EB-2011-0361
EB-2011-0376

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 Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other order.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

GOLDCORP'S BOOK OF AUTHORITIES
(PART 3)

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File No.: 96289

December 16, 2011

E-FILED

Ms. Kirsten Walli, Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli,

Re: EB-2011-0361; EB-2011-0376 -
Preliminary Issues

We enclose herewith Goldcorp's Book of Authorities, Part 3.

Yours truly,

Gardiner Roberts LLP

Ian A. Blue

Enclosures

TORONTO: 285379\1 (96289)

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TAB NO.

TAB 28

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

DATE: 20101223

DOCKET: 33041

BETWEEN:

Attorney General of Canada

Appellant

and

TeleZone Inc.

Respondent

CORAM: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Binnie J. (LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring)

(paras. 1 to 81)

Canada (Attorney General) *v.* TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

Attorney General of Canada *Appellant*

v.

TeleZone Inc. *Respondent*

Indexed as: Canada (Attorney General) *v.* TeleZone Inc.

2010 SCC 62

File No.: 33041.

2010: January 20, 21; 2010: December 23.

Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Provincial superior courts — Action brought against federal Crown in Ontario Superior Court of Justice seeking damages for breach of contract, negligence and unjust enrichment arising from decision rejecting application for telecommunications licence — Whether plaintiff entitled to proceed by way of action in Ontario Superior Court of Justice without first proceeding by way of judicial review in Federal Court — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18; Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21.

In 1995, Industry Canada issued a call for personal communication services licence applications, and released the policy statement within which potential service providers could shape their applications. The statement provided that Industry Canada would grant up to six licences on the basis of criteria it set out. T submitted an application, but when Industry Canada announced its decision, there were only four successful applicants and T was not among them. T filed an action against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment, and sought compensation for claimed losses of $250 million. It claimed that it was an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Since its application satisfied all the criteria, it says, Industry Canada must have considered other undisclosed factors when it rejected T's application. The Attorney General of Canada, relying on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, challenged the jurisdiction of the Superior Court on the ground that the claim constituted a collateral attack on the decision, which is barred by the grant to the Federal Court, by s. 18 of the *Federal Courts Act*, of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Superior Court dismissed the objection on the ground that it was not plain and obvious that the claim would fail. The Court of Appeal upheld the decision, holding that *Grenier* was wrongly decided. In that court's view s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown, and s. 18 of the *Federal Courts Act* did not remove relief by way of an award of damages from the jurisdiction of superior courts.

Held: The appeal should be dismissed.

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The Court's approach should be practical and pragmatic with that objective in mind. Acceptance of *Grenier* would tend to undermine the effectiveness of the *Federal Courts Act* reforms of the early 1990s by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite Parliament's promise to give plaintiffs a choice of forum and to make provincial superior courts available to litigants "in all cases in which relief is claimed against the [federal] Crown" except as otherwise provided.

Apart from constitutional limitations, none of which are relevant here, Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. However, any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language. Nothing in the *Federal Courts Act* satisfies this test. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes the Attorney General's argument. The grant of exclusive jurisdiction to judicially review federal decision makers in s. 18 is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". This reservation or subtraction is expressed in s. 18 of the *Federal Courts Act* in terms of particular remedies. All the remedies listed are traditional administrative law remedies and do not include awards of damages. If a claimant seeks compensation, he or she cannot get it on judicial review, but must file an action.

The *Federal Courts Act* contains other internal evidence that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*. Section 18.1(2) imposes a 30-day limitation for judicial review applications. A 30-day cut off for a damages claimant would be unrealistic, as the facts necessary to ground a civil cause of action may not emerge until after 30 days have passed, and the claimant may not be in a position to apply for judicial review within the limitation period. While the 30-day limit can be extended, the extension is discretionary and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. Moreover, the grant of judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. Further, s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the lawfulness of administrative decisions could be assessed by the provincial superior court in the course of adjudicating a claim for damages.

The *Grenier* approach cannot be justified by the rule against collateral attacks. T's claim is not an attempt to invalidate or render inoperative the Minister's decision; rather, the decision and the financial losses allegedly consequent to it constitute the very foundation of the damages claim. In any event, given the statutory grant of concurrent jurisdiction in s. 17 of the *Federal Courts Act*, Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of a claim and this includes any attack on the validity of the Minister's decision where this issue is essential to the cause of action and where adjudicating the matter is a necessary step in disposing of the claim. While the doctrine of collateral attack may be raised by the Crown in the provincial superior court as a defence, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Similarly, while it may be open to the Crown, by way of defence, to argue that the government decision maker was acting under statutory authority which precludes compensation for consequent losses, this is not a matter of jurisdiction and can be dealt with as well by the provincial superior court as by the Federal Court.

It is true that the provincial superior courts and the Federal Court have a residual discretion to stay a damages claim if, in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. However, where a plaintiff's pleading alleges the elements of a private cause of action, the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that could be pursued on judicial review. If the plaintiff has pleaded a valid cause of action for damages, he or she should generally be allowed to pursue it.

Here, T's claim as pleaded is dominated by private law considerations. It is not attempting to nullify or set aside the decision to issue licences. Nor does it seek to deprive the decision of any legal effect. T's causes of action in contract, tort and equity are predicated on the finality of that decision excluding it from participation in the telecommunications market. The Ontario Superior Court of Justice has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from

adjudicating T's claim.

Cases Cited

Overruled: *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321, leave to appeal refused, [2003] 1 S.C.R. vii; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568, rev'd 2010 SCC 64, [2010] 3 S.C.R. 639; *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, leave to appeal refused, [2009] 3 S.C.R. vii; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Pringle v. Fraser*, [1972] S.C.R. 821; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 41 C.R. (3d) 262; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130; *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212; *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624.

Statutes and Regulations Cited

Civil Code of Québec, R.S.Q., c. C-1991.

Constitution Act, 1867, ss. 96, 101.

Corrections and Conditional Release Act, S.C. 1992, c. 20.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 3, 8, 21.

Federal Court Act, S.C. 1970-71-72, c. 1.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2(1) "federal board, commission or other tribunal", 17, 18, 18.1, 18.4, 39, 50(1).

Radiocommunication Act, R.S.C. 1985, c. R-2.

Authors Cited

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada.* Toronto: Canvasback, 1998 (loose-leaf updated July 2010).

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, pp. 14-15.

Canada. *House of Commons Debates*, 2nd Sess., 28th Parl., March 25, 1970, pp. 5470-71.

Canada. *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, p. 5414.

Craig, Paul P. *Administrative Law*, 6th ed. London: Sweet & Maxwell, 2008.

