 4 -- General Use and Zone Regulations

4.1 Uses Permitted.

4.1.1. No land, building or structure shall be used or occupied and no building or structure or part thereof shall be erected or altered except as permitted by the provisions of this by-law.

4.2.3 Except as limited herein nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto, but no appurtenances in the form of a metering, booster, dryer, stipper or pumping station, shall be constructed closer than 500 feet to any adjacent residential or commercial zone or rural residence, except as otherwise provided. All transmission pipelines to be installed from or to a production, treatment or storage site shall be constructed from or to such site to and along, in or upon a right-of-way, easement or corridor located as follows:

(a) running northerly or southerly within 100 feet perpendicular distance from the centre line dividing the east and west halves of a concession lot;

(b) running easterly and westerly within 100 feet perpendicular distance from a concession lot line not being a township, county or provincial road or highway;
(c) across, but not along a township, county or provincial road or highway.

Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

On May 20, 1975, the Ontario Municipal Board released its decision approving of By-law 40 as amended. The reasons are devoted almost exclusively to s. 4.2.3 as amended and the objections of the appellants thereto. To fully understand the approach taken by the Municipal Board, the following extracts from these reasons are quoted [4 O.M.B.R. 462 at pp. 463-6]:

> The Township consists of flat agricultural land with soil rated in the Canada Land Survey as A2. The Board was advised by the representative of the Ministry of Agriculture and Food that the soil is of the Brookstone clay type which requires particular attention to drainage because the land is so flat and that this was the reason it was rated A2 rather than A1. The soil is very productive if properly drained and worked. As drainage is installed the soil responds to cash crops such as corn and soya beans. Drainage is accomplished generally by a grid system of tile drainage lines approximately 40 ft. apart throughout the whole of the Township. These feed into municipal drains which generally follow lot and concession lines and eventually drain to the south-west into the Sydenham River. An example of this method of drainage in the Township is shown on ex. 9, filed. This also indicates the position of the Union Gas Company pipeline which runs in a diagonal direction across the tile drains referred to above. Because the pipeline runs across the drains, a header line is required to direct the flow of the water into the municipal drain.
>
> The evidence indicates that in respect of the pipeline installation on a right of way that may be 60 ft. wide or more, and the header line parallel to it, the farmer in using his equipment must gear down each time before crossing these installations rather than continuing in the usual sweep of the farm land. This time-consuming and inconvenient operation is necessary every time the farmer crosses the pipeline easement area. In addition, the evidence clearly indicated that upon excavation for the pipeline, the soil composition is disturbed and impacted so that growth is hampered for several years until the soil is returned to its normal state. The company indicated in evidence that a new method for laying lines and conserving the topsoil for future development had been devised. This may alleviate the problems, but only time will tell.
>
> . . . . .
>
> The Union Gas Limited (hereinafter to be referred to as "the Company") operates in the south-west part of the Province and has important connections with Consumers Gas Company of Toronto and other systems for whom it stores gas in the summer months for delivery in the winter. The relationship of the Union Gas Limited operation to other systems in the Province are well illustrated on ex. 33, filed. The hub of their system is in Dawn Township from which all the distribution and transmission lines radiate. The

importance of the Company to the municipality is illustrated by ex. 26 filed, which shows that for the years 1970 to 1974 inclusive, the Company paid taxes which formed a significant portion of the total Township levy varying from 24.3% to 30.6% in those years.

The by-law provides that transmission lines are to be laid in corridors 200 ft. wide running along the half lot lines in a north-south direction and along concession lines in an east-west direction, "across but not along a township, county or provincial road or highway", s. 4.2.3.

This corridor concept was the chief source of objection registered by the Company which in evidence indicated that the corridor method of laying their lines would be very costly. This was particularly so when some of the existing lines are now laid in a diagonal direction. When new looping lines are required they are now planned to run generally parallel to the existing lines. If they were to follow the corridors the length of line would be increased, in some cases the diameter of the pipe would have to be greater, and perhaps they might also require additional compression facilities. The additional costs were shown to be large and would result in increased costs to the public.

The Board must weigh the possibility of incurring these increased costs against the need for protecting the farm industry against unnecessary and unplanned disturbance in future years. There was ample evidence to indicate that the need for pipeline installations would increase in the future. There was also evidence to indicate that about 50% of the existing lines are already built in a north-south and east-west direction and that the corridor concept has therefore in fact found practical use in the past (exs. 7 and 27). It was the argument of counsel for the applicant that once the corridors were established the extra cost for looping will not be as significant.

Argument of counsel for the Tecumseh Gas Storage Limited was that the use of land for pipelines was not in fact a use of land as envisaged under s. 35(1)1 of the Planning Act, R.S.O. 1970, c. 349. To bolster this argument counsel referred the Board to the case of Pickering Twp. v. Godfrey, [1958] O.R. 429, 14 D.L.R. (2d) 520, [1958] O.W.N. 230. The Board finds that the instant case can be distinguished from the quoted case which dealt specifically with the making of a quarry or gravel pit as a "land use". In addition, the Board finds that the use of land for installation of a pipeline fits the definition arrived at in the case above quoted [at p. 437] as meaning: "the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself."

The second major argument of counsel was that the municipality has no jurisdiction to deal with pipeline installation because of the existence of the Ontario Energy Board Act, R.S.O. 1970, c. 312, which creates the Ontario Energy Board and gives it jurisdiction to determine the route for a transmission line, production line, distribution line or a

station (s. 40(1)). The Board was also referred to s. 57 of the Ontario Energy Board Act which reads as follows:

"57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

(2) This Act and the regulations prevail over any by-law passed by a municipality."

In the opinion of the Board the above section provides only for the event of a conflict between the Ontario Energy Board Act and any other Act. It does not, nor can it be interpreted to mean that no other Act can be effective. It does not in the opinion of the Board prohibit the municipality from dealing with those matters referred to in s. 35 of the Planning Act.

The major considerations of the Ontario Energy Board are not directed towards planning. It is the responsibility and duty of Council to plan for the proper and orderly development of the municipality having regard to the health, safety, convenience and welfare of the present and future inhabitants of the municipality all within the framework of the Planning Act.

The Board is of the opinion that zoning by-laws must provide for all ratepayers a degree of certainty for reasonable stability. This can be accomplished by passing restricted area by-laws for land use on a planning basis with proper and responsible study and public input. The evidence indicates that the municipality has indeed acted in a reasonable and responsible manner to achieve this end. The consideration for the farming community which forms a large proportion of the municipality is a proper and reasonable one. There is no certainty as to where the Ontario Energy Board may finally decide to place the pipelines required by the criteria they have and will develop. They will, however, have the legislative document before them giving the corporate expression of the municipality to indicate where, on the basis of planning considerations, the pipelines should go. The Ontario Energy Board will then, on the basis of its criteria and the evidence heard, be in a position to give its decision on the ultimate route chosen.

In the meantime, the municipality will by legislation inform all its ratepayers where the pipelines should be laid. The farmer will be able to proceed with the least amount of interference both during construction of pipelines on or near his lands and indeed in his everyday work. The pipeline companies will benefit from this as well. With less interference to the farmer there should be fewer difficulties experienced both in the installation of the pipelines and the servicing and maintenance of the pipelines and the tile drain systems.

By-law 40 as amended was enacted by the Council of the respondent in accordance with the powers given to municipal councils by s. 35 of the Planning Act, R.S.O. 1970, c. 349. The relevant portions of that section read as follows:

35(1) By-laws may be passed by the councils of municipalities:

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

Section 46 of the Planning Act is identical with s. 57(1) of the Ontario Energy Board Act, R.S.O. 1970, c. 312, quoted in the reasons of the Ontario Municipal Board. Fortunately, s. 46 of the Planning Act has no equivalent to s. 57(2) of the Ontario Energy Board Act or the Court might well have been forced to assert that its views prevailed over one or other or both of the statutes.

The appellant Union Gas operates an extensive network of natural gas transmission lines throughout south-western Ontario delivering this energy to customers, both wholesale and retail, extending from Windsor on the south-west, to Hamilton and Trafalgar on the east and Goderich and Owen Sound on the north.

It supplies scores of city, town and village municipalities in this extensive and heavily-populated area and its lines traverse 16 counties which contain upwards of 140 township municipalities. The municipal councils of each of these has the same power under the Planning Act to pass zoning by-laws.

The principal source of the supply of natural gas to Union Gas is the Trans-Canada pipeline which enters the southern part of Ontario in Lambton County just south of Sarnia and connects with a major compressor station of Union Gas in the Township of Dawn. There are four other major compressor stations operated by this appellant, one just west of London, another at Trafalgar between Hamilton and Toronto, one near Simcoe and the fourth south of Chatham. These stations are essential to maintain pressure throughout the pipeline network.

In addition, Union Gas lines serve as feeders for companies like the Consumers' Gas Company serving Metropolitan Toronto and another extensive area of Ontario.

In addition, a significant portion of the source of natural gas transmitted by Union Gas, comes from local wells found in south-western Ontario, a number of which are located in the Township of Dawn.

The company also maintains reserves of gas in natural underground storage fields, some but by no means all of which are also located in the Township of Dawn.

The local wells and the storage fields must all be connected to the distribution lines and the compressor stations.

The second appellant, Tecumseh Gas Storage Limited, is equally affected by the impugned by-law, but no detailed description of its operations was presented to the Court.

I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.

At the conclusion of the argument of this appeal I informed counsel, on behalf of the Court, that the Appeal Book had been endorsed as follows:

> The appeal will be allowed with costs. In view of the importance of the issue, which is raised in this appeal insofar as it relates specifically to the Energy Board's jurisdiction as challenged by a municipal council, and in deference to the lengthy reasons delivered by the Ontario Municipal Board, the Court will in due course, deliver considered reasons which will be the basis of the formal order of the Court.

It is not necessary for my purpose to trace the history and origins of the present Ontario Energy Board Act as amended. Reference to s. 58 of the present Act will suffice to show that this industry has developed over many years under provincial legislation. Section 58 reads as follows:

> 58. Every order and decision made under,
>
> (a) The Fuel Supply Act, being chapter 152 of the Revised Statutes of Ontario, 1950;
>
> (b) The Natural Gas Conservation Act, being chapter 251 of the Revised Statutes of Ontario, 1950;
>
> (c) The Well Drillers Act, being chapter 423 of the Revised Statutes of Ontario, 1950;
>
> (d) The Ontario Fuel Board Act, 1954;
> (e) The Ontario Energy Board Act, 1960;
>
> (f) The Ontario Energy Act, being chapter 271 of the Revised Statutes of Ontario, 1960; or
>
> (g) The Ontario Energy Board Act, 1964.
>
> that were in force on the day the Revised Statutes of Ontario, 1970 is proclaimed in force shall be deemed to have been made by the Board under this Act.

Pursuant to s. 2 [am. 1973, c. 55, s. 2] of the Act, the Ontario Energy Board is composed of not less than five members appointed by the Lieutenant-Governor in Council. It has an official seal, and

its orders which must be judicially noticed are not subject to the Regulations Act, R.S.O. 1970, c. 410.

By s. 14, many of the powers of the Supreme Court of Ontario are vested in this Board "for the due exercise of its jurisdiction".

Section 18 is important having regard to the penalty provisions of the township by-law quoted above. That section reads as follows:

> 18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order.

Section 19 [am. 1973, c. 55, s. 5(1)] vests power in the Board to fix rates and other charges for the sale, transmission, distribution and storage of natural gas.

Under s. 23 [am. ibid., s. 8] the Board is charged with responsibility to issue permits to drill gas wells.

Section 25 prohibits any company in the business of transmitting, distributing or storing gas from disposing of its plant by sale or otherwise without leave, and such leave cannot be granted without, inter alia, a public hearing.

Section 30 provides that any order of the Board may be filed with the Registrar of the Supreme Court and is enforceable in the same way as a judgment or order of the Court.

Part II of the Act deals specifically with pipe lines and I quote s. 38(1), s. 39, s. 40(1), (2), (3), (8), (9) and (10), s. 41(1) and (3), and s. 43(1) and (3):

> 38(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.
>
> . . . . .
>
> 39. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station.
>
> 40(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.
>
> (2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture and Food, the Department of Municipal Affairs, the Department of Highways and such persons as the Board may direct.

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

. . . . .

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 42.

41(1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land.

. . . . .

(3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

. . . . .

43(1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

. . . . .

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over

> a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper.

Finally, with respect to the statute itself, it may not be amiss to again quote s. 57:

> 57(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act.

These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served. In this connection it will be recalled that s. 40(1) speaks of the requirement for filing a general location of proposed lines or stations showing "the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass".

Persons affected must be given notice of any application for an order of the Energy Board and full provision is made for objections to be considered and public hearings held.

In the final analysis, however, it is the Energy Board that is charged with the responsibility of making a decision and issuing an order "in the public interest".

While the result in the case of Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans Mountain Oil Pipe Line Co., [1954] S.C.R. 207, [1954] 3 D.L.R. 481, 71 C.R.T.C. 291, might perhaps be different today, having regard to the facts of that case and subsequent federal legislation, the principles enunciated are valid and applicable to the case before this Court.

In the Campbell-Bennett case, the defendant Trans Mountain Pipe Line was incorporated by a special Act of the Parliament of Canada to construct interprovincial pipe lines. During the course of construction of a pipe line from Acheson, Alberta to Burnaby, British Columbia, some work was done in British Columbia by the plaintiff for which it claimed to be entitled to a mechanics' lien on the works in British Columbia, and to enforce that lien under the British Columbia Mechanics' Lien Act by seizing and selling a portion of the pipe line.