Hogg, Peter W., and Patrick J. Monahan. *Liability of the Crown*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Horsman, Karen, and Gareth Morley, eds. *Government Liability: Law and Practice*. Aurora, Ont.: Cartwright Law Group, 2007 (loose-leaf updated 2010).

Mullan, David J. "Administrative Law Update — 2008-2009", prepared for the Continuing Legal Education conference, *Administrative Law Conference—2009*. Vancouver: The Continuing Legal Education Society of British Columbia, 2009.

Woolf, Harry, Jeffrey Jowell and Andrew Le Sueur. *De Smith's Judicial Review*, 6th ed. London: Sweet & Maxwell, 2007.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19, 303 D.L.R. (4th) 626, 245 O.A.C. 91, 86 Admin L.R. (4th) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, affirming a decision of Morawetz J. (2007), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Appeal dismissed.

Christopher M. Rupar, Alain Préfontaine and Bernard Letarte, for the appellant.

Peter F. C. Howard, Patrick J. Monahan, Eliot N. Kolers and *Nicholas McHaffie*, for the respondent.

The judgment of the Court was delivered by

[1] BINNIE J. — TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of $250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

[2] The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister's decision. TeleZone's claim, he says, constitutes an impermissible collateral

attack on the Minister's order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals — *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18. The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, hence the "*Grenier* principle".

[3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the *Federal Courts Act*.

[4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

[5] The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

[6] In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 88 O.R. (3d) 173) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

I. Facts

[7] The alleged faults of the Minister of Industry Canada in dealing with the application under

the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone's allegations as capable of proof.

[8] TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal communication services ("PCS") — essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a licence to provide personal cordless telephone service. Between 1993 and 1995, TeleZone alleges that it kept Industry Canada appraised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

[9] In June 1995, Industry Canada issued a call for PCS licence applications (the "Call"), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the "Policy Statement"). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

[10] Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

[11] In September 1995, TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately $20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

[12] The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says, the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

[13] On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

[14] In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

II. Judicial History

A. *Ontario Superior Court of Justice (Morawetz J.) (2007), 88 O.R. (3d) 173*

[15] On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

B. *Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19*

[16] Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

III. Relevant Enactments

[17] *Constitution Act, 1867*

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Federal Courts Act, R.S.C. 1985, c. F-7

2. (1) . . .

> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

17. (1) [Relief against the Crown] Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

(2) [Cases] Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

. . .

(*b*) the claim arises out of a contract entered into by or on behalf of the Crown;

. . .

(*d*) the claim is for damages under the *Crown Liability and Proceedings Act*.

(5) [Relief in favour of Crown or against officer] The Federal Court has concurrent original jurisdiction

. . .

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

18. (1) [Extraordinary remedies, federal tribunals] Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) [Remedies to be obtained on application] The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) [Application for judicial review] An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) [Time limitation] An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) [Powers of Federal Court] On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.4 (1) [Hearings in summary way] Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) [Exception] The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

3. [Liability] The Crown is liable for the damages for which, if it were a person, it would be liable

(*a*) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. (1) [Concurrent jurisdiction of provincial court] In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

IV. Analysis

[18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic

with that objective in mind.

[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[20] The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a "collateral attack" prohibited by "inferences" derived from s. 18 of the *Federal Courts Act*. His argument, in a nutshell, is:

> Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court.

(A.G. Factum,[1] at para. 4)

[21] The Attorney General accepts that judicial review is not required "for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal" (para. 29). However, the detour is required for claims that engage, directly or indirectly, the "validity and unlawfulness" of such decisions (para. 2). "Lawfulness" is a broad term. The Attorney General uses "invalid" and "unlawful" conjunctively (e.g., at para. 49). He seems to use the term "unlawful" to cover virtually any government order that could lay the basis for a finding of fault in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a "physical task or activity" negligently, or breaching a duty to warn (Factum, at para. 50).

[22] The Attorney General's concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with "convenience" and "a choice of forum" in the provincial courts (see statement of the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414, reproduced below, at para. 58).

[23] I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

A. *The Nature of Judicial Review*

[24] The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

[25] Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

[26] The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[28] Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract (*Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii) or tort (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201).

[29] Nor is a breach of statutory power necessarily sufficient. Many losses caused by

government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

[30] In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

[31] The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.

[32] The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

B. *The Grenier Case*

[33] The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

[34] *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded $5,000 in compensatory and exemplary damages.

[35] On appeal, the Attorney General objected that the inmate should have sought judicial review of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to enter the wrong one. He knocked on s. 17 whereas he should have gone through s. 18. The Federal Court of Appeal agreed, taking the view that "Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal

Court. This review must be exercised under section 18, and only by filing an application for judicial review" (para. 24 (emphasis added)). The court reasoned that even within the same court, the s. 17 action for damages constituted an impermissible collateral attack on the decision of the prison authority (paras. 32-33) because the trial court "had to review the lawfulness of the institutional head's decision . . . and set it aside" (para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court's view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[36] Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. "[A] decision of a federal agency, such as the one by the institutional head in this case", the court reasoned, "retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated" (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the s. 17 damages action.

[37] More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier*'s "separate silos" approach. In *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476, the court allowed an application for judicial review to be converted into an action for damages which was also certified as a class action, Sexton J.A. commenting that "[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review" (para. 50).

[38] More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568 (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that "the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis" (para. 41).

[39] At the same time, some provincial courts have accepted the *Grenier* approach: see, e.g., *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244. Most provincial courts, however, have either not followed *Grenier* or distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1, at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379, at para. 24; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123, at para. 54; see also *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93, at para. 43; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182, at para. 34.

C. *The Attorney General's Expansive View of the Grenier Decision*

[40] According to the Attorney General, *Grenier* denied the *jurisdiction* of either the Federal Court or a provincial superior court to proceed to adjudicate a damages claim without first passing through the "unique" judicial review procedure set out in s. 18 of the *Federal Courts Act* if the "lawfulness" of an administrative decision or order is in issue. The Attorney General uses the expression "invalidity or lawfulness" which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, at pp. 703-6, where the Federal Court of Appeal concluded that the exercise by a Minister of a

statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii. However, in this Court's decision in *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

[41] Moreover, I do not think the Attorney General's position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737. Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence "would encourage conduct contrary to the [regulatory] Act's objectives and would tend to undermine its effectiveness" (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court's view of the statute under which an order is made "and must be answered in light of the legislature's intention as to the appropriate forum" for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that "would tend to undermine [the] effectiveness" of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally "appropriate forum" for resolving in an efficient way financial claims against the federal Crown.

D. *The Jurisdiction of the Provincial Superior Courts*

[42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

[43] The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

[44] The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *Mills v. The Queen*, [1986] 1 S.C.R. 863, *per* McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at p. 271, and *per* Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the Superior Court's authority to award damages. The dispute centres on subject matter jurisdiction.

[45] It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

[46] Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd.* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64, [2010] 3 S.C.R. 639), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court in the course of adjudicating a claim for damages (para. 39).

E. *Claimed "Inferences" From Section 18 of the Federal Courts Act*

[47] An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

[48] The Attorney General argues that a "remedies" oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in "a rigid, formalistic and literal interpretation" of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General's argument.

(i) The Parliamentary Context

[49] The Parliamentary debates in 1971 took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a "national perspective" on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court's supervisory jurisdiction over federal decision makers.

[50] The Minister of Justice in 1970 emphasized that Parliament's concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

> This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. . . . It is for this reason . . . that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

(*House of Commons Debates*, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also A.G. Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of "federal board, commission or other tribunal" goes well beyond what are usually thought of as "boards and commissions" and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

[51] The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

> **18.** (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[52] All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

(iii) Reading the Act as a Whole

[53] There is much internal evidence in ss. 18 and 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*.

[54] As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure — but not a damages action. TeleZone's action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

[55] The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable "between subject and subject" in the province where the claim arose, or six years in respect of a "cause of action arising otherwise than in a province".

[56] As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention:

. . . the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case". [para. 36]

See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 592-93; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, "the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals" (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the *Federal Courts Act*

[57] The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

The grant of jurisdiction is thus framed in terms of relief, i.e.,"all cases in which relief is claimed" except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature of judicial review* "may be obtained only on an application for judicial review made under section 18.1". The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

[58] As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

[W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.

. . .

Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.

Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added.]

(*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

[59] The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive

jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a "choice of forum" and to make available relief in the provincial superior courts that may be more "familiar" to litigants.

F. *The Doctrine of Collateral Attack*

[60] The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible "collateral attack" on the Minister's decision. The Court has described a collateral attack as

an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

(*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599)

[61] The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

[62] In *R. v. Litchfield*, [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

[63] I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was "invalid or unlawful".

[64] Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board

orders. Consequently, the collateral attack doctrine does not apply. [Emphasis added; para. 71.]

[65] Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was "an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does" (para. 34).

[66] Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based. . . . [Emphasis added.]

(D. J. Mullan, "Administrative Law Update — 2008-2009", prepared for the Continuing Legal Education conference, *Administrative Law Conference—2009*, October 2009, at p. 1.1.22.)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the collateral attack in light of the tribunal's expertise and *raison d'être* (including whether "the legislature intended to confer jurisdiction to hear and determine the question raised"); and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

[67] Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be "implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based", the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's "need to attack a law or order" is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

[68] In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

G. *The Defence of Statutory Authority*

[69] It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

[70] In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

[71] However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), that there may be "alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance" (p. 1226). Reference should also be made to the qualifying observation of what is "practically impossible" made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

[72] It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute . . . .

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts: see, e.g., *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212.

[73] I give an example. In *Ryan v. Victoria (City)*, the "inevitable result" defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that "[s]tatutory authority provides, at best, a narrow defence to nuisance" (para. 54), and rejected it on the facts of the case.

[74] For present purposes, we need go no further than to repeat that "statutory authority" is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under s. 17) finds that the government has a good defence based on statutory authority, it will simply dismiss the claimant's action.

H. *The Concern About "Artful Pleading"*

[75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

[76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

[77] In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:

. . . where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy*, *per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

[78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with

only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

I. *Application to the Facts*

[79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

[80] To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

V. Disposition

[81] The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Stikeman Elliott, Toronto.

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[1] The Attorney General's principal argument was filed in the companion case of *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, and references herein are to that factum unless otherwise noted.

TAB 29

Source: http://scc.lexum.org/en/2011/2011scc52/2011scc52.html

SUPREME COURT OF CANADA

CITATION: British Columbia (Workers' Compensation Board) *v.* Figliola, 2011 SCC 52

DATE: 20111027

DOCKET: 33648

BETWEEN:

Workers' Compensation Board of British Columbia

Appellant

and

Guiseppe Figliola, Kimberley Sallis, Barry Dearden and

British Columbia Human Rights Tribunal

Respondents

- and -

Attorney General of British Columbia, Coalition of BC Businesses,

Canadian Human Rights Commission, Alberta Human Rights Commission

and Vancouver Area Human Rights Coalition Society

Interveners

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

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

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

WORKERS' COMPENSATION BOARD *v.* FIGLIOLA

Workers' Compensation Board of British Columbia — *Appellant*

v.

Guiseppe Figliola,

Kimberley Sallis, Barry Dearden and

British Columbia Human Rights Tribunal — *Respondents*

and

Attorney General of British Columbia,

Coalition of BC Businesses,

Canadian Human Rights Commission,

Alberta Human Rights Commission and

Vancouver Area Human Rights Coalition Society — *Interveners*

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

2011 SCC 52

File No.: 33648.

2011: March 16; 2011: October 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

The complainant workers suffered from chronic pain and sought compensation from British Columbia's Workers' Compensation Board. Pursuant to the Board's Chronic Pain Policy, they received a fixed compensation award. They appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* ("*Code*"). The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint and concluded that the Board's Chronic Pain Policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

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

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

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

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

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

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

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

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

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

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

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

The Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are not the only, or even the most important considerations. The need for this necessarily broader discretion in applying the finality doctrines in the administrative law setting is well-illustrated by the intricate and changing procedural context in which the complainants found themselves in this case and underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The most important consideration is

whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

In this case, the Tribunal's decision not to dismiss the complaint under s 27(1)(f) was patently unreasonable. The Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. This requires looking at such factors as the issues raised in the earlier proceeding; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to be exactly the sort of approach called for by s. 27(1)(f). The Tribunal also failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

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

Cases Cited

By Abella J.

Referred to: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Berezoutskaia v. Human Rights Tribunal (B.C.)*, 2006 BCCA 95, 223 B.C.A.C. 71; *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

By Cromwell J.

Referred to: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (QL); *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129; *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52.

Statutes and Regulations Cited

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

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

Canadian Charter of Rights and Freedoms, s. 15.

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

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

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

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

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

Authors Cited

British Columbia. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, p. 4094.

British Columbia. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, pp. 8088-93.

British Columbia. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, p. 16062.

British Columbia. Workers' Compensation Board. *Rehabilitation Services and Claims Manual*, vols. I and II, updated June 2011 (online: http://www.worksafebc.com/publications/policy_manuals/rehabilitation_services_and_claims_manual/default.asp).