At p. 212 S.C.R., p. 486 D.L.R., Kerwin, J. (as he then was), on behalf of himself and Fauteux, J. (as he then was), said:

> The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

Then at pp. 213-5 S.C.R., pp. 487-9 D.L.R., Rand, J., on behalf of himself and the other three members of the Court, said:

> The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.
>
> The Pipe Lines Act, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tools therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the Railway Act. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tools or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.
>
> Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: Winner v. S.M.T. (Eastern) Limited, [1951] S.C.R. 887, affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realize the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.
>
> In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode

of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purpose of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the Railway Act, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the Pipe Lines Act is sale by the company, not one arising under the provisions of law and in a proceeding in invitum. The general principle was stated by Sir Hugh M. Cairns, L.J. in Gardner v. London, Chatham and Dover Railway (1867), L.R. 2 Ch. 201 at p. 212:--

"When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:--

"The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money ejusdem generis--that is to say, the earnings of the undertaking--must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees--by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking--either prevent its completion, or reduce it into its original elements when it has been completed."

Several further and compelling submissions were made to the Court on behalf of the appellants, but having regard to the first submission which is irresistible and of fundamental importance, I do not think it necessary to deal with all of the arguments advanced.

Reference should be made, however, to two of them. First, attention should be directed to "An Act to regulate the Exploration and Drilling for, and the Production and Storage of Oil and Gas", 1971 (Ont.), c. 94, commonly referred to as the Petroleum Resources Act.

The objects of this legislation can be readily understood by reference to s. 17(1) of the statute, which reads as follows:

17(1) The Lieutenant Governor in Council may make regulations,

(a) for the conservation of oil or gas;

(b) prescribing areas where drilling for oil or gas is prohibited;

(c) prescribing the terms and conditions of oil and gas production leases and gas storage leases or any part thereof, excluding those relating to Crown lands, and providing for the making of statements or reports thereon;

(d) regulating the location and spacing of wells;

(e) providing for the establishment and designation of spacing units and regulating the location of wells in spacing units and requiring the joining of the various interests within a spacing unit or pool;

(f) prescribing the methods, equipment and materials to be used in boring, drilling, completing, servicing, plugging or operating wells;

(g) requiring operators to preserve and furnish to the Department drilling and production samples and cores;

(h) requiring operators to furnish to the Department reports, returns and other information;

(i) requiring dry or unplugged wells to be plugged or replugged, and prescribing the methods, equipment and materials to be used in plugging or replugging wells;

(j) regulating the use of wells and the use of the subsurface for the disposal of brine produced in association with oil and gas drilling and production operations.

The importance of this Act is reflected in s. 18 which reads as follows:

18(1) In the event of conflict between this Act and any other general or special Act, this Act, subject only to The Ontario Energy Board Act [1964], prevails.

(2) This Act and the regulations prevail over any municipal by-law.

Similarly, although it was not referred to in argument, the Energy Act, R.S.O. 1970, c. 148 [since repealed by 1971, Vol. 2, c. 44, s. 32, and superseded by the Energy Act, 1971, and the Petroleum Resources Act, 1971], deals with other aspects of the natural gas and oil industry. The objects of the legislation are set out in s. 12(1) which I need not quote, but again s. 13 of this Act is identical in its wording to s. 18 of the Petroleum Resources Act, 1971, quoted above.

The second of the additional submissions to which reference should be made is based on a cardinal rule for the interpretation of statutes and expressed in the maxim generalia specialibus non derogant. For a discussion of the effect of this rule I will only refer to the case of City of Ottawa v.

Town of Eastview et al., [1941] S.C.R. 448 commencing at p. 461 [1941] 4 D.L.R. 65 at p. 75, 53 C.R.T.C. 193, and to the Dictionary of English Law (Earl Jowitt), at p. 862.

In the case before this Court, it is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

The Planning Act, on the other hand, is of a general nature and the powers granted to municipalities to legislate with respect to land use under s. 35 of that Act must always be read as being subject to special legislation such as in contained, for example, in the Ontario Energy Board Act, the Energy Act and the Petroleum Resources Act, 1971.

In the result, therefore, and in response to the questions with respect to which leave to appeal was granted, this Court certifies to the Ontario Municipal Board:

(a) Section 4.2.3. of By-law 40 as amended, of the Township of Dawn is ultra vires the said municipality, and
(b) The Ontario Municipal Board therefore is without jurisdiction to approve the said by-law as amended in its present form by reason of section 4.2.3. thereof.

This Court further certifies that should the Ontario Municipal Board see fit to exercise the powers vested in it by s. 87 of the Ontario Municipal Board Act, the said By-law 40, as amended, may be approved after deleting from s. 4.2.3. the words "Except as limited herein" at the commencement of the said section and all the words after the word "thereto" in the fourth line of the said by-law as printed down to and including the words "road or highway" in subcl. (c) of the said s. 4.2.3., so that s. 4.2.3. as so approved would read:

> Nothing in this by-law shall prevent the use of any land as a right-of-way, easement or corridor for any oil, gas, brine or other liquid product pipeline and appurtenances thereto.
>
> Nothing herein shall prevent the location of a local distribution gas service line upon any street, road or highway.

The appellants and the Ontario Energy Board are entitled to their costs of this appeal.

Appeal
allowed.

---- End of Request ----
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TAB "F"

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Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

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July 2008

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tion in Canadian statutes and are not mentioned in either the federal or provincial Interpretation Acts.

Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out governing principles or norms. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they carry the authority and weight of duly enacted law. However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation are to be interpreted and applied.

Function of purpose statement. Purpose statements play an important role in modern "program" legislation.[63] Such legislation establishes a general framework within which administrative and legislative powers are conferred to achieve particular goals or to give effect to particular policies. Purpose statements expressly set out these policies and goals. They give context for the entire Act.[64]

In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome. In *LeBlanc v. LeBlanc*,[65] for example, the Supreme Court of Canada considered s. 2 of New Brunswick's *Marital Property Act*. La Forest J. wrote:

> Section 2 is an interpretative provision in the nature of a preamble announcing the general framework and philosophy of the legislation.... The provisions of ss. 3 and 7, *inter alia*, work this framework out in detail....
>
> In common with similar provisions in other jurisdictions, s. 2 establishes the general principle that each spouse is entitled to an equal share of marital property.... The principle must be respected. In applying that principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage....[66]

The Court here understands the legislature to have used the purpose statement to introduce a new approach to the definition and distribution of matrimonial property, one that it was bound to adopt in interpreting and applying the provisions of the Act.

In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, the purpose statement relied on by the Court mentioned a number of concerns and objectives, not all of them complementary. However, the court was able to discern

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63 For discussion of the distinctive features of modern program legislation, see *supra* Chapter 8, at pp. 262-63. As Gonthier J. wrote in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] S.C.J. No. 38, [1999] 3 S.C.R. 134, at para. 26 (S.C.C.): "A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard."

64 *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15, [2007] 1 S.C.R. 650, at para. 287 (S.C.C.).

65 [1988] S.C.J. No. 6, [1988] 1 S.C.R. 217 (S.C.C.).

66 *Ibid.*, at 221-22.

ticular provision to be interpreted — are identified and taken into account in every case.[1]

Evolution of Purposive Analysis

Heydon's Case. Historically, purposive analysis is associated with the so-called mischief rule or the rule in *Heydon's Case*.[2] Although the mischief rule did not originate in *Heydon's Case*, it there received its most famous and influential formulation:

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[3]

Judges are here advised not only to interpret legislation so as to promote its purpose but also suppress measures designed to avoid the impact of the legislation and to read words into the scheme, if necessary, to ensure that the legislature's true intent is accomplished — in other words, to fill gaps in the legislative scheme.

Doctrine of equitable construction. *Heydon's Case* is an expression of the doctrine of equitable construction which dominated interpretation up to the seventeenth century. The hallmark of equitable construction is its elevation of the spirit or intent of a statute over its literal meaning. As explained in one sixteenth century case:

> [E]very thing which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter....[4]

---

1 See the comparison of purposive analysis to the purposive approach, *infra* at pp. 259-60.

2 (1584), 3 Co. Rep. 7a, 76 E.R. 637.

3 *Ibid.*, at 638 (E.R.).

4 See *Stowel v. Lord Zouch* (1569), 1 Plowd. 353, at 366, 75 E.R. 536, at 556.

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at 366, 75 E.R. 536, at 556.

Under the doctrine of equitable construction judges had jurisdiction to recast legislation so as to promote what they believed to be Parliament's true intent. After reviewing a number of decisions from this period Sedgwick wrote:

> Here we find cases in numbers, and the numbers might easily be increased, where laws have been construed, not merely without regard to the language used by the legislator, but in defiance of his expressed will. Qualifications are inserted, exceptions are made, and omitted cases provided for, and the statute is in truth remolded, by the mere exercise of judicial authority. It is in vain to seek for any principle by which these decisions can be supported, unless it be one which would place all legislation in the power of the judiciary.[5]

Sedgwick wrote in 1874, when the dominant approach to interpretation was "literal" construction. During this period, most legislation was drafted in a concrete and detailed style which left little room for judicial choice. Yet even in this era, the idea that legislation should be interpreted so as to promote its purpose remained an important part of statutory interpretation. If the words to be interpreted lent themselves to two or more plausible interpretations, the courts would choose the interpretation that best advanced the purpose. As Viscount Simon said in *Nokes v. Doncaster Amalgamated Collieries Ltd.*:

> [I]f the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[6]

Legislative purpose was also taken into account under the golden rule. It would be absurd for a legislature to adopt a provision that conflicted with the purpose of legislation or was likely to render it futile. To avoid this absurdity, the courts could reject the ordinary meaning of the provision in favour of a more reasonable alternative.[7]

Modern purposive analysis. Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. This is clear from Driedger's modern principle, which makes purpose an essential part of the entire context. And Driedger's emphasis on purpose is justified by a well established caselaw. In 1975, in *Carter v. Bradbeer*, Lord Diplock wrote:

> If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past thirty years one cannot fail to be struck by the

5 T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed. (New York: Baker, Voorhis & Co., 1874), p. 261.

6 [1940] A.C. 1014, at 1022 (H.L.).

7 For discussion of the absurdity of defeating the legislature's purpose, see Chapter 9, pp. 311-12.

TAB "G"

Air Canada and Pacific Western Airlines Ltd. *Appellants*

v.

Her Majesty The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia *Respondents*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Attorney General for Alberta, and the Attorney General of Newfoundland *Interveners*

and between

Her Majesty The Queen in Right of the province of British Columbia and the Attorney General of British Columbia *Appellants*

v.

Air Canada, Pacific Western Airlines Ltd. and Canadian Pacific Airlines Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Intervener*

indexed as: air canada *v.* british columbia

File Nos.: 20079, 20082, 20085.

1988: June 8, 9, 10; 1989: May 4.

Present: Beetz, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the appeal court for british columbia

Taxation -- Provincial powers -- Tax levied first purchaser of gasoline following manufacture -- Tax amended to apply to purchaser ultimately consuming gasoline -- Airlines involved in interprovincial and international service taxed for fuel purchases in province -- Whether or not original tax ultra vires the province -- Whether or not amended tax ultra vires the province -- If so, whether or not taxes paid by mistake under ultra vires statute refundable -- Whether or not taxes contrary to s. 7 Charter right to liberty -- If so, whether or not taxes justified under s. 1 -- Gasoline Tax Act, 1948, R.S.B.C. 1960, c. 162, s. 25(1), (2), (3), (4), (5) -- Miscellaneous Statutes Amendment Act, 1976, S.B.C. 1976, c. 32, s. 7 -- Constitution Act, 1867, ss. 91(2), 92(2), (10)(a) -- Canadian Charter of Rights and Freedoms, ss. 1, 7.

Statutes -- Retroactive operation -- Taxing statutes -- Ultra vires taxing provision amended -- Amendment providing for retroactive operation of amendment -- Whether or not retroactive

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* Le Dain J. took no part in the judgment.

application of taxing provision ultra vires the province -- Finance Statutes Amendment Act, 1981, S.B.C. 1981, c. 5, s. 20.

In 1980, Air Canada, Pacific Western Airlines and Canadian Pacific Airlines commenced separate actions (which were heard together) against British Columbia, seeking the reimbursement of amounts paid as "gasoline taxes" under the *Gasoline Tax Act* in effect on and following August 1, 1974. (A fiat was no longer necessary to sue the provincial Crown from August 1, 1974.) Air Canada and Pacific Western Airlines sought to recover the taxes paid between August 1, 1974 and the date of trial. Canadian Pacific Airlines' claim was limited to the taxes paid between August 1, 1974 and July 1, 1976.

The Act, as it stood on August 1, 1974, taxed every purchaser on all gasoline sold in the province for the first time after its manufacture in, or importation into, the province. The Act remained in this form until 1976 even though the Privy Council had struck down a similar provision for not being a direct tax within s. 92(2) of the *Constitution Act, 1867*. The definition of "purchaser" was repealed and replaced in July 1976. "Purchaser" was defined to mean any person who, acting for himself or as agent, bought or received delivery of gasoline within the province for his or her own use or consumption. In 1981, legislation was enacted purporting to extend the application of legislation similar to that enacted in 1976 back to August 1, 1974. This legislation also purported to legalize the Crown's retention of the money collected from 1974 to 1976 under the Act as it then stood: moneys collected as taxes, penalties or interest under the Act during that period were to "be conclusively deemed to have been confiscated by the government without compensation".