Lange, Donald J. *The Doctrine of Res Judicata in Canada*, 3rd ed. Markham, Ont.: LexisNexis Canada, 2010.

Lovett, Deborah K., and Angela R. Westmacott. "Human Rights Review: A Background Paper", prepared for Administrative Justice Project, Ministry of Attorney General of British Columbia, 2001 (online: http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/350060/hrr.pdf).

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

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

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

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

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

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

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

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

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

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

ABELLA J. —

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

[12] Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division. They did not proceed with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.

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

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

. . .

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

[14] The Tribunal rejected both arguments (2008 BCHRT 374 (CanLII)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *British Columbia (Ministry of Competition, Science & Enterprise) v. Matuszewski*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308, and relying on this Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, the Tribunal concluded that "the substance of the Complaints was not appropriately dealt with in the review process. . . . [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing" (para.

50).

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

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

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

[17] The Court of Appeal restored the Tribunal's decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274). It interpreted s. 27(1)(f) as reflecting the legislature's intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal's role in determining whether the previous proceeding had substantively addressed the human rights issues.

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

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

(d) fails to take statutory requirements into account.

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

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

Analysis

[21] The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT's human rights jurisdiction, both the Workers' Compensation Board *and* the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants' human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.

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

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

[24] On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these doctrines are "factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint" (para. 31).

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

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

[27] The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant . . . is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of

justice" (para. 19).

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

[29] Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision" (para. 35):

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

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

[31] And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

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

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

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

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

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

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

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

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

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

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

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

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

[37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

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

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

(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

there is no reasonable prospect that the complaint will succeed;

proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

the complaint or that part of the complaint was filed for improper motives or made in bad faith;

he substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

[40] Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal's jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word "may" is used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

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

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

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

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

In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings

. . .

You have the power to dismiss the complaints, as I indicated, and that has been expanded. [Emphasis added.]

(British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

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

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

[46] This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with". With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant's request for relitigation of the same s. 8 issue, the Tribunal was disregarding Arbour J.'s admonition in *Toronto (City)* that parties should not try to impeach findings by the "impermissible route of relitigation in a different forum" (para. 46).

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

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

[48] The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision.

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

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

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

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

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

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

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

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

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

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

[54] Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties' time and resources by sending the matter back for an inevitable result.

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

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

CROMWELL J. —

I. Introduction

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

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

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

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

II. Analysis

1. Common Law Finality Doctrines

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

[61] In *Danyluk*, the question was whether Ms. Danyluk's court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice: para. 19. He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however,

he added that in the administrative law context, "the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process": para. 21. Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion "is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers": para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case": *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is "an error of principle not to address the factors for and against the exercise of the discretion . . . . The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice": paras. 66-67.

[62] To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an opportunity to know the case and have a chance to meet it.

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

[64] I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a "judicial balance between finality, fairness, efficiency and authority of judicial decisions": para. 15. Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that "[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result": para. 53. She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.

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

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

[67] As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers' Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the

Board's Policy No. 39.01. He appealed the Board's decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.

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

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

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

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

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

[72] As noted earlier, the Review Officer's decisions are appealable to the Workers' Compensation Appeal Tribunal ("WCAT"), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter, including hearing evidence; it is not simply an appeal in the usual sense: ss. 245 to 250 of the Act. However, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), was amended effective October 18, 2007, removing the WCAT's jurisdiction to apply the *Code*: *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review of the merits of the Review Officer's decision on the human rights issue.

[73] The question of what this amendment did to the Review Officer's authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT's jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board's policy as being patently unreasonably and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT's *Code* jurisdiction not

only took away a right of review on the merits, but also had the effect of taking away the Review Officer's authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects of the Court's decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).

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

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

B. *Statutory Interpretation*

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

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

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

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

[80] We must interpret the words of the provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

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

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

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

[84] A further element of the statutory context is the provision's legislative history. That history confirms that it was the legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly (Handard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that the test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.

. . .

. . . [What the amendment] does is express the principle or the test pretty broadly and pretty generally. [Emphasis added.]

(*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

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

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

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

(1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.

(D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at p. 100, fn. 128)

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

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

25. . . .

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

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

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

C. *Exercising the Discretion*

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

[93] Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute is silent on the factors that may properly be considered by the Tribunal in exercising its discretion to dismiss or not to dismiss. This exercise of discretion is "necessarily case specific and depends on the entirety of the circumstances": *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.

[94] The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review mechanisms for the earlier decision is also a relevant consideration. Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration: paras. 74 and 80. The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie J. noted in *Danyluk*, the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is "based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'etre*" may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk*, for example, the fact that the employee had undertaken the earlier administrative proceedings at a time of "personal vulnerability" was taken into account: para. 78.

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

[96] The Tribunal's approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*, the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal's process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply "rubber stamp" the previous decision: para. 19. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27

(1)(f).

D. *Application*

[97] At the end of the day, I agree with Abella J.'s conclusion that the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the *ATA*. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it "is based entirely or predominantly on irrelevant factors" (s. 59(4)(c)), or "fails to take statutory requirements into account" (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

[98] However, I do not agree with my colleague's proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers' Compensation Board's application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, 229 B.C.A.C. 129 at para. 51: "the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body" (see also *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302, 243 B.C.A.C. 52). This case does not present exceptional circumstances justifying diverging from this general rule.

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

Appeal allowed.

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

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

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

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

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

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

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

Calgary.

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

TAB 30

Case Name:

Graywood Investments Ltd. v. Toronto Hydro-Electric Energy System Ltd.

Between
Graywood Investments Limited, (plaintiff/appellant), and Toronto Hydro-Electric Energy System Limited and Ontario Energy Board, (defendants/respondent)

[2004] O.J. No. 193

181 O.A.C. 265
128 A.C.W.S. (3d) 397

Docket No. C40159

Ontario Court of Appeal
Toronto, Ontario

Labrosse, Moldaver and Gillese JJ.A.

Heard: January 21, 2004.
Judgment: January 26, 2004.

(9 paras.)

Administrative law — Boards and tribunals — Jurisdiction — Natural resources law — Hydro-electricity — Regulation.

Appeal by the plaintiff, Graywood Investments Ltd, from the decision of a motions judge dismissing its application for judicial review on the basis that the Ontario Energy Board had exclusive jurisdiction over the subject-matter of its claim against the defendant, Toronto Hydro-Electric Energy System Ltd., and that the action amounted to an abuse of process. The Board had published a Distribution System Code dealing with conditions that a distributor of electricity must meet in carrying out its obligations under its license. However, the Code only applied to projects that were the subject matter of an agreement entered into before November 1, 2000. In finding that the defendant was not in breach of its license, the motions judge found that the determination of whether an agreement between the parties had been entered into before November 1, 2000 was a matter within the exclusive jurisdiction of the Board to determine pursuant to s. 75 of the Ontario Energy Board Act.

HELD: Appeal dismissed. The action of Graywood was based on the same fundamental issue as to whether there was an agreement between the parties prior to November 1, 2000, within the meaning of the Code. The application for judicial review brought by Graywood against the defendant and the Board was also based on the same issue. The fundamental issue was within the exclusive jurisdiction of the Board. While the complaint of Graywood may have been a matter of judicial review, its action was nothing more than an attempt to circumvent the Board's decision.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, ss. 19(1), 75.

Appeal From:

On appeal from the judgment of Justice Alexandra Hoy of the Superior Court of Justice dated May 16, 2003.

Counsel:

Robert J. Howe and David S. Cherepacha, for the appellant.
Frank Newbold, Q.C., for the respondent.

The following judgment was delivered by

1 THE COURT (endorsement):-- The appellant appeals the decision of the motions judge who dismissed Graywood Investments Limited's ("Graywood") claim on the basis that the Ontario Energy Board ("OEB" or "the Board") had exclusive jurisdiction over the subject-matter of the claim and that the action amounted to an abuse of process.

2 Pursuant to its powers under the Ontario Energy Board Act, S.O. 1998, c. 15 ("the Act"), the OEB approved and published a Distribution System Code dealing with conditions that a distributor of electricity must meet in carrying out its obligations under its license. The OEB ruled that the Code does not apply to projects "that are the subject matter of an agreement entered into before November 1, 2000."

3 The essence of the dispute between Graywood and Toronto Hydro-Electric Energy System Limited ("Hydro") is whether Hydro was in breach of its license in failing to apply the Code. In that regard, the motions judge found, correctly in our view, that the dispute was one that fell squarely within the exclusive jurisdiction of the Board under s. 75 of the Act.

4 In the circumstances of this case, the determination of that dispute turned on whether the parties had entered into an agreement, within the meaning of the Code, prior to November 1, 2000. That was a matter for the Board to decide, in accordance with its authority under s. 19(1) of the Act.

5 This action by Graywood is based on the same fundamental issue as to whether there was an agreement between the parties prior to November 1, 2000, within the meaning of the Code.

6 The application for judicial review brought by Graywood against Hydro and the OEB is also based on the same issue.

7 In our view, the fundamental issue was within the exclusive jurisdiction of the OEB. The complaint of Graywood may be a matter of judicial review, but this action is nothing more than an attempt to circumvent the OEB's decision.

8 We agree with the conclusion of the motions judge.

9 We would dismiss this appeal with costs fixed at $9,000.

LABROSSE J.A.
MOLDAVER J.A.
GILLESE J.A.

cp/e/nc/qw/qlhcc

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TAB 31

Interprovincial Pipe Line Limited (applicant) (appellant)
v.
National Energy Board (respondent)

[1978] 1 F.C. 601

Action No. A-335-77

Federal Court of Canada
COURT OF APPEAL

HEALD AND LE DAIN JJ. AND KELLY D.J.

TORONTO, JUNE 20; OTTAWA, AUGUST 17, 1977.

Jurisdiction — Appeal from National Energy Board order — Whether or not Board can order preparation and filing of information in documentary form not already in existence — National Energy Board Act, R.S.C. 1970, c. N-6, ss. 10(3), 14(2), 18, 24, 50, 52, 53, 54, 55 — National Energy Board Rules of Practice and Procedure, SOR/72-413, ss. 3(1), 5.1 — Inquiries Act, R.S.C. 1970, c. I-13, s. 4.

This is an appeal pursuant to section 18 of the National Energy Board Act, from an order of the National Energy Board directing the appellant to file with the Board certain information relating to its wholly-owned subsidiary in the United States. Leave to appeal was granted to consider the issue of the Board's statutory authority to order the preparation and filing of information in a documentary form that is not already in existence.

Held, the appeal is dismissed. It is questionable whether the Board can claim to be exercising the powers of inquiry conferred for purposes of Part II when exercising its jurisdiction under Part IV. There is no clearly explicit authority in the Act or Rules for the power exercised by the Board in the present case, but given the practical necessity of such power it exists by necessary implication from the nature of the regulatory authority that has been conferred on the Board. To deny the Board this power and to deny application of such power to information that is available to and under control of appellant by virtue of its control of and common management with its subsidiary would defeat the purposes of the statute. The allocation of costs and charges between appellant and its subsidiary is of essential concern to the Board and the information sought is relevant to that concern.

APPEAL.

COUNSEL:

John W. Brown, Q.C., and J.A. Hodgson for appellant.
Ian Blue and A. Bigué for respondent.
William G. Burke-Robertson, Q.C., for British Columbia Energy Commission.
D.H. Rogers for Ministry of Energy for Ontario.

SOLICITORS:

Blake, Cassels & Graydon, Toronto, for appellant.
Cassels, Brock, Toronto, for respondent.
Burke-Robertson, Chadwick & Ritchie, Ottawa, for British Columbia Energy Commission.

Thomson, Rogers, Toronto, for Ministry of Energy for Ontario.

The following are the reasons for judgment rendered in English by

1 LE DAIN J.: This is an appeal pursuant to section 18 of the National Energy Board Act, R.S.C. 1970, c. N-6, from an order of the National Energy Board directing the appellant, Interprovincial Pipe Line Limited (hereinafter referred to as "Interprovincial") to file with the Board certain information relating to its wholly-owned subsidiary in the United States of America, Lakehead Pipe Line Company Inc. (hereinafter referred to as "Lakehead").

2 Interprovincial, a company incorporated by Act of Parliament and continued under the Canada Corporations Act, R.S.C. 1970, c. C-32, owns and operates a pipeline system in Canada for the transmission of crude oil and other liquid hydrocarbons. The system runs from Edmonton, Alberta, to a point on the International Boundary between Canada and the United States near Gretna, Manitoba, and from a point on the International Boundary in the St. Clair River near Sarnia, Ontario, to Port Credit, Ontario. It has a branch line running from Westover, Ontario, to a point on the International Boundary in the Niagara River near Chippewa, Ontario, as well as an extension from Sarnia to Montreal.