Air Canada and Pacific Western Airlines alleged that none of the definitions made the tax a direct tax in the province for provincial purposes so as to give the province jurisdiction under

s. 92(2) of the *Constitution Act, 1867*. All three airlines contended that, even if the 1976 version of the statute were constitutional, they were still entitled to be reimbursed for moneys paid between 1974 and 1976 because the 1981 attempt to give the 1976 tax retroactive effect was invalid.

At trial the province conceded that the Act as it existed before 1976 was *ultra vires*, but the 1976 Act was held to be valid. The 1981 legislation to give the tax retroactive effect, however, was found to be *ultra vires*. The airlines were therefore entitled to recover taxes paid between 1974 and 1976 but not the taxes paid after 1976.

The Court of Appeal dismissed the appeal by Air Canada and Pacific Western Airlines on the issue of their liability after 1976. The Attorney General cross-appealed against Air Canada and Pacific Western Airlines and appealed against Canadian Pacific Airlines on the issue of the province's liability to repay the taxes collected between 1974 and 1976. The Court of Appeal, by majority, dismissed the Crown appeals. Appellants were granted leave to appeal to this Court.

The constitutional questions before this Court queried: (1) if the *Gasoline Tax Act*, as amended in 1976 and 1981, was *ultra vires* in its application or otherwise constitutionally inapplicable to the airlines here; (2) whether the application of the *Gasoline Tax Act* to the airlines violated s. 7 of the *Canadian Charter of Rights and Freedoms*; and (3) if so, whether its application was justified under s. 1.

Held (Wilson J. dissenting in part): The appeal by Air Canada and Pacific Western Airlines should be dismissed, the Crown's cross-appeal against them should be allowed and the Crown's appeal against Canadian Pacific Airlines should be allowed. As to the first constitutional question, the *Gasoline Tax Act*, as it existed in 1974, was constitutionally invalid, but the

amendments of 1976 and 1981 were valid. The second constitutional question should be answered in the negative; the third did not need to be answered.

Per Lamer, La Forest and L'Heureux-Dubé JJ.: The Crown could not rely on the Act as it existed in 1974 to justify collection or retention of the taxes levied between 1974 and 1976. The Act could not be "read down" so as to apply only to persons who purchased gasoline for their own use or consumption as it was in practice applied.

The 1976 tax met the requirements of s. 92(2) of the *Constitution Act, 1867*: it was a direct tax, imposed in the province and for provincial purposes. A direct tax is one demanded from the very person who it is intended or desired should pay it. The 1976 Act clearly taxed the ultimate consumer of the gasoline and made no provision for passing it on to others, whatever the opportunities of recouping it by other means. The transaction attracting the tax took place in the province and the purchaser had a sufficient presence in the province to be taxed there. Nothing in the *Constitution Act, 1867* requires that the taxpayer must benefit from the tax. A person, a transaction or property in the province may be taxed by the province if taxed directly.

The Act did not impose a consumption tax and references to consumption or use in the definition of purchaser merely defined the taxpayer. Since the tax was imposed in the province in respect of the purchase of gasoline, it did not matter where it was consumed, whether in airspace or in another province. That the tax could have an effect on persons outside the province was of no consequence.

The *Charter* right to "life, liberty or security of the person" could not be invoked here. The airlines were required to pay taxes in the same way as other purchasers of gasoline within the province. An ordinary tax like the one at issue could not be equated with expropriation.

Federal jurisdiction over trade and commerce (s. 91(2)), interprovincial undertakings (s. 92(10)(*a*)) and aeronautics was not violated by the 1976 Act. Any alleged violation of the trade and commerce power would be based on the impugned tax's being characterized as a consumption tax on the airlines' fuel. The federal power over interprovincial undertakings and aeronautics did not create an immunity for the airlines from otherwise valid provincial legislation. By and large federal undertakings, like other private enterprises functioning within the province, must operate in a provincial legislative environment, and must like them pay provincial taxes imposed within the province.

The words of the 1976 Act clearly indicated that the Legislature meant to give effect to the whole of the statute in its amended form from the date of its enactment. The argument that the 1976 Act was invalid because the Legislature could not amend an *ultra vires* statute so as to make it *intra vires* was without merit.

The taxing provisions of the 1981 legislation, like the 1976 legislation, were a proper exercise of the province's power to impose direct taxation in the province. The sole difference was that the 1981 provisions were given retroactive effect -- a result that was not constitutionally barred. The tax illegally collected under the *ultra vires* provision before 1976 would be equal to the amount levied in 1981 and the moneys owing by the taxpayers under the 1981 provision was simply to be taken out of the equal amounts collected from those taxpayers under the invalid tax. The subsection which referred to "confiscation" was nothing more nor less than machinery for collecting the taxes properly imposed in the other subsections and accordingly could not taint their constitutionality.

The 1981 legislation does not violate the principle enunciated in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576. *Amax* concerned a situation where the

province sought to avoid repaying a tax it was bound by law to pay. It simply sought in an indirect way to give effect to an invalid statute. Here the Legislature did directly what it was empowered to do -- impose a direct tax and give it retroactive effect.

The argument that, apart from the 1981 Act, the airlines could not recover on the basis that the tax was paid under a mistake of law (the "mistake of law" rule) could not succeed. The rule was rejected as having been constructed on inadequate foundations as lacking in clarity and resulting in undue harshness. It should not in any event be extended to the constitutional plane. The development of the law of restitution had rendered otiose the distinction between mistakes of fact and mistakes of law. It should play no part in the law of restitution. Recovery should generally be allowed in any case of enrichment at the plaintiff's expense caused by a mistake, subject to any available defences or equitable reasons for denying recovery. Restitution should apply against public bodies as well as to private individuals.

Restitutionary principles, however, preclude recovery where the plaintiff has suffered no loss. If the taxing authority retains a payment to which it was not entitled, it will be unjustly enriched but not at the taxpayer's expense if the economic burden of the tax has been shifted to others. Generally, it is preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Rather, its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the taxpayer's expense. The taxpayer must show that it bore the burden of the tax to make out its claim. What the province received was relevant only in so far as it was received at the taxpayer's expense.

Apart from this, while the principles of unjust enrichment can operate against a government to ground restitutionary recovery, where the effect of an unconstitutional or *ultra vires* statute is in issue, special considerations operate to take the case out of the normal restitutionary framework and require a rule responding to the underlying policy concerns specific to this problem. The rule is against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes. The policies that underlie this rule are numerous. Chief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it, either on the same or on a new generation of taxpayers, to finance the operations of government. It could lead to fiscal chaos, particulary where a long-standing taxation measure is involved. The tax here is of broad general application and has been imposed for decades.

Exceptions may exist where the relationship between the state and a particular taxpayer results in the collection of tax which would be unjust or oppressive in the circumstances. The present case does not, however, call for a departure from the general rule. The tax, though unconstitutional, raised an issue bordering on the technical. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed. Nor was there compulsion. Payment under an *ultra vires* statute does not constitute "compulsion". Before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment. Finally, the fact that the province may have been in a better position to determine that the statute was unconstitutional does not affect the rule. The policy reasons underlying it remain.

The rule against the recovery of unconstitutional and *ultra vires* levies is an exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it.

The rule should not apply where a tax is extracted from a taxpayer through a misapplication of the law. Where an otherwise constitutional or *intra vires* statute or regulation is applied in error to a person to whom, on its true construction, it does not apply, the general principles of restitution for money paid under a mistake should be applied, and, subject to available defenses and equitable considerations, the general rule should favour recovery. No distinction should be made between mistakes of fact and mistakes of law.

Per Beetz J.: While agreeing with the reasons and conclusions of La Forest J., it is not necessary to deal with the "Mistake of Law" defence or to express any opinion thereon with respect to private law or public law and with respect to the recovery of taxes levied pursuant to an unconstitutional statute because the new *Gasoline Tax Act* was valid in its entirety. If the rule should be against the recovery of *ultra vires* taxes, at least in the case of unconstitutional taxes, this rule should not extend to cases of error in the application of the law.

Per McIntyre J.: The reasons for judgment of La Forest J. were agreed with, subject to the qualifications expressed by Beetz J.

Per Wilson J. (dissenting in part): British Columbia's *Gasoline Tax Act*, as it existed in 1974, was *ultra vires* the province and could not be relied upon by the Crown to justify the collection or retention of the taxes levied against the appellants between 1974 and 1976. The unconstitutional aspects were remedied by amendment made in 1976. However, in 1981, the province through the imposition of a retroactive tax and the confiscation of the taxes paid between 1974 and 1976 attempted unsuccessfully to give effect to the earlier unconstitutional legislation in violation of principles already stated by this Court.

Appellants' claim for repayment is not defeated by the doctrine of mistake of law which should not be extended to moneys paid under unconstitutional legislation. Otherwise, taxpayers would be obliged to check out the constitutional validity of taxing legislation before paying on pain of being unable to recover anything paid under unconstitutional laws. The appellants were entitled to rely on the presumption of validity of the legislation and on the representation as to its validity by the legislature enacting and administering it.

Payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute which it is entitled to do, considers itself obligated to pay. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

Payments made under a statute subsequently found to be unconstitutional should be recoverable and the principle should not be reversed for policy reasons in the case of payments made to governmental bodies. If any judicial policy were to be developed, that policy should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer who paid what the legislature improperly said was due.

The appellants were not required to show that the unjust enrichment of the province was at their expense. The argument that their receipt of the money back amounted to a "windfall" because in all likelihood they had recouped it from their customers is no basis on which to deny recovery. Where payments are made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained.

Section 7 of the *Canadian Charter of Rights and Freedoms* had no application to this case for the reasons given by La Forest J.

Cases Cited

By La Forest J.

Considered: *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347; **distinguished**: *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; **referred to**: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934; *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45; *Marine Petrobulk Ltd. v. R. in right of B.C.* (1985), 64 B.C.L.R. 17; *Bank of Toronto v. Lambe* (1887), 12 A.C. 575; *R. in right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303; *Atlantic Smoke Shops, Ltd. v. Conlon*, [1941] S.C.R. 670; *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); *Reference re the Employment and Social Insurance Act*, [1936] S.C.R. 427; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355; *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *Delta Air Lines Inc. v. Department of Revenue*, 455 So.2d 317 (1984 Fla.), cert. denied 474 U.S. 892 (1985); *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207; *Commissioner for Motor Transport v. Antill Ranger & Co.*, [1956] A.C. 527; *Norton v. Shelby County*, 118 U.S. 425 (1886); *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Vancouver Growers Ltd. v. G. H. Snow Ltd.*, [1937] 3 W.W.R. 121; *Glidurray Holdings Ltd. v. Qualicum Beach* (1981), 31 B.C.L.R. 82; *The King v. National Trust Co.*, [1933] S.C.R. 670; *R. v. Williams*, [1942]

A.C. 541; *Lovitt v. The King* (1910), 43 S.C.R. 106; *Bilbie v. Lumley* (1802), 2 East 469, 102 E.R. 448; *Coleman v. Inland Gas Corp.*, 21 S.W.2d 1030 (1929); *Mercury Machine Importing Corp. v. City of New York*, 144 N.E.2d 400 (1957); *United States v. Butler*, 297 U.S. 1 (1936); *Kiriri Cotton Co. v. Dewoni*, [1960] A.C. 192; *A. J. Severseu Inc. v. Village of Qualicum Beach* (1982), 135 D.L.R. 122; *Maskell v. Horner*, [1915] 3 K.B. 106; *Lynden Transport Inc. v. R. in Right of British Columbia* (1985), 62 B.C.L.R. 314.

By Wilson J. (dissenting in part)

Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576; *Bilbie v. Lumley* (1802), 2 East 469, 102 E.R. 448; *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitution Act, 1867, ss. 91(2), 92(2), (10)(*a*)

Finance Statutes Amendment Act, 1981, S.B.C. 1981, c. 5, s. 20.

Fuel-oil Tax Act, R.S.B.C. 1924, c. 251.

Gasoline Tax Act, 1948, R.S.B.C. 1960, c. 162, s. 25(1), (2), (3), (4), (5).

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APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1986), 4 B.C.L.R. 356, [1986] 5 W.W.R. 385, dismissing the airlines' appeal and dismissing the Crown's cross-appeal from a judgment of Macdonald J. (1984), 51 B.C.L.R. 175, [1984] 3 W.W.R. 353. The appeal by Air Canada and Pacific Western Airlines Ltd. should be dismissed, the Crown's cross-appeal against them should be allowed, the Crown's appeal against Canadian Pacific Airlines Ltd. should be allowed, Wilson J. dissenting in part. As to the first constitutional question, the *Gasoline Tax Act*, as it existed in 1960, was constitutionally invalid, but the amendments of 1976 and 1981 were valid. The second constitutional question should be answered in the negative; the third did not need to be answered.

D. M. M. Goldie, Q.C., W. S. Martin, C. F. Willms and *R. G. Berrow*, for the appellant Air Canada.

Wendy G. Baker and *Peter G. Voith,* for the appellants Canadian Pacific Airlines Ltd. and Pacific Western Airlines Ltd.

E. Robert A. Edwards, Q.C., and *Joseph J. Arvay, Q.C.*, for the respondents the Province of British Columbia, et al.

Elizabeth Goldberg and *Gerry Sholtack*, for the intervener the Attorney General for Ontario.

Michel Jolin, for the intervener the Attorney General of Quebec.

Reinhold M. Endres, for the intervener the Attorney General of Nova Scotia.

Richard P. Burns, for the intervener the Attorney General for New Brunswick.

Dirk Blevins and *Stewart J. Pierce*, for the intervener the Attorney General of Manitoba.

Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

Howard Kushner, for the intervener the Attorney General for Alberta.