3 Lakehead, its wholly-owned subsidiary incorporated under the laws of the state of Delaware, owns and operates a pipeline system for carrying similar products in the United States. The Lakehead system commences at a point on the International Boundary between Canada and the United States near Gretna, Manitoba, and traverses the states of North Dakota and Minnesota to Superior, Wisconsin. From Superior, a northerly line crosses the states of Wisconsin and Michigan to a point on the International Boundary in the St. Clair River. A southerly line extends from Superior across the states of Wisconsin, Illinois and Indiana around the southerly tip of Lake Michigan and across the state of Michigan to a point on the International Boundary in the St. Clair River immediately downstream of the northerly line. The pipeline commences again at a point on the International Boundary in the west branch of the Niagara River and extends to refineries in Buffalo.

4 The Interprovincial and Lakehead systems connect at the points referred to above on the International Boundary near Gretna, Manitoba, in the west, and near Sarnia and Niagara Falls in the east. The Lakehead system makes deliveries in the United States, but it also forms an essential part of the integrated system by which crude oil and other liquid hydrocarbons are transmitted from western Canada to the Provinces of Ontario and Quebec.

5 Interprovincial is subject in respect of its inter-provincial pipeline to the regulatory jurisdiction of the National Energy Board and Lakehead is subject in respect of its pipeline to the regulatory jurisdiction of the Interstate Commerce Commission of the United States. The tariffs filed by Interprovincial with the Board include joint tariffs entitled

INTERPROVINCIAL PIPE LINE LIMITED
in connection with
Lakehead Pipe Line Company, Inc.

and covering through transportation from points in western Canada to points in eastern Canada. The precise extent of the Board's jurisdiction with respect to such joint tariffs is not in issue on this appeal.

6 The order appealed from arises out of a rate hearing which the Board ordered of its own motion to determine whether the tolls charged by Interprovincial are just and reasonable and whether Interprovincial makes any unjust discrimination in tolls, service or facilities against any

person or locality. The authority for such a hearing exists under Part IV of the National Energy Board Act, and in particular, in virtue of sections 50, 52, 53, 54 and 55 thereof[1]. Subsection 14(2) of the Act provides[2] that the Board may act of its own motion to exercise its jurisdiction under the Act. Interprovincial does not in these proceedings challenge the authority of the Board to conduct the rate hearing that it has initiated in the present case.

7 The issue on appeal is the authority of the Board to compel Interprovincial to file certain information related to Lakehead. The information is specified in the Board's Order No. PO-5-RH-2-76 dated February 10, 1977 as follows:

1. Information for Lakehead Pipe Line Company Inc. for 1975 and 1976 similar to the information already provided respecting Interprovincial contained in Exhibits 19(A) and 19(E).
2. An up to date, physical description and systems map of the facilities owned by Lakehead Pipe Line Company Inc., including laterals, tankage, loading and delivery points.
3. The actual throughputs by product to delivery points of Lakehead Pipe Line Company Inc.'s systems for the year 1976.
4. Lakehead Pipe Line Company Inc.'s tariff curves, including supporting data and information as to the method used in developing the historic curve.
5. Calculations supporting Lakehead Pipe Line Company Inc.'s minimum charge, its cost additives for specific movements to specific areas and its oil allowance.

8 Interprovincial applied to this Court for leave to appeal from the Board's order pursuant to section 18 of the Act upon the following grounds:

1. That the National Energy Board has no jurisdiction over Lakehead Pipe Line Company Inc. (hereinafter referred to for convenience as "Lakehead") and accordingly the National Energy Board erred in law and exceeded its jurisdiction in directing the applicant to file information respecting the costs underlying the tariffs and tolls charged by Lakehead.
2. That the National Energy Board erred in law in holding that it had sufficient jurisdiction over joint tariffs to enable it to require the production of information relating to the operations of a pipeline located in the United States of America and owned and operated by Lakehead.
3. That the National Energy Board erred in law in holding that it had jurisdiction to order the applicant to produce information relating to the operation of a subsidiary company which carried on business solely in the United States of America.
4. That the National Energy Board erred in law and exceeded its jurisdiction in requiring the applicant to file financial information not already in existence related to the operation of Lakehead.

9 By order of this Court dated May 10, 1977 leave to appeal was granted upon the following terms:

> ... on the following question only namely:
>
> That the National Energy Board erred in law and exceeded its jurisdiction in requiring the applicant to file financial information not already in existence related to the operation of Lakehead Pipe Line Company Incorporated.

10 In thus limiting the appeal to the fourth ground on which leave was sought the Court has ruled that the question of whether the Board has any jurisdiction with respect to Lakehead, as distinct from Interprovincial, is not an issue on the appeal. The emphasis in the question on which leave was granted is that the information referred to in the Board's order is information that is not already in existence in the form specified by the Board, and this is the point to which argument was directed on the appeal. Counsel appeared on behalf of the Minister of Energy for the Province of Ontario and the British Columbia Energy Commission and made submissions in support of the Board's order.

11 The issue on appeal is whether the Board has statutory authority to order the preparation and filing of information in a documentary form that is not already in existence. Such information can be said to be not already in existence, at least in the form specified by the Board, because its preparation involves such acts or operations as calculations, reconciliation, analysis, adjustments, estimates and forecasts. It is information that must be specially prepared in a particular form for the Board's purposes. What is involved in complying with the Board's order in the present case is suggested by the affidavit of Mr. McWilliams, Assistant Secretary of Interprovincial, in which he states that he is informed that "it will be necessary for Interprovincial to request Lakehead staff in Superior, Wisconsin, to make estimates of future costs, make allowances and adjustments to annualize and normalize existing data and prepare schedules of financial information not already in existence".

12 There can be no doubt that the power to order the preparation and filing of written information of this kind is necessary to the effective exercise of the Board's jurisdiction under the Act. Mr. Whittle, the Secretary of the Board, put the matter thus in his affidavit:

> It is my opinion that, if the Board is not able to require companies subject to its jurisdiction to provide information in a form directed by the Board, and if it is restricted to using unprocessed, unanalysed, unscheduled, uncollated and disorganized documents, financial and engineering data as happen to be in the custody and control of such companies, the Board, assisted by technical staff, would be unable to adequately discharge the statutory responsibilities assigned to it under the National Energy Board Act, having regard to the complexity and nature of the energy problems facing Canada in the 1970's.

It is conceded that all of the information sought by the Board's order could be obtained in some manner, shape or form, and over some extended period of time, by viva voce evidence, but the same reasoning applies to the practicality of this mode of proceeding. The nature of the economic and other issues to be determined by the Board in the exercise of its jurisdiction under Parts III and IV of the Act with respect to certificates of public convenience and necessity and traffic, tolls and tariffs is such that the Board must have the power to determine the kinds of information it requires from companies and the form in which it requires it.

13 The Board appears to have relied for statutory authority for its order on subsection 10(3)[3] of the Act, which confers on it the power of a superior court of record to order production of documents. I would question whether the order in this case can be assimilated to an order for the production of documents, which in practice is directed to specific, existing documents. Reference was also made in the course of argument to section 5.1[4] of the National Energy Board Rules of Practice and Procedure (adopted pursuant to section 7 of the Act), which provides that the Board may require an applicant, respondent or intervenor to furnish additional information, but strictly speaking, this section, as indeed the Rules generally, would appear to apply to proceedings upon an application rather than proceedings which the Board orders of its own motion[5]. There was also reference to section 24[6] of the Act which confers on the Board, when it is exercising its advisory functions under Part II, the powers of commissioners under Part I of the Inquiries Act, R.S.C. 1970, c. I-13, including those conferred by section 4[7] thereof, which in its terms would appear to

be comprehensive enough to include the specific power exercised in this case. It is questionable, however, whether the Board can claim to be exercising the powers of inquiry conferred for purposes of Part II when exercising its jurisdiction under Part IV. In view of these uncertainties I am unable to conclude that there is clearly explicit authority in the Act or the Rules for the power exercised by the Board in the present case, but given the practical necessity of such power I am of the opinion that it exists by necessary implication from the nature of the regulatory authority that has been conferred on the Board. See Halsbury's Laws of England, 3rd ed., vol. 36, para. 657, p. 436: "The powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured."

14 To deny the Board this power, which it has exercised by long-established practice, and which, indeed, Interprovincial did not challenge in complying with previous orders of the Board for similar information relating to itself, would be to defeat the purposes of the statute. It would also in my opinion defeat the purposes of the statute to deny the application of such power to information that is, as the Board found, available to and under the control of Interprovincial by virtue of its control of and common management with Lakehead. Quite clearly the allocation of costs and charges between Interprovincial and Lakehead is of essential concern to the Board and the information sought is relevant to that concern. For these reasons I would dismiss the appeal.

* * *

15 HEALD J.: I concur.

* * *

16 KELLY D.J.: I concur.

qp/s/mwk

1 50. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.

52. All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

53. The Board may disallow any tariff or any portion thereof that it considers to be contrary to any of the provisions of this Act or to any order of the Board, and may require a company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tariffs in lieu of the tariff or portion thereof so disallowed.

54. The Board may suspend any tariff or any portion thereof before or after the tariff goes into effect.

55. A company shall not make any unjust discrimination in tolls, service or facilities against any person or locality.

2 14. (1) ...

(2) The Board may of its own motion inquire into, hear and determine any matter or thing that under this Act it may inquire into, hear and determine.

3 10. (1)...

(3) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

4 5.1 At any time after the filing of an application and before the disposition thereof by the Board, the Board may require any applicant, respondent or intervenor to furnish the Board with such further information, particulars or documents as the Board deems necessary to enable it to obtain a full and satisfactory understanding of the application, reply or submission.

5 This would appear to result from the terms of section 5.1 itself, and from the other provisions of the Rules, including

particularly subsection 3(1), which provides:

> 3. (1) Subject to the Act and the regulations and except as otherwise provided in these Rules, these Rules apply to every proceeding before the Board upon an application.

6 24. For the purposes of this Part, the Board has all the powers of commissioners under Part I of the Inquiries Act.

7 4. The commissioners have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

TAB 32

Case Name:

NB (ELECTRIC POWER COMMISSION) v. MARITIME ELECTRIC CO

New Brunswick Electric Power Commission (Applicant)
v.
Maritime Electric Company Limited and
National Energy Board (Respondents)

[1985] F.C.J. No. 93

[1985] 2 F.C. 13

Action No. 85-A-314

Federal Court of Canada
COURT OF APPEAL

MAHONEY, RYAN AND STONE JJ.

OTTAWA, APRIL 17, 18 AND JUNE 7, 1985.

COUNSEL:

Ian Blue, Q.C. and Paul Creghan, Q.C. for applicant.

William G. Lea for respondent Maritime Electric Company Limited.

Fred H. Lamar, Q.C. and Alan Macdonald for respondent National Energy Board.

John F. Funnell, Q.C. for Manitoba Hydro.

Judith M. Haldemann for Minister of Energy and Forestry for the Province of Prince Edward Island.

Richard Burns for Attorney General for the Province of New Brunswick.

SOLICITORS:

Cassels, Brock & Blackwell, Toronto, for applicant.

Campbell, Lea, Cheverie & Michael, Charlottetown, for respondent Maritime Electric Company Limited.

Nation Energy Board, Ottawa, appearing on its own behalf.

Manitoba Hydro, Winnipeg, appearing on its own behalf.

Attorney General for the Province of Prince Edward Island, Charlottetown, for Minister of Energy and Forestry for the Province of Prince Edward Island.

Attorney General for the Province of New Brunswick, Fredericton, appearing on behalf of the Province of New Brunswick.

The following are the reasons for judgment rendered in English by

STONE J.: This application is to stay execution of an order of the respondent Board.

The applicant generates electrical power by various means at its facilities in the Province of New Brunswick. Part of this power is sold under interconnecting agreements to utilities in neighbouring provinces as well as in the State of Maine. It holds licences from the Board for the purpose. Power that is sold to another facility in order to effect a saving in generating cost is known as "economy energy". When it is sold under a supply agreement which permits the supplier to curtail or cease delivery under defined circumstances it is known as "interruptible energy". The respondent Maritime Electric Company Limited ("MECL") distributes power to its customers in the Province of Prince Edward Island. It is a party to an interconnecting agreement with the applicant by which, inter alia, it is supplied economy energy according to a pricing formula therein contained.

In March of 1982 the applicant was successful in having its interruptible energy export licensing arrangements changed by the Board. The new arrangements are contained in licences EL-140, EL-143 and EL-145. A revised pricing provision appears in each licence as condition 6(b):

> 6. The Licensee shall not export energy hereunder e
>
> . . .
>
> (b) without first offering such energy, including any part thereof, to economically accessible Canadian markets, on terms not less favourable to a Canadian purchaser, after any appropriate adjustments have been made for differences in the cost of delivery, than the terms on which the export would be made.

Subsequently, on January 21, 1983 the applicant entered into a contract with Central Maine Power Company for the sale of interruptible energy at a monthly price to be negotiated. Upon agreeing to that price the applicant becomes obliged to supply the power after satisfying its own firm loads but before providing any economy energy to adjacent facilities. This agreement was approved by the Board on August 4, 1983 as interruptible energy and the licensing arrangements were amended to incorporate it. A similar agreement was entered into by the applicant with Bangor HydroElectric Company in April of 1984.