F. Greig Crockett, for the intervener the Attorney General of Newfoundland.

//Beetz J.//

The following are the reasons delivered by

BEETZ J. -- I have had the advantage of reading the reasons for judgment written by my brother Justice La Forest. I agree with his reasons and conclusions. However, since I take the view that the new s. 25 of the *Gasoline Tax Act* of British Columbia is constitutionally valid in its entirety, I do not find it necessary to express any opinion with respect to the "Mistake of Law" defence, either in private law or in public law, nor with respect to the recovery of taxes levied and paid pursuant to an unconstitutional statute.

Assuming without deciding that my brother La Forest J. is correct in holding that "the rule should be against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes", I agree with him that this rule should not extend to a case of misapplication of the law such as the misapplication of the *Social Service Tax Act* of British Columbia to aircraft, aircraft parts and alcoholic beverages in the related appeals.

I agree with the disposition proposed by my brother La Forest J.

//McIntyre J.//

The following are the reasons delivered by

MCINTYRE J. -- I agree with the reasons for judgment of my brother, Justice La Forest, subject to the qualifications expressed by my brother, Justice Beetz, which I would adopt.

//La Forest J.//

The judgment of Lamer, La Forest and L'Heureux-Dubé JJ. was delivered by

LA FOREST J. -- This judgment deals with the third of a trilogy heard at the same time involving the application and constitutionality of the *Social Service Tax Act*, R.S.B.C. 1979, c. 388, and the *Gasoline Tax Act, 1948*, R.S.B.C. 1960, c. 162. Most of the major issues raised regarding the former Act have been dealt with in a separate judgment on the first and second appeals, issued contemporaneously herewith. This judgment deals with the *Gasoline Tax Act*. However, a number of issues, most importantly the issue whether taxes paid under a mistake of law may be recovered, are common to the second appeal and to this, the third appeal. Since these issues were originally raised and more directly addressed in relation to the *Gasoline Tax Act*, I have in the interests of clarity and comprehensiveness dealt with them in this judgment.

The principal issues raised in this appeal are:

(1) whether the *Gasoline Tax Act* of British Columbia, both as originally enacted and as amended over the years, is constitutionally valid under s. 92(2) of the *Constitution Act, 1867* as imposing direct taxation within the province in order to the raising of a revenue for provincial purposes;

(2) whether, if the Act as originally enacted was *ultra vires*, a later amendment can retroactively impose the tax and permit the retention of the amounts unconstitutionally levied before the amendment in settlement of the tax owing under the amendments; and

(3) whether, apart from statute, an unconstitutional tax paid by a taxpayer may be recovered.

Also at issue is whether the tax is invalid or inapplicable, as infringing against the federal powers respecting trade and commerce, aeronautics and interprovincial undertakings, or as violating s. 7 of the *Canadian Charter of Rights and Freedoms*.

Facts

In 1980, Air Canada, Pacific Western Airlines and Canadian Pacific Airlines commenced actions in the Supreme Court of British Columbia against the Province of British Columbia, seeking the reimbursement of $18 million, $9 million and $3.5 million respectively, which amounts the airlines had paid as "gasoline taxes" under the *Gasoline Tax Act, 1948*, as amended. The sums claimed by Air Canada and Pacific Western Airlines represented payments made to the province under the Act between August 1, 1974 and the date of trial. Canadian Pacific Airlines' claim was limited to the payments it made in the 23-month period between August 1, 1974 and July 1, 1976. The significance of the August 1, 1974 starting date is that from that date it was no longer necessary to obtain a fiat to sue the provincial Crown. Separate actions for taxes paid prior to 1974 were subsequently launched (see *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539), but the latter actions do not form the subject matter of this appeal.

The *Gasoline Tax Act* was originally enacted in 1923, and has since been amended and consolidated on numerous occasions. The relevant provision of the Act as it stood on August 1, 1974 provided that every purchaser shall pay a tax equal to 10 cents per gallon on all gasoline purchased, except gasoline purchased for use in an aircraft, which was taxed at a lower rate. Section 2 defined "purchaser" in these terms:

> "purchaser" means any person who within the Province purchases gasoline when sold for the first time after its manufacture in or importation into the Province.

A virtually identical provision in the British Columbia *Fuel-oil Tax Act*, R.S.B.C. 1924, c. 251, had been struck down by the Privy Council in *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934, on the ground that since the initial purchaser could always resell the commodity and thereby pass on the tax, it was not a direct tax within the meaning of s. 92(2) of the *Constitution Act, 1867*. Oddly enough, though the *Fuel-oil Tax Act* was shortly afterwards amended so as to impose the tax directly on the consumer, an approach later held by the Privy Council to conform to the constitutional requirements of s. 92(2) (see *Attorney-General for British Columbia v. Kingcome Navigation Co.*, [1934] A.C. 45), no such step was taken in respect of the Act impugned in the present case until 1976. In July of that year, however, by s. 7 of the *Miscellaneous Statutes Amendment Act, 1976*, S.B.C. 1976, c. 32, the definition of "purchaser" was repealed and replaced by the following:

> "purchaser" means any person who, within the Province, purchases or receives delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of, or as an agent for, a principal who is acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

This provision, of course, took effect only from 1976. In 1981, however, the province enacted the *Finance Statutes Amendment Act, 1981*, S.B.C. 1981, c. 5, which by s. 20 enacted a new s. 25 of the *Gasoline Tax Act* purporting by ss. 25(1) to (4) to extend the application of the Act, in a form similar to that enacted in 1976, back to August 1, 1974, and by s. 25(5) purporting to legalize the retention by the Crown of the money collected from 1974 to 1976 under the Act as it then stood. Section 25 reads as follows:

25. (1) In this section "purchaser" means any person who, within the Province, after August 1, 1974 and before July 8, 1976, purchased or received delivery of gasoline for his own use or consumption or for the use or consumption by other persons at his expense, or on behalf of or as an agent for a principal who was acquiring the gasoline for use or consumption by the principal or by other persons at his expense.

(2) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 15¢ a gallon on all gasoline purchased by him after August 1, 1974 and before February 28, 1975, but

(a) where gasoline was purchased for use in an aircraft the tax shall be 3¢ a gallon, and

(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 10¢ a gallon.

(3) Every purchaser shall pay to Her Majesty for the purpose of raising revenue for Provincial purposes a tax of 17¢ a gallon on all gasoline purchased by him after February 27, 1975 and before July 8, 1976, but

(a) where gasoline was purchased for use in an aircraft the tax shall be 5¢ a gallon, and

(b) where gasoline in the form of liquefied petroleum gas or natural gas was purchased to propel a motor vehicle the tax shall be 12¢ a gallon.

(4) Where a purchaser is liable to pay tax under subsection (2) or (3) and the gasoline was used or consumed for

(a) the operation of logging trucks other than on public highways,

(b) the operation of a motor vehicle on a public highway by any person who had suffered the loss of a limb, or who was permanently confined to a wheelchair, or who was in receipt of a 100% disability pension through active service in any war while in Her Majesty's service, or

(c) the operation of the power unit of a motor vehicle, while the vehicle was stationary, for any industrial purpose approved by the minister,

the taxes of 17¢ a gallon and 12¢ a gallon shall be reduced to 5¢ a gallon, and the taxes of 15¢ a gallon and 10¢ a gallon shall be reduced to 3¢ a gallon.

(5) Where, after August 1, 1974 and before July 8, 1976, money was collected or purported to have been collected as taxes, penalties or interest under this Act, the money shall by this section be conclusively deemed to have been confiscated by the government without compensation.

Section 62(5) of the *Finance Statutes Amendment Act, 1981* makes clear the retroactive character of this provision. It reads:

> **62.** . . .
>
> (5) Section 20 shall be deemed to have come into force on August 1, 1974 and is retroactive to the extent necessary to give it effect on and after that date.

In these three actions, which were heard together, two of the airlines (Air Canada and Pacific Western Airlines) submitted that the province had no jurisdiction to levy these taxes under any of the various statutory definitions of "purchaser", as none of those definitions made the tax a direct tax in the province for provincial purposes as required by s. 92(2) of the *Constitution Act, 1867*. All three airlines contended that, even if the 1976 version of the statute were constitutional, the airlines were still entitled to be reimbursed for moneys paid between 1974 and 1976 because the 1981 attempt to give the 1976 tax retroactive effect was invalid. In fact, it appears that the province has already reimbursed the airlines, and it is the province that is seeking recovery.

The Courts Below

At trial, counsel for the Attorney General conceded that the Act as it stood on August 1, 1974, was *ultra vires*, given the Privy Council's decision in *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, *supra*, but he maintained that the province was entitled to retain the money collected during the 1974-1976 period by virtue of (1) the 1981 amendment, which gave the 1976 definition retroactive effect, and (2) common law defences.

In light of this concession, it was only necessary for the trial judge, B. D. Macdonald J., to deal with the validity of the statutes of 1976 and 1981 -- see (1984), 51 B.C.L.R. 175. Turning to the 1976 statute, more specifically, to the question whether the definition of "purchaser" in that statute cured the defect in the previous definition and rendered the tax from 1976 onwards a direct tax within the province pursuant to s. 92(2) of the *Constitution Act, 1867*, Macdonald J. concluded that it did. In his view, the 1976 definition disclosed that the nature of the tax was a purchase or transaction tax. Such a tax was direct because it was levied upon a person who purchased gasoline for his own use or consumption. It was also imposed within the province. So long as purchase or delivery took place within the province, the tax applied, and the place of use or consumption was irrelevant. The *Constitution Act, 1867* did not require consumption within the province when what the province intended to tax was a transaction within the province.

Macdonald J. summarily rejected attacks on the validity of the 1976 amendment based on arguments (1) that for a provincial tax to be valid it must be collected from those who can receive a benefit, and that the airlines could not receive any benefit; and (2) that the Act impaired the airlines' capacity as a federal undertaking to carry on business in the province. He also rejected the argument that a province cannot amend an *ultra vires* statute so as to cure the defect that rendered it invalid. As he put it at p. 184, "If the province has the power to impose this tax by re-enacting the whole Act, I find it difficult to accept the proposition that it cannot do so by amending the single definition which makes it invalid."

Macdonald J. then considered the validity of s. 25 of the *Finance Statutes Amendment Act, 1981*. He read that provision as purporting to do two things: (a) as imposing, by ss. 25(1) to (4), a fresh tax on any person who, between August 1, 1974 and July 8, 1976, purchased or received delivery of gasoline in the province for his own use or consumption; and (b) as providing, by s. 25(5) that

money collected as taxes between August 1, 1974 and July 8, 1976, "shall . . . be conclusively deemed to have been confiscated by the government without compensation."

So far as the fresh tax was concerned, Macdonald J. held that since the tax was direct, there was no impediment to enacting it retroactively. In his view, the airlines' reliance on this Court's decision in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, (hereinafter *Amax*), to challenge the validity of this new tax was misplaced. In the present case, a fresh tax was being levied retroactively pursuant to a valid re-enactment. *Amax* applied to a situation where there was no consitutional basis for the impugned legislation. It did not apply to invalidate a taxing statute where there is a constitutional power to enact such a measure provided it is done in proper form, as in the present cases. Sections 25(1) to (4) were, therefore, valid, and each of the airlines was in consequence obliged to pay a fresh tax pursuant to these provisions.

Macdonald J., however, found s. 25(5) *ultra vires*. It purported to confiscate taxes paid pursuant to the *ultra vires* legislation and, therefore, fell within the reasoning in *Amax*. He recognized that the province might well be in a position to set off the liability of the airlines arising under ss. 25(1) to (4) against its obligation to repay taxes improperly collected under the Act as it existed between 1974 to 1976, but, he stated, that matter was not before him.

The airlines, therefore, succeeded in their claims that they were entitled to recover taxes paid between 1974 and 1976. However, they were not entitled to recover taxes paid after 1976.

Air Canada and Pacific Western Airlines appealed to the British Columbia Court of Appeal on the issue of their liability after 1976. As already noted, Canadian Pacific Airlines had not disputed this liability. The appeals were unanimously dismissed. The Attorney General cross-appealed against Air Canada and Pacific Western Airlines, and appealed against Canadian

Pacific Airlines on the issue of the province's liability to repay the taxes collected between 1974 and 1976. In separate judgments, the Court of Appeal (Hinkson and Lambert JJ.A., Esson J.A. dissenting) dismissed the Crown appeals -- see (1986), 4 B.C.L.R. 356.

Hinkson J.A. noted that, as a result of the British Columbia Court of Appeal decision in *Marine Petrobulk Ltd. v. R. in right of B.C.* (1985), 64 B.C.L.R. 17, the airlines did not advance the submission that the trial judge erred in concluding that the 1976 definition of "purchaser" rendered the tax a direct tax within the province as required by s. 92(2) of the *Constitution Act, 1867*. He rejected the submission that the tax was, as the airlines argued, a "consumption tax" and in consequence invalid because 99% of the fuel was consumed outside the province (since the airspace over a province is not a *situs* for provincial taxation). In his view the tax was a purchase tax. It was directed to a person within British Columbia who purchased gasoline with the intention of consuming it. The Legislature was not concerned, and need not be concerned with where the person consumed the gasoline purchased. For this reason, he dismissed the airlines' appeals.

Lambert J.A. reached the same conclusion. In his view, the Act as amended in 1976, taken as a whole, imposed a tax either on the transaction of purchase for the purpose of consumption, or on a person who purchased goods for the purpose of consumption. The qualification that the purchase must be for the purchaser's own use or consumption was a condition of the application of the tax, as was the fact that the purchase must take place within the province, but those conditions did not affect the true incidence of the tax, which was directed at the transaction of purchase for consumption, or at a purchaser who bought for the purpose of consumption.