In November of 1983 the applicant made alternative offers to MECL for the sale of interruptible energy. In consequence of its claim that these offers did not conform to the requirements of condition 6(b), MECL applied to the Board for an order directing the applicant to conform to the condition as interpreted by it and, in the alternative, for an amendment of the licences in line with that interpretation. It contended that condition 6(b) entitled it to be offered the price resulting from a pricing formula contained in the interconnecting agreement between the applicant and Central

Maine Power Company. The applicant claimed that the requirements of the condition were met when it offered MECL that pricing formula even though it would result in a higher price to MECL than that paid by Central Maine Power Company. It cross-applied for amendment of the licences in line with its own interpretation of condition 6(b).

A hearing of the applications was held in 1984. By its order of january 23, 1985 the Board ordered (in Part) as follows:

> 1. NB Power shall, within 15 days of receipt by it of this Order and the reasons for Decision dated January 1985, offer to Maritime Electric and to every other economically accessible Canadian utility, the energy being exported to Central Maine Power Company under the power Purchase Agreement dated 21 January 1983 and to the Bangor Hydro-Electric Company under the agreement dated 27 April 1984, and under any other term agreement for the export of interruptible energy under Licences EL-140, EL-143 and EL-145, on terms that comply with the requirements set out in section 4.2.4 of the Reasons for Decision dated January 1985.

In point of fact, the Board's reasons for decision are dated February 20, 1985.

Two applications were brought in this Court in consequence of the order. By the first the applicant requested leave to appeal that order to this Court pursuant to subsection 18(1) of the National Energy board Act, R.S.C. 1970, c. N-6 [as am. by R.S.C. 1970 (2nd Supp.), c. 10 s. 65]. After hearing counsel for both parties and for the intervenors, we granted leave on April 18, 1985 in the following terms:

> Pursuant to subsection 18(1) of the National Energy Board Act, leave is granted to New Brunswick Electric Power commission to appeal to this Court in respect of the national Energy Board's order No. MO-9-85 and its related decision issued February 20, 1985, on the following grounds;
>
> 1. that the National Energy Board erred in law in its interpretation of condition 6(b) of licenses EL-140, EL-143 and EL-145;
> 2. that the National Energy Board erred in law in holding that the offer, dated November 7, 1983, by New Brunswick Electric Power Commission to Maritime Electric Company Limited, did not comply with the said condition 6(b);
> 3. that the National Energy Board exceeded its jurisdiction by specifying the contractual terms on which New Brunswick Electric Power Commission is required to offer power to Maritime Electric Company Limited in an interprovincial electricity exchange and, in the alternative, by thereby over-riding the subsisting contract between the said parties; and
> 4. that the National Energy Board exceeded its jurisdiction by interpreting condition 6(b) of the New Brunswick Electric c Power Commission licenses differently from its prior and contemporaneous interpretation of the same condition in licenses held by others. The second application is for a stay in the execution of that order pending disposition of the appeal. It raises two separate questions. First, does the Court have jurisdiction to grant a stay? Secondly, if jurisdiction exists should a stay be granted?

JURISDICTION

The applicant bases its case for the existence of jurisdiction on three alternative grounds. It says that jurisdiction is expressly conferred by subsection 50(1) of the Federal Court Act [R.S.C. 1970 (2nd Supp.), c. 10] (the "Act"), or that it is inherent or, finally, that it may be implied. Each argument was developed at length in light of the decided cases and requires separate consideration.

Express Jurisdiction

The argument that express jurisdiction exists is found upon the language of paragraph (b), subsection 50(1) of the Act and the decision of the Supreme Court of Canada in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. That subsection reads:

> 50.(1) The Court may, in its discretion, stay proceedings in any cause or matter,j
>
> (a) on the ground that the claim is being proceeded with in another Court or jurisdiction; or
> (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

The applicant contends that we should review our earlier decisions in the light of the Labatt Breweries case. I propose to examine those decisions at this point before discussing the case.

The earliest of these decisions is Lariveau v. Minister of Manpower and Immigration, [1971] F.C. 390 (C.A.). There the applicant was the subject of a deportation order made and confirmed pursuant to the Immigration Appeal Board Act, R.S.C. 1970, c. I-3 as amended [now repealed S.C. 1976-77, c. 52, s. 128]. He applied for an extension of time within which to seek leave to appeal to this Court from that order as well as for a stay of its execution. His argument for jurisdiction was based on rule 5 of the Federal Court rules [C.R.C. c. 663], the so-called "gap" rule, which he claimed empowered the Court to apply powers conferred upon the Quebec Court of Appeal by the Civil Code of that Province as a basis for staying the execution of the order under appeal. The Court found those provisions inapplicable. In the course of his judgment Mr. Justice Pratte stated on behalf of the majority (at page 394):

> There is, however, a much more fundamental reason for denying the motion before us. In fact, what the appellant is asking the Court to do is to modify the effect of a decision delivered in due form by the Immigration Appeal board, before he has even appealed from this decision or requested leave to do so. It seems to me that the court clearly does not have the power which appellant is asking to exercise.

In Minister of Employment and Immigration Canada v. Rodrigues, [1979] 2 F.C. 197 (C.A.) the Court reversed a decision of the trial Division which had stayed all proceedings relating to an inquiry being conducted pursuant to the Immigration Act, R.S.C. 1970, c. I-2 on the basis that a discretionary power to do so had been conferred by paragraph 50(1)(b). In holding that jurisdiction to stay the proceedings had not been conferred the court expressed the view (at page 199) that section 50 "allows the Court to stay proceedings which are in progress in the Court itself; it does not allow the Court to stay proceedings in progress before some other tribunal."

This Court has also held that the Trial Division has no jurisdiction to stay an order of the Canada Labour Relations Board pending the determination of an application made to this Court to review the order pursuant to section 28 of the Act (Nauss v. International Longshoremen's Association, Local 269, [1982] 1 F.C. 114 (C.A.), Union des employés de commerce, local 503 v. Purolator Courrier Ltée, [1983] 2 F.C. 344; 53 N.R. 330 (C.A.)). Additionally, in General Aviation Services Ltd. v. Canada Labour Relations Board (Court File No. A-762-82, August 9, 1982) it held that this Court was without jurisdiction to stay an order made by that Board pending its review pursuant to section 28 of the Act. The Court file indicates that the application was dismissed without detailed reasons.

I agree that each of these decisions is distinguishable from this case. At the same time it seems to me that the general approach has been that staying of proceedings of tribunals other than of the Court itself is beyond the reach of the powers conferred by subsection 50(1) of the Act. Nevertheless the applicant correctly points out that the Lariveau and Rodrigues cases were decided prior to that of Labatt Breweries