Esson J.A. concluded, for substantially the same reasons as given by Hinkson J.A., that the 1976 definition of "purchaser" in the *Gasoline Tax Act* rendered the statute constitutional. In his

opinion, the statute limited the incidence of the tax to those who purchase or receive gasoline for their own use or consumption. The purpose of that limitation was to ensure that the tax would have no tendency to be passed on; the limitation did not make the imposition a tax on consumption.

On the cross-appeal by the Attorney General against the direction that the moneys paid between 1974 and 1976 must be repaid, counsel for the Attorney General conceded the invalidity of s. 25(5) of the *Finance Statutes Amendment Act, 1981* in light of the *Amax* decision, but submitted that this provision should be severed from the remainder of s. 25, leaving ss. 25(1) to (4) as a valid retroactive tax.

Though they arrived at the same conclusion, the two majority judges differed in their views on this issue. Hinkson J.A. concluded that it was wrong to read s. 25 as imposing both a "fresh tax" and then confiscating tax money already collected. The tax having been imposed retroactively in ss. 25(1) to (4), s. 25(5) made it clear that its payment was to be made by confiscating the moneys already paid. Section 25(5) was therefore integral to the scheme, and once it was conceded that it was invalid, ss. 25(1) to (4) would also fall. The provisions could not be severed since the Legislature would not have enacted them without also enacting s. 25(5). Section 25(5), which gave purpose and meaning to the rest of the section, so tainted the remainder of s. 25 that the whole section was *ultra vires*. The other majority judge, Lambert J.A., agreed with the trial judge that while s. 25(5) was *ultra vires*, ss. 25(1) to (4) were severable and constituted a valid retroactive tax, not a colourable attempt to retain moneys paid to the Crown under an unconstitutional taxing statute. They did not amount to a legislative confiscation of taxes under an *ultra vires* statute forbidden under the principle in *Amax*. He, therefore, upheld the trial judge's conclusion that these provisions were constitutional, but refrained from expressing any opinion about the effectiveness or enforceability of the tax and dismissed the

cross-appeal. Lambert J.A.'s view left open the possibility that the province might validly collect the tax.

In the Court of Appeal, the province also argued that it was not required to repay the tax collected because of the operation of the common law rules regarding "mutual mistake of law" and "voluntary payment of tax". After reviewing the evidence, Hinkson J.A. found that from 1927 onwards, the province was aware that the tax was unconstitutional, while the airlines did not suspect this until they decided to challenge the legislation. These findings refuted the suggestions that there was a mutual mistake of law and that during the period in question the payments made by the airlines were made voluntarily knowing that the tax was unconstitutional.

Hinkson J.A. also rejected the contention that the parties were *in pari delicto*, i.e., that if the province was to blame for imposing the tax, the airlines were equally to blame for paying it. While he could not, he stated, on the evidence conclude that Air Canada had acted under practical compulsion in paying the tax, as *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347 (hereinafter *Nepean*), required, he distinguished that decision on the basis that it was not a constitutional case. He then relied on this Court's judgment in *Amax* for the proposition that, in a federal state, the Crown cannot engage in an *ultra vires* exercise of power by way of taxation and then call in aid either legislation enacted by it or common law rights to retain the proceeds of that taxation. He, therefore, concluded that the province could not retain the moneys paid during the period in question. He did, however, leave open the possibility that the Crown could impose a fresh retroactive tax.

Lambert J.A., too, found that even if the common law principles applicable to recovery of taxes would preclude restitution, they must be subject to a constitutional exception. If money taxed under an *ultra vires* statute could be retained, the Constitution would be flouted. Thus, the

Nepean and *Amax* cases were perfectly reconcilable. In his view, payment pursuant to an *ultra vires* statute amounted to irresistible practical compulsion even in the absence of protest or complaint by the taxpayer. He was also of the view that retention by the Crown of taxes collected under an *ultra vires* statute would be *ultra vires*.

Esson J.A. dissented on the cross-appeal. In his view the trial judge erred in holding that the province must repay the airlines the taxes paid by them prior to July 1, 1976. The salient fact upon which he based that conclusion arose from the decision on the main appeal that the airlines were in the same position as all others who purchased fuel within British Columbia for their own consumption. Before July 1976, although the tax was imposed under an invalid statute, it was in essence the same tax as the present one. Then, as now, it was imposed "at the pump", i.e., at the point of purchase for consumption. The statute was, until 1976, *ultra vires* the province because it authorized a tax in terms that could have resulted in its being passed on to others. It was capable of being indirect and, therefore, was indirect. But the moneys the airlines now seek to recover were not paid by them in satisfaction of an indirect tax. As actually administered, the tax was within the powers of the province. In that sense, the defect was one of constitutional form rather than substance.

Esson J.A. disagreed with the view that *Amax* stands for the proposition that any money paid as taxes under a statute later held to be *ultra vires* can never be retained, and that private law considerations such as were relied upon in *Nepean* are irrelevant. Rather, *Amax* simply stood for the proposition that an attempt by a legislature to enact a statute barring access to the courts would be struck down as attempting by covert means to impose illegal burdens. *Amax* held that fundamental principles of federalism preclude a province from barring access to the general law where the issue is whether the province has exceeded its powers and whether, if it has, the taxpayer is entitled to a remedy. However, where the legislature has not created such a bar, there

is no reason why the province should not be able to rely on ordinary principles of justice and fairness in defending itself against a taxpayer's claim for repayment of moneys. The airlines should be entitled to recover only if they could satisfy the requirements of the action for money had and received which are rooted in principles of justice and equity.

In these cases, the requirements of common law principles were not met. The mistake is one of law, not fact. The *in pari delicto* exception had no application. There was no duress or compulsion in the collection of the tax. Moreover, even if there was practical compulsion, it would not be unjust to permit the Crown to keep the money, since the money collected was clearly within the province's competence to tax. The province received no benefit, and the taxpayer suffered no detriment not authorized by the Constitution. It could not be suggested that if the province retained this money, it would be unjustly enriched. Rather, it is the airlines who, if successful, would obtain a windfall.

Esson J.A. therefore would have allowed the cross-appeal and dismissed the airlines' action for recovery of the taxes paid.

The Appeal to this Court

Leave to appeal to this Court was then sought and was granted on all issues. These issues included two not argued before the courts below, namely, whether the impugned statute as it existed in 1974 was constitutionally valid, and whether its application in the circumstances of this case contravened s. 7 of the *Canadian Charter of Rights and Freedoms*. The following constitutional questions were stated:

1. Is the *Gasoline Tax Act*, R.S.B.C. 1960, c. 162, as amended by S.B.C. 1976, c. 32 and as subsequently amended, *ultra vires* in its application or otherwise constitutionally inapplicable to Air Canada in the circumstances of this case?

2. Does the application of the *Gasoline Tax Act* to Air Canada in the circumstances of this case violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

3. If so, is its application justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

The Attorneys General of the following provinces intervened to make submissions regarding the constitutional questions: Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta and Newfoundland.

I propose to deal with the issues in terms of the impugned Act as it existed at the relevant dates.

The Act in 1974

As already described, the *Gasoline Tax Act* as it existed in 1974 was, in its relevant aspects, substantially the same as it had been at the time of its original enactment in 1923. It imposed a tax on a purchaser of gasoline when it was sold for the first time after its manufacture in, or importation into the province. Since the Privy Council in *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, *supra*, had, we saw, found a similar provision to be *ultra vires* on the ground that the tax imposed by it was not direct as required by s. 92(2) of the *Constitution Act, 1867*, because it was capable of being passed on to subsequent purchasers, counsel for the Attorney General of British Columbia in the courts below refrained from arguing the validity of the tax imposed under the Act as it existed in 1974. In this Court, however, counsel invited us to review the *C.P.R.* case and to hold that the tax had been valid from its inception. He asked us to "read down" the Act so that it would apply only to persons who purchase the gasoline for their

own use or consumption as it was in practice applied. He observed that the Privy Council in the *C.P.R.* case did not expressly advert to this possibility. However, since counsel squarely raised the issue in that case (see *supra*, p. 935), the Privy Council must have found it unnecessary to deal with it expressly. In my view, it quite correctly rejected this argument *sub silentio*. The words of the statute were clear and it is not for the courts to look for outside evidence of how an Act is applied in practice to determine its constitutional validity. This could lead to finding a statute in one province valid, while holding an identical statute in another province invalid if the circumstances to which it was applied were different. It is not for the courts to redraft statutes, particularly taxation statutes. Even if it were, I do not think it would be appropriate after over sixty years to overrule a case that not only constitutes a distinct step in the development of the definition of direct taxation, but that has been repeatedly cited and relied upon by the courts since it was decided.

The Act as it existed in 1974 cannot, therefore, be relied upon by the Crown to justify collection or retention of the taxes levied between 1974 and 1976.

The 1976 Act -- the s. 92(2) Arguments

The principal attack on the validity of the 1976 Act was that it did not conform to the requirements of s. 92(2) of the *Constitution Act, 1867*. Thus, it was argued, the tax imposed was not a direct tax; it was not imposed in the province; and it was not for provincial purposes, each of which conditions is required by s. 92(2). All of these submissions were rejected, rightly in my view, by the courts below.

That the tax is a direct tax I have no doubt. Since at least *Bank of Toronto v. Lambe* (1887), 12 A.C. 575 (P.C.), the generally accepted test of what constitutes a direct tax has been that of John

Stuart Mill: "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it." That person is clearly identified in the definition in the 1976 Act as the ultimate consumer of the gasoline; there is no passing on of the tax to others, whatever may be the opportunities of recouping the amount of the tax by other means (a very different thing). Whether one chooses to call it a transaction tax or a tax against the purchaser does not affect this simple reality. However important it may be to distinguish between taxes on persons, property or transactions for the purpose of determining whether a tax is imposed in the province, the relevant inquiry in determining whether the tax is direct or indirect is generally whether it conforms to the test just quoted (see Kennedy and Wells, *The Law of the Taxing Power in Canada*, at p. 61). In some cases, it is true, the courts have decided the latter question on the basis of a "categories" test, but that is irrelevant here.

I have no doubt either that the tax is imposed in the province. It is imposed on a purchaser of gasoline and a purchaser is defined as "any person who, within the Province, purchases or receives delivery of gasoline for his own use or consumption . . . ." Whether the tax is viewed as one on a transaction (the purchase) or on a person (the purchaser) does not matter for this purpose either. The purchase must obviously take place in the province and the purchaser has a sufficient presence in the province to be taxed there.

The airlines argued that the tax was a tax on the consumption of gasoline. Since most of that consumption, so far as the airlines were concerned, was in the airspace, which falls outside the province (see *R. in right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303), the tax was imposed outside the province. I cannot agree with this contention. The Act clearly does not impose a consumption tax. The references in the definition to consumption or use merely define the taxpayer, i.e., a purchaser who buys gasoline for his own use. Since the tax is imposed in the province in respect of the purchase of gasoline, it does not matter where the gasoline is

consumed, whether it is in the airspace or in another province. The passing reference by Taschereau J. in *Atlantic Smoke Shops, Ltd. v. Conlon*, [1941] S.C.R. 670, at p. 717, to the fact that only in exceptional cases will tobacco (the subject matter of the tax there) be consumed outside the province, in no way detracts from this.

There may, I suppose, be cases where a tax, though in form a purchase tax within the province, might, in essence, be a tax on consumers outside the province. But the present statute is a general one directed at all purchasers of gasoline within the province. The fact that some of these purchasers may consume some or a considerable portion of the gasoline outside the province does not change the basic character of the Act, which is one that imposes a tax on the purchase of gasoline within the province. That it may have an effect on persons outside the province is of no consequence. In the only field where the issue of the territoriality of legislation has been canvassed in any depth, succession duties, it has often been held that property in the province passing on death, or its transmission there as a result of that event, may be taxed in that province although the beneficiary who bears the burden of the tax resides outside the province. *R. in right of Manitoba v. Air Canada*, *supra*, is in no way contrary to this approach. What that case decided was that mere overflight of an aircraft or the landing of an aircraft in a province in the course of a through-flight did not give the aircraft sufficient presence in the province to make it the subject of a tax there. Here the transaction between the seller of the gasoline and the taxpayer clearly took place in the province.

It was also argued that the tax was not raised "in order to the raising of a Revenue for Provincial Purposes" within the meaning of s. 92(2) of the *Constitution Act, 1867*. In support of this position, counsel asserted that for a provincial tax to be valid it must relate to opportunities, benefits or protection afforded by the taxing province to the taxpayer or class of taxpayers. The province, counsel went on, did not and could not confer such benefits or provide such

opportunities or protection since the control of aeronautics was solely within the powers of Parliament. Under these circumstances, the levy imposed here amounted to expropriation rather than taxation. In this context, reference was made to United States authorities such as *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), *per* Reed J. (hereinafter *Braniff*).

I cannot accept these contentions. Though spoken in dissent, the view of Duff C.J. in *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427, regarding the requirement that taxation must be "for provincial purposes" has never been successfully challenged. That requirement, he said (at p. 434) "mean[s] neither more nor less than this: the taxing power of the legislatures is given to them for raising money for the exclusive disposition of the legislature." Despite the airlines' argument to the contrary, the Privy Council on the appeal from that case (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355) did not cast doubt on Duff C.J.'s proposition. What the Privy Council objected to in that case was not the tax (if there was one), but that the federal legislation there in question was in pith and substance a law in relation to insurance so framed as to encroach upon a field within the exclusive competence of the provinces (see pp. 366-67). There is nothing in the *Constitution Act, 1867* requiring that the taxpayer must benefit from the tax. A person, a transaction or property in the province may be taxed by the province if taxed directly.

I do not find the *Braniff* case and similar American decisions particularly useful in this context. The *Braniff* case is more akin to *R. in right of Manitoba v. Air Canada, supra*, since it involved taxation of flight equipment engaged in interstate commerce, with the difference that the court in *Braniff* held that there were sufficient regular stops within the state to give the planes in question there sufficient contact with the state to permit them to form the subject matter of taxation there. Here there can be no doubt that the transaction was located within the province.

The 1976 Act -- Subsidiary Arguments

In addition to arguing that the 1976 Act did not meet the requirements of s. 92(2) of the *Constitution Act, 1867*, the airlines also advanced a number of subsidiary arguments.

To buttress the argument under s. 92(2) that the airlines received no benefit from the tax, the airlines also relied on s. 7 of the *Canadian Charter of Rights and Freedoms*. The tax, they argued, was tantamount to an expropriation. I fail to see, however, how the "life, liberty or security of the person" of the airlines is involved (assuming the provision can otherwise apply to them in circumstances like these) by being required to pay taxes in the same way as other persons who purchase gasoline within the province. It is simply not accurate to equate an ordinary tax like the one at issue in this case with expropriation. Assuming it is necessary to show a relationship between the tax and the benefits derived by the airlines, finding that relationship poses no difficulty here. Indeed, Air Canada admitted that airport facilities are serviced by municipal and provincial utilities, including water, electricity, and road systems to the airport. To that may be added fire protection and the benefits provided to various of the airlines' facilities and offices as well as to their employees.

Counsel for the airlines also argued that the 1976 Act in its application to fuel consumed by the airlines was invalid as violating ss. 91(2) (trade and commerce) and 92(10)(*a*) (interprovincial undertakings) of the *Constitution Act, 1867*, and the federal aeronautics power. The argument regarding the trade and commerce power appears to have been based on the characterization that the impugned tax was a consumption tax, a view I have already rejected. There is no indication that the tax in question here is anything but a general tax imposed upon all purchasers of gasoline in the province. While it may incidentally affect interprovincial or international trade, that burden is no greater than that imposed on intra-provincial trade. There is nothing discriminatory

about the tax, and no one argues that it is so heavy as to amount to regulation. The gasoline is not purchased as an article of commerce for sale abroad. It is intended to be, and is used by the airlines. Even under the broader interpretation given to the commerce power in the United States, a similar approach to state taxes imposed on fuel used in interstate and international flights has been followed in that country; see among others *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933); *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (1984 Fla.), cert. denied 474 U.S. 892 (1985).

So far as the attack based on the federal nature of the undertaking (i.e., s. 92(10)(*a*) and the aeronautics powers), the airlines at times appeared to argue for a type of enclave theory making them immune from otherwise valid provincial legislation. This contention is wholly without merit. By and large federal undertakings, like other private enterprises functioning within the province, must operate in a provincial legislative environment, and must like them pay provincial taxes imposed within the province. Obviously, if a tax amounted to a colourable attempt to regulate a federal undertaking, that would not be permitted; see *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 324-25. Again, there may be instances where provincial statutes may cripple or destroy a federal undertaking; see *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207. However, we are far from any situation here that would attract the application of these principles.

Finally, it was argued that the 1976 Act was invalid because the Legislature could not by an amendment to an *ultra vires* statute make the statute *intra vires*. That proposition had, I think wisely, been virtually abandoned in the Court of Appeal. It is abundantly obvious from the words used in the 1976 Act that the Legislature meant to give effect to the whole of the statute in its amended form from the date of its enactment. In this I fully agree with Macdonald J.

I see no reason then why the airlines should be immune from the tax imposed under the 1976 statute, nor on the basis of these arguments, from the 1981 Act. The latter Act, however, raises difficulties of its own, and I shall now turn my attention to these.

The 1981 Act

In 1981, the Legislature enacted a new s. 25 of the taxing Act. Substantially, ss. 25(1) to (4) purport to retroactively impose a tax on a person who, within the province, between August 1, 1974 and July 8, 1976, purchased gasoline for his own use or consumption. Section 25(5) then goes on to provide that where during that period moneys were collected as taxes, penalties or interest under the Act, such money "shall . . . be conclusively deemed to have been confiscated by the government without compensation".

None of the judges in the courts below casts any doubt on the legislative power of the province to impose a retroactive tax in the manner provided in ss. 25(1) to (4). What they really disagreed about was the effect of s. 25(5) on those provisions. In common with these judges, I am unable to see any constitutional impediment to the province's enacting ss. 25(1) to (4). On the reasoning regarding the 1976 Act, these provisions seem to be a proper exercise of its power to impose direct taxation in the province, the sole difference being that the 1981 provisions are given retroactive effect, a result that is not constitutionally barred. The real question, then, is whether when ss. 25(1) to (4) are conjoined to s. 25(5), they become so coloured by the latter provision as to make all of s. 25 *ultra vires*.

That, of course, raises the issue whether s. 25(5) is itself *ultra vires*. There are, in my view, some serious difficulties in establishing its invalidity. It may be, if the provision stood alone, that it could be successfully maintained that it violates the principle in the *Amax* decision. I need not

consider that situation because it does not stand alone. It is the fifth of five subsections, the first four of which impose a valid direct tax, and it must obviously be read in that context. It must also be read in light of the well known principle that it must be assumed that the Legislature intended to stay within the confines of its constitutional competence. While, as Esson J.A. notes, the expression "confiscated" is distasteful, one should not permit it to mislead us regarding the purpose of s. 25(5). The function of the courts is not to give the Legislature lessons in tact. Their function, rather, is to attempt to discern what the Legislature, however clumsily, was attempting to achieve by the language it used, a task that should, as already noted, be informed by the presumption that the Legislature intended to stay within its constitutional powers.

In the context in which it appears, s. 25(5) seems to be nothing more nor less than machinery for collecting the taxes properly imposed in the first four subsections of s. 25. It must be remembered that the amounts illegally collected under the *ultra vires* provision before 1974 would be equal to the taxes levied under ss. 25(1) to (4). Administratively, the taxes levied under the invalid scheme were collected in the same manner and in the same amounts and from the same taxpayers as would have occurred if the scheme had originally been framed along the lines of ss. 25(1) to (4). What the Legislature attempted to do by s. 25(5), therefore, was to provide collection machinery whereby the moneys owing by the taxpayers under the latter provision could simply be taken out of the equal amounts it had collected from those taxpayers under the invalid tax. It was in that sense that the moneys were deemed to have been confiscated by the government.

To read s. 25(5) otherwise demands that one attribute to the Legislature the intent to impose double taxation. Hinkson J.A. clearly saw this but found that the provision violated the principle in *Amax*, *supra*, and so all of s. 25 must fall. On this point, I respectfully disagree. In that case, the Legislature sought, by giving itself immunity, to avoid repaying an unlawful tax. This was

simply an indirect way of giving effect to the invalid statute. Immediately after the statement I have just cited, Dickson J. quoted from the headnote to the Privy Council case, *Commissioner for Motor Transport v. Antill Ranger & Co.*, [1956] A.C. 527 (P.C.), as follows: "the immunity accorded by that Act (the *Barring Act* of 1954) to the unlawful exactions was as offensive to the Constitution as the unlawful exactions themselves . . . ." The situation is entirely different here. The Legislature did directly what it was empowered to do -- impose a direct tax under ss. 25(1) to (4). I see no reason why it could not then take that tax out of moneys it had improperly collected from the taxpayers under the *ultra vires* statute, just as it could have set it off against any other obligation of the government to the taxpayers. The good fortune of the Legislature, in the unusual facts of this case, in having collected amounts that matched precisely those owing by each taxpayer under ss. 25(1) to (4) affords no reason to brand as unconstitutional a tax that it can validly impose and collect.

Since the foregoing issues were not strongly pursued, however, I find it better also to base my decision on considerations raised in relation to "mistake of law" to which I now turn.

"Mistake of Law"

In federal countries like Canada where governments possess only limited legislative power, constitutional lawyers and judges alike have largely concentrated on the constitutional validity of laws. The effect of action taken under unconstitutional laws is only rarely considered. It is easy enough, I suppose, to accept without discrimination the words of Field J. in *Norton v. Shelby County*, 118 U.S. 425 (1886), at p. 442, that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed". From this basis it may quite readily be deduced that anything done under colour of an *ultra vires* statute has no more effect than if the statute had

not existed. In the case of an *ultra vires* taxing statute, that would mean that the money levied pursuant to the statute should be recoverable from the state by the taxpayer under the ordinary remedies for recovering moneys paid to others without right or compensation, through an action for restitution for unjust enrichment, and indeed there are cases such as *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545, and *R. in right of Manitoba v. Air Canada*, *supra*, where recovery has been allowed.

We know, however, that this neat, logical construct does not always prevail. There is a clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination. Dramatic illustrations of this distinction can be found in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and *R. v. Mercure*, [1988] 1 S.C.R. 234. In the field of taxation the courts have on numerous occasions at the sub-constitutional level held that payments made under a mistake of law are irrecoverable. That rule has also been applied to payments made pursuant to unconstitutional statutes in at least two lower court decisions in this country (see *Vancouver Growers Ltd. v. G. H. Snow Ltd.*, [1937] 3 W.W.R. 121; *Glidurray Holdings Ltd. v. Qualicum Beach* (1981), 32 B.C.L.R. 82 (C.A.)

The province invited us to apply the rule to this case. It principally relied on the *Nepean* case, *supra*, to support its claim that it was entitled to retain the moneys paid under the impugned legislation in this case. The action in the *Nepean* case arose as a result of a scheme developed by Ontario Hydro for the cost of power. Under this scheme, newer municipalities, like Nepean, contributed more heavily to the capital cost of the hydro system than other municipalities. While Nepean rigorously protested the nature of the scheme from 1966 to 1973, it was only in 1974 that it came to the conclusion that the additional charges assessed to it had no legal basis in Ontario Hydro's enabling Act. This Court agreed with the contention that the additional charge was unlawfully levied by Hydro against Nepean, but by a 3-2 majority judgment delivered by Estey

J., it concluded (in common with the courts below) that Nepean could not recover the moneys unlawfully levied by Ontario Hydro on the ground that Nepean had voluntarily paid them under a mistake of law. The mistake of law rule, however, was not itself attacked; it was accepted by the parties; see Estey J. (pp. 381-82 and 412). In particular, Estey J. noted (at p. 412) that the only mention of unjust enrichment made by the appellant was in reference to the *in pari delicto* argument, although he did at one stage observe (at p. 413) that in his view the concept of unjust enrichment is not easily associated with the relationship of public bodies like the parties to the action there.

Counsel for Pacific Western Airlines led the airlines' attack on the validity and applicability of the "mistake of law doctrine". First of all, she stated, the Court should require restitution because to do otherwise would undermine the Constitution and be contrary to public policy. The province should not, therefore, be permitted to legislatively escape the consequences of its unconstitutional act. Nor should the airlines be denied recovery by the application of common law or equitable principles developed in the context of private law or in non-federal states. In the *Amax* case, *supra*, she noted, this Court held that a provincial legislature could not enact a statute barring recovery of taxes collected under an unconstitutional statute. It would be anomalous, she continued, if a court could deny recovery on the basis of a common law rule -- the mistake of law rule -- that the legislature could not enact.

The foregoing argument seems to me to rest on a misconception of the *Amax* case and of the place of the mistake of law rule in this context. The facts in *Amax* were that the province had by an unconstitutional statute levied taxes which the taxpayer had, on the assumed facts, paid under compulsion and which, therefore, it was entitled to recover. What the statute there impugned did was to bar actions for taxes paid under an unconstitutional statute that were otherwise recoverable. The legislature was, in essence, giving effect to the unconstitutional statute. It was

doing indirectly what it could not do directly. *Air Canada v. British Columbia (Attorney General)*, *supra*, is of a similar nature. The actions of the province there would have had the effect, by the exercise of the power to grant or refuse a trial, of indirectly giving effect to an unconstitutional statute. Whether, and within what limits, the province may regulate recovery of unconstitutional taxes is really not in issue here. The issue is the very different one of the effect of action taken pursuant to an *ultra vires* or unconstitutional statute.

In developing the law in public areas like this, the courts have not unnaturally turned to relevant experience in areas of private law, and where it appeared appropriate, they have, on occasion, simply transplanted such principles of private law to the realm of public and constitutional law. This type of transplantation has been done in other areas of law. For example, the principles for determining whether a tax is "within the province" for the purposes of s. 92(2) of the *Constitution Act* were derived in no small measure from the rules developed at common law to determine which ordinary should have power to administer an estate; see *The King v. National Trust Co.*, [1933] S.C.R. 670; *R. v. Williams*, [1942] A.C. 541. But this borrowing should not blind us to what the courts are really doing. They are defining rules of public and constitutional law. This is underlined again by reference to the *situs* rules. Though these were imported from the common law, they have been transformed, and it is constitutionally impermissible for a province to prescribe the conditions fixing the situs of property for the purposes of defining what may be taxed within the province; see *Lovitt v. The King* (1910), 43 S.C.R. 106, at p. 160; *The King v. National Trust Co., supra*. Similarly, the courts are at liberty to adopt the mistake of law rule, which finds its origin in private law, to define the effects of *ultra vires* or unconstitutional statutes. Whether this would be wise or not is another question, one to which I shall return. But if so adopted, one should not be misled by the supposed anomaly of the courts using a common law rule to do what a legislature could not by statute enact.

I mentioned earlier that it may or may not be wise to incorporate the mistake of law defence in the constitutional fabric. This brings me to what I consider the most weighty point made on behalf of the airlines. Counsel for Canadian Pacific Airlines invited us to do away with the mistake of law rule. As she noted, the common law has largely permitted recovery of payments made under a mistake of fact. The same approach should, she contended, be followed in the case of a mistake of law. The distinction between the two, she stated, has resulted in confusion, ambiguity and injustice, and should no longer be recognized. She urged us to adopt the dissenting reasons of Dickson J., as he then was, in the *Nepean* case, *supra*.

I do not intend to regurgitate what was said by Dickson J. in his judgment. Suffice it to say that it constitutes a thorough, scholarly and damning analysis of the mistake of law doctrine from its beginning and through the egregious error of Lord Ellenborough C.J. in the case of *Bilbie v. Lumley and Others* (1802), 2 East 469, 102 E.R. 448, to the present day; see Goff and Jones, *The Law of Restitution*, 3rd ed., at p. 117. What the judgment reveals is a rule built on inadequate foundations, lacking in clarity (the distinction between a mistake of fact and mistake of law can best be described as a fluttering, shadowy will-o'-the-wisp), and whose harshness has led to a luxuriant growth of exceptions (twelve perhaps, though the identity and scope of the exceptions I am told has led to considerable learned esoteric debate). Despite this, and despite almost universal criticism, the doctrine has spread from its original place in contract law into other areas, including public law (such as in *Nepean* itself), and it now even more ambitiously threatens to invade the domain of constitutional law. This explosion has, as Corbin has observed, probably occurred because of the temptation under the pressure of work for judges to seize upon the first plausible rule that becomes handy to dispose of a case that has no merit; *Corbin on Contracts* (1960), vol. 3, para. 617, at p. 756. The result is that while the rule undoubtedly serves some useful functions, these could be achieved by other means. As Dickson J. himself put it at p. 362:

> The modern justification for the existence of the rule against recovery of monies paid under a mistake of law has been the stability of contractual relations. The rule though is often used as a handy means of disposing of cases where, in fact, recovery of money should be barred, and would be, under a more searching analysis of the case. [Emphasis in original.]

From his analysis, Dickson J. concluded that the judicial development of the law of restitution or unjust (or as Dickson J. noted, "unjustified") enrichment renders otiose the distinction between mistakes of fact and mistakes of law. He would abolish the distinction, and would allow recovery in any case of enrichment at the plaintiff's expense provided the enrichment was caused by the mistake and the payment was not made to compromise an honest claim, subject of course to any available defences or equitable reasons for denying recovery, such as change of position or estoppel. Dickson J. considered the finality of transactions to be an important, but not an absolute value, and its weight in a particular context was best assessed within the context of the principles of the law of restitution. He preferred to do this rather than by engrafting new exceptions to a rule that has over the years been variously described as "most unfortunate", "monstrous", "decrepit" and "unjust".

I am aware that Dickson J. was speaking in minority (for himself and Laskin C.J.), but it can scarcely be maintained that the three judges who formed the majority rejected this position. Indeed, they never really faced this issue at all. The case, we saw, was argued on the basis that it fell within one of the exceptions to the mistake of law rule, that the parties were not *in pari delicto*, and they dealt with it accordingly. After having read Dickson J.'s judgment, Estey J. was at pains to note that in the argument unjust enrichment had only been tangentially mentioned and that the distinction between mistake of fact and mistake of law was not raised; indeed, it was accepted. "Accordingly," he concluded, "my considerations have been confined to the operation of the doctrine of mistake of law as argued."

This can hardly constitute an expression of opinion -- let alone a definitive one -- by this Court on the issues raised by Dickson J., and I therefore have no hesitation in following his lead in these matters. In my view the distinction between mistake of fact and mistake of law should play no part in the law of restitution. Both species of mistake, if one can be distinguished from the other, should, in an appropriate case, be considered as factors which can make an enrichment at the plaintiff's expense "unjust", or "unjustified". This does not imply, however, that recovery will follow in every case where a mistake has been shown to exist. If the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment, then restitution will be denied. Even were I not of the opinion that this "rule" should be abolished, I would not be prepared to extend to the constitutional plane a rule so replete with technicality and difficulty as the mistake of law rule. Constitutional adjudication invites the formulation of broad principles suitable to the accommodation and resolution of broad social and political values, and this much criticized rule seems singularly unsuited to that purpose.

As Dickson J. stated, however, unjust enrichment, particularly in this field, is no formula for easy solutions. The present case illustrates this. In the *Nepean* case, Estey J. made the passing comment that the concept of unjust enrichment was not easily associated with the relationship of public bodies such as were in issue there. I am not prepared to go that far. Where one party is enriched at the expense of another, it is appropriate to begin by asking if the principles of restitution would afford recovery to the deprived party, whether that party is a public body or not. However, as my comments below will indicate, where unconstitutional or *ultra vires* levies are in issue, special considerations do arise which may call for a different rule.

In this case, I have no doubt that the province has been enriched through the imposition of this unconstitutional tax. A more difficult issue which could preclude recovery in this case, even if

I were to base my decision solely on the application of restitutionary principles, is whether the enrichment of the province was at the expense of the plaintiff airlines. The Attorney General argued that the airlines were able to pass on the burden of the tax to their passengers. Counsel for Air Canada, however, strongly pressed that the "passing-on" defence should only be available where the tax has been specifically charged to other identified parties so as to make those parties the true taxpayers. He submits that otherwise the fact that a tax may have been passed on is no ground on which to deny recovery. Though the airlines may have increased their prices to raise revenue to pay the tax, the resulting higher prices may have had an impact on sales volume which may in turn have an out-of-pocket impact on the airlines' profit.

While it will take some time for the courts to work out the limits of the developing law of restitution, it is useful on this point to examine the American experience. Professor George E. Palmer, in his work, *The Law of Restitution*, makes the following comment (1986 Supp., at p. 254):

> There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the taxpayer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer.

In my view there is merit to this observation, and if it were necessary I would apply it to this case as the evidence supports that the airlines had passed on to their customers the burden of the tax imposed upon them. The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the

airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense.

This alone is sufficient to deny the airlines' claim. However, even if the airlines could show that they bore the burden of the tax, I would still deny recovery. It is clear that the principles of unjust enrichment can operate against a government to ground restitutionary recovery, but in this kind of case, where the effect of an unconstitutional or *ultra vires* statute is in issue, I am of the opinion that special considerations operate to take this case out of the normal restitutionary framework, and require a rule responding to the specific underlying policy concerns in this area.

It is not without significance that an examination of the case law of the United States, Australia and New Zealand shows that generally there is no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid. (See Clifford L. Pannam, "The Recovery of Unconstitutional Taxes in Australia and in the United States" (1964), 42 *Texas L. Rev.* 779, George E. Palmer, *The Law of Restitution*, vol. III, at p. 248.) While this rule has most often been stated in the traditional terms of mistake of law, which I have rejected, it is noteworthy that even in jurisdictions in the United States where the mistake of law rule is not followed (Connecticut and Kentucky), or has been abolished (New York), the courts have nevertheless held that a voluntary payment of taxes under an unconstitutional statute is not recoverable; (see Pannam, *supra*, at pp. 793-94, Palmer, *supra*, vol. III, at pp. 248-49).

What this suggests is that there are solid grounds of public policy for not according a general right of recovery in these circumstances, and that this prohibition exists quite independently of the law of restitution. This policy was forcefully stated by Logan J. in the Kentucky Court of

Appeals (where it will be remembered there is no general mistake of law doctrine) in *Coleman v. Inland Gas Corp.*, 21 S.W.2d 1030 (1929), at p. 1031:

> . . . all state governments have been slow indeed to open the doors of their treasuries and allow money to pass therefrom after it has once found lodgment within the governmental vaults. This is as it should be. The state is the sovereign and its affairs must be conducted for the best interest and welfare of the people. That calls for the expenditure of large sums of money for governmental affairs, and such sums of money can be obtained only through taxation. The state should determine the amount which it will spend by the probable income it will receive. When the income is collected it is allocated to different funds. The state uses the funds nearly always during the current year. It has been universally held, unless a contrary conclusion was forced by an ironclad statute, that no taxpayer should have the right to disrupt the government by demanding a refund of his money, whether paid legally or otherwise . . . .

See also *Mercury Machine Importing Corp. v. City of New York*, 144 N.E.2d 400 (1957), especially at p. 404. Similar sentiments were expressed by M. A. MacDonald J.A. in *Vancouver Growers Ltd. v. G. H. Snow Ltd., supra*. Such a rule is sensible. The only practical alternative as a general rule would be to impose a new tax to pay for the old, which is another way of saying that a new generation must pay for the expenditures of the old. At best it is simply inefficient.

A related concern, and one prevalent through many of the authorities and much of the academic literature is the fiscal chaos that would result if the general rule favoured recovery, particularly where a long-standing taxation measure is involved. That this is not an unfounded concern can be seen by reference to one incident in the United States. A provision has been inserted in the United States *Internal Revenue Code* removing the distinction between mistakes of fact and mistakes of law because of the harsh and unjust results that had occurred under the general rule. This, however, placed a severe strain on the United States Treasury when the Supreme Court in *United States v. Butler*, 297 U.S. 1 (1936), held unconstitutional the *Agricultural Adjustment Act* making almost one billion dollars in invalid taxes (a respectable amount now but overwhelming during the depression) repayable by the government. Faced with this situation

Congress immediately passed an Act which provided that no refunds for such taxes would be allowed unless the claimant could establish the burden of the tax. In view of *Amax*, *supra*, a province faced with a similar situation could not enact a similar measure.

To some extent the present case raises difficulties of a similar character. As Esson J.A. remarked at p. 390:

> It is instructive to consider what the consequences might be if Professor Hogg's thesis [which advocates general recovery of unconstitutional taxes] were to be applied to the Gasoline Tax Act. The tax imposed under it for decades before 1976 was a tax of broad general application. It has long been a major component of the provincial budget. Every operator of a vehicle contributed to the provincial coffers in this way. The total number of such taxpayers must be in the millions. The amount involved in these three actions is "only" something over six million dollars. In the modern scale of things, that will not have a major additional impact on the already sorry financial state of the province. A few more schoolrooms and a few more hospital wards may have to be closed and a few roads may go unrepaired; or perhaps the matter will be dealt with by a further increase in the deficit so that future generations will bear the burden. The blow will, however, be greater than that inflicted by these cases. We are told that other large taxpayers, including one of the national railways, commenced action before the period of limitation expired and await the outcome of these actions to decide whether to go ahead.

The situation would be much worse, of course, if the *Statute of Limitations* or laches could not be pleaded, a question Esson J.A. did not resolve and upon which it is unnecessary for me to embark.

Those who favour recovery of *ultra vires* taxes concede that an exception would be required where this would disrupt public finances; see John D. McCamus, "Restitutionary Recovery of Moneys Paid to Public Authority Under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada" (1983), 17 *U.B.C. Law Rev.* 233. But how would a court determine this? Among other complications is the fact that what can make recovery against the state impractical is the length of time during which an invalid tax has been collected. Equitable laches could be brought

into service, but these ordinarily involve some discernible act of acquiescence to trigger their operation. The obvious remedy is a period of limitations, but it would be inappropriate for courts at this late date of legal development to define such periods which, to be effective, may have to differ from one type of tax to another.

Professor Birks has argued that the dominant value should be respect for the principle that there should be no taxation without parliamentary sanction, and so the general rule should favour recovery; see Peter Birks, *An Introduction to the Law of Restitution*, at p. 294. Even Professor Birks, however, concedes that "Where there is a serious danger that public finances will be disrupted it may be necessary to limit or exclude a right to restitution" (at p. 298). I agree that the value he favours is worthy of protection, but in the context of taxes exacted through unconstitutional statutes in light of the other policies outlined above, I am not willing to give it the dominant status that Birks would accord it.

All in all, I have become persuaded that the rule should be against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes. It seems best to function from the basis of that rule with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances. However, this case does not call for departure from the general rule. The tax levied in this case, though unconstitutional, comes close to raising a mere technical issue. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed. Though specific evidence was not led on this point, were recovery to be allowed, the airlines would receive a windfall, and fiscal chaos could well result. Many others could well bring suit, for this is a general tax applying to all purchases of gasoline in the province. It is true that many of these would not be in a position to establish their claims but it would be odd if this factor were taken into account

since its general effect would be to favour the strong against the weak. Finally, there is not the element of discrimination, oppression or abuse of authority which would warrant recovery.

This rule against the recovery of unconstitutional and *ultra vires* levies is an exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it. Chief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government. Though the drawing of lines is always difficult, I am persuaded that this rule should not apply where a tax is extracted from a taxpayer through a misapplication of the law. Thus, where an otherwise constitutional or *intra vires* statute or regulation is applied in error to a person to whom on its true construction it does not apply, the general principles of restitution for money paid under a mistake should be applied, and, subject to available defenses and equitable considerations discussed earlier, the general rule should favour recovery. In exceptional cases public policy considerations may require a contrary holding, but those exceptional cases do not justify extending the general rule of non-recovery of unconstitutional or *ultra vires* levies. As Professor Palmer has noted (*The Law of Restitution*, *supra*, vol. III, at p. 247):

> The effect of restitution in dislocating the fiscal affairs of the governmental unit in such isolated instances of mistake is nothing like it would be where many payments have been made under a tax law which is unconstitutional or invalid for some other reason.

In my view no distinction should be drawn between those cases which would traditionally be considered as mistakes of fact, as for example where a tax assessment is based on a misapprehension of the facts which attract the tax, or where an error has been made in calculation, and those cases where the taxing statute is construed in error so as to impose liability

on a party not liable on the true construction of the statute. In both cases recovery should be available.

If recovery in all cases is to be the general rule, then that is best achieved through the route of statutory reform. If there are limits to the extent to which, because of the *Amax* principle, a legislature may limit recovery of taxes by a taxpayer who is at law entitled to recoup them, there would appear to be no limit to the legislature's providing for their recovery. This could take into account the types of variables already mentioned, the nature of the tax, the amounts involved, the times within which a claim may be made, the situation of those who are in a position to recoup themselves from others, and so on. Considerable study has gone into the nature of such legislation in the United States, where several jurisdictions have adopted this expedient: see Pannam, *supra*, at pp. 504 *et seq*. In Canada, see the Law Reform Commission of British Columbia's *Report on Benefits Conferred Under a Mistake of Law* (1981).

The airlines then contended that they should recover on the ground that they were not *in pari delicto* with respect to the imposition and collection of the tax. They cited in aid *Kiriri Cotton Co. v. Dewoni*, [1960] A.C. 192, at p. 204, where Lord Denning remarked that "If there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake -- then it may be recovered back". On this issue, I am in substantial agreement with Esson J.A. Like him, I agree that this ground is effectively disposed of by the judgment of Estey J. in *Nepean*, *supra*, at p. 394, in the following passage:

> The parties here did not 'agree' to do something prohibited by the Act. The respondent submitted a claim for payment of charges for power supplied, which were not authorized by the Act under which the parties were operating and the appellant, in all innocence, paid the account so rendered. The "*in pari delicto*" test and its terminology seem most inappropriate and utterly unconnected to the realities of the transaction.

While the province may have been in a better position to determine that the statute was unconstitutional and could therefore be accused, as Esson J.A. calls it, of "sloppy legislative housekeeping", I do not think that changes the picture. The same policy grounds against recovery exist and cannot depend on the competence or care of its legal advisers at the time. At all events, as he notes, it would not be unjust for the province to retain money that it could have obtained in any event by a statute properly framed to do what it purported to do; see *A. J. Seversen Inc. v. Village of Qualicum Beach* (1982), 135 D.L.R. 122 (B.C.C.A.)

Finally, the airlines contended that they paid the tax as a result of practical compulsion. For reasons that are apparent from the views earlier expressed, I do not accept Lambert J.A.'s view that payment under an *ultra vires* statute constitutes "compulsion" within the meaning of the rule sought to be applied here. That would substantially amount to saying, a view I have rejected, that there is a general rule of recovery when taxes are paid under an *ultra vires* statute. What the rule of compulsion seems to require is that there is no practical choice but to pay in the circumstances, or to put it another way, before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment; see Pannam, *supra*, pp. 785-87; see in this context *Maskell v. Horner*, [1915] 3 K.B. 106; *Lynden Transport Inc. v. R. in Right of British Columbia* (1985), 62 B.C.L.R. 314. Hinkson and Esson JJ.A. examined the factual basis upon which this contention is founded and, in my view, correctly arrived at the conclusion that there was no practical compulsion, and I find it unnecessary to review these again.

Disposition

For these reasons, I would dismiss the appeal by Air Canada and Pacific Western Airlines and allow the Crown's cross-appeal against them. I would also allow the appeal of the Crown against Canadian Pacific Airlines. I would order the airlines to repay the Crown the following amounts, respectively: Air Canada, $4,399,642.85; Pacific Western Airlines, $1,934,122.91; Canadian Pacific Airlines, $7,052,785.88.

I would reply to the constitutional questions as follows:

1. Is the *Gasoline Tax Act*, R.S.B.C. 1960, c. 162, as amended by S.B.C. 1976, c. 32 and as subsequently amended, *ultra vires* in its application or otherwise constitutionally inapplicable to Air Canada in the circumstances of this case?

A. The Act, as it existed in 1960, was constitutionally invalid, but the amendments of 1976 and 1981 are valid.

2. Does the application of the *Gasoline Tax Act* to Air Canada in the circumstances of this case violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

A. No.

3. If so, is its application justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. It is unnecessary to answer this question.

//Wilson J.//

The following are the reasons delivered by

WILSON J. (dissenting in part) -- I have had the benefit of the reasons of my colleague Justice La Forest on this appeal and I fully agree with his conclusion that the *Gasoline Tax Act, 1948* of British Columbia as it existed in 1974 was *ultra vires* the province and cannot be relied upon by the Crown to justify the collection or retention of the taxes levied against the appellants between 1974 and 1976. I agree with him also that this situation was corrected by the amendments made to the legislation in 1976 and that gasoline tax was properly exigible after 1976.

I take a different view, however, from my colleague of what was done by the province in 1981. I do not doubt for a moment that the province was free in 1981 to impose a retroactive tax covering the period 1974 to 1976. I do not believe, however, that it can do so as a mechanism for the confiscation of payments made under the earlier unconstitutional legislation.

It is, in my view, impossible to divorce s. 25(1) to (4) from s. 25(5). The only possible basis for the confiscation under s. 25(5) is the imposition of the retroactive tax under s. 25(1) to (4). Certainly the payments made under the *ultra vires* legislation could not support such a confiscation since the monies were not as a constitutional matter properly exigible under that legislation. Moreover, the fact that the amount payable under s. 25(1) to (4) coincides exactly with the amount paid under the *ultra vires* legislation is not, as my colleague suggests, a matter of "good fortune" for the legislature, but makes it perfectly clear that s. 25(1) to (5) were intended to defeat any claim for the return of the money paid under the *ultra vires* legislation. If, of course, such monies are not recoverable by law in any event, the confiscation provision is unnecessary; the province is then entitled to retain the money and there is nothing in the amended legislation to say that such payments must be applied against the new retroactive tax. The legislation does not require it nor was any claim of set-off made by the Crown. The Crown thus seeks legislatively to have its cake and eat it too. By confiscating the earlier payments it hopes to

defeat the claim for their return. By not pleading a set-off it does not have to acknowledge any right on the part of the appellants to the return of such monies. Instead, by imposing a retroactive tax it purports to create a new base of liability against which the confiscated payments may but do not have to be applied. The imposition of the retroactive tax in the exact amount of the payments made under the *ultra vires* legislation combined with the act of confiscation lead, in my opinion, to the inescapable conclusion that the intent of the province was to defeat any claim for the return of the monies paid pursuant to the *ultra vires* legislation so as to achieve indirectly what it could not achieve directly, namely the imposition of an *ultra vires* tax. This, in my view, is a clear violation of the principle in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576 (hereinafter *Amax*). It is an attempt, through the combined effect of a retroactive tax and confiscation of the monies already paid, to give effect to unconstitutional legislation.

In case I am wrong in this, I propose to consider, as does my colleague, whether the doctrine of mistake of law provides an alternate basis on which the appellants should succeed in their claim for repayment.

My colleague expresses the view that monies paid under a mistake of law should, despite the traditional rule to the contrary, be in general recoverable unless there is some specific reason why they should not be. My colleague reaches this conclusion by discarding the traditional common law distinction between mistake of fact and mistake of law in favour of the equitable doctrine of unjust enrichment. Whatever the nature of the mistake, the key question, my colleague suggests, should be whether the respondent has been unjustly enriched at the appellants' expense or whether there is some specific reason which makes restitution inappropriate in the circumstances. My colleague concludes that there was unjust enrichment in this case but he finds two reasons why restitution is inappropriate. The first is that the appellants in all likelihood passed on the burden of the *ultra vires* tax to their customers; the unjust enrichment of the

respondent was therefore not shown to be at the expense of the appellants. The second is that the general rule of recovery should, as a matter of policy, be reversed where the person unjustly enriched is a governmental body.

Before dealing with the suggested exceptions to the general rule I would like to address the underlying rationale for the traditional rule that monies paid under a mistake of law are irrecoverable. I think it is clearly and succinctly expressed by Lord Ellenborough in *Bilbie v. Lumley* (1802), 2 East 469, 102 E.R. 448, at p. 472 and pp. 449-50 as follows:

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.

In other words, the underlying premise on which the rule is based is that ignorance of the law is no excuse. The citizen is deemed to know the contents of legislation. The appellants in this case knew the law, i.e., that the monies were payable under the statute then in force and they paid. What they did not know was that the law was unconstitutional. It seems to me, however, that the appellants were entitled in making their payments to rely on the presumption of validity of the legislation and that, if the presumption was not by itself enough, they were entitled to rely on the representation as to its validity by the legislature enacting and administering it. It would be my view that the mistake of law doctrine (if it is to be retained) should certainly not be extended to monies paid under unconstitutional legislation. Otherwise taxpayers will be obliged to check out the constitutional validity of taxing legislation before they pay their taxes in pain of being unable to recover anything paid under unconstitutional laws. In my opinion, this is to place the onus of inquiry as to constitutionality in the wrong place.

If a valid distinction is to be made between payments made in error under perfectly valid legislation (as to which the mistake of law doctrine would seem clearly to apply) and payments made under unconstitutional legislation quite properly presumed by the taxpayer to be constitutional (as to which the doctrine of mistake of law has no application), it is unnecessary for me to consider whether the traditional rule as to the irrecoverability of monies paid under a mistake of law should be abolished. However, I am in complete agreement with what my colleague has to say on this subject and, were it necessary for me to do so in order to dispose of this case, I would support the minority view expressed by Dickson J. in *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347.

It is, however, my view that payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.

Based on the foregoing reasoning I conclude that payments made under a statute subsequently found to be unconstitutional should be recoverable and I cannot, with respect, accept my colleague's proposition that the principle should be reversed for policy reasons in the case of payments made to governmental bodies. What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the

burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. I find it quite ironic to describe such a person as "asserting a right to disrupt the government by demanding a refund" or "creating fiscal chaos" or "requiring a new generation to pay for the expenditures of the old". By refusing to adopt such a policy the courts are not "visiting the sins of the fathers on the children". The "sin" in this case (if it can be so described) is that of government and only government and government has means available to it to protect against the consequences of it. It should not, in my opinion, be done by the courts and certainly not at the expense of individual taxpayers.

My colleague advances another reason why the appellants should be denied recovery in this case. He says, in effect, that the appellants would be receiving a "windfall" if they received their money back because in all likelihood they have already recouped the payments made on account of the *ultra vires* tax from their customers. In terms of my colleague's analysis, the appellants are unable to show that the unjust enrichment of the province was at their expense. In my view there is no requirement that they be able to do so. Where the payments were made pursuant to an unconstitutional statute there is no legitimate basis on which they can be retained. As Dickson J. stated in *Amax*, *supra*, at p. 590:

> To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.

Likewise, Professor Hogg commenting on *Amax* in his treatise *Constitutional Law of Canada* (2nd ed. 1985) said at p. 349:

> Where a tax has been paid to government under a statute subsequently held to be unconstitutional, can the tax be recovered by the taxpayer? In principle, the answer should be yes. The government's right to the tax was destroyed by the holding of unconstitutionality, and the tax should be refunded to the taxpayer.

Indeed, even on my colleague's unjust enrichment analysis Dickson J. found in *Nepean, supra*, that there were no equitable reasons of principle or policy to preclude recovery from Ontario Hydro. He said at p. 373:

> I do not think it is any answer in law for Ontario Hydro to say to Nepean "True, we took your money unlawfully but we do not have to repay it because we mistakenly paid it out to other people". The fact is that Ontario Hydro did receive, and did have the use and benefit of Nepean's money. What it did with it is, as Mr. Laidlaw said, a problem for Ontario Hydro. The mere spending of the money is not, of itself, sufficient to establish a defence (*Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd., supra*).

If this appeal is properly disposed of on the basis of the equitable doctrine of unjust enrichment, I see no reason why the same approach taken by Dickson J. towards the difficulties of Ontario Hydro in making restitution should not be taken to any similar difficulties faced by the government of British Columbia.

For all these reasons I would allow the appeal and dismiss the cross-appeal and, failing agreement as to quantum, I would refer the matter back to the trial judge to determine the amount owing to the appellants for taxes and interest from July 1, 1976 to the date of judgment. I would award the appellants their costs both here and in the courts below.

I agree with my colleague for the reasons given by him that s. 7 of the *Canadian Charter of Rights and Freedoms* has no application to this case. I would answer the constitutional questions as follows:

1. Is the *Gasoline Tax Act*, R.S.B.C. 1960, c. 162, as amended by S.B.C. 1976, c. 32 and as subsequently amended, *ultra vires* in its application or otherwise constitutionally inapplicable to Air Canada in the circumstances of this case?

A. The Act prior to the 1976 amendments was *ultra vires* the Province of British Columbia. The amendments made to the Act in 1981 were also *ultra vires.*

2. Does the application of the *Gasoline Tax Act* to Air Canada in the circumstances of this case violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

A. No.

3. If so, is its application justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?

A. It is unnecessary to answer this question.

The appeal by Air Canada and Pacific Western Airlines Ltd. should be dismissed, the Crown's cross-appeal against them should be allowed and the Crown's appeal against Canadian Pacific Airlines Ltd. should be allowed, WILSON J. *dissenting in part. As to the first constitutional question, the Gasoline Tax Act, as it existed in 1960, was constitutionally invalid, but the amendments*

of 1976 and 1981 were valid. The second constitutional question should be answered in the negative; the third did not need to be answered.

Solicitors for the appellant Air Canada: Russell & DuMoulin, Vancouver.

Solicitors for the appellants Pacific Western Airlines Ltd. and Canadian Pacific Airlines Ltd.: Davis & Company, Vancouver.

Solicitor for the respondents the Province of British Columbia, et al.: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener Attorney General of Nova Scotia: The Attorney General of Nova Scotia, Halifax.

Solicitor for intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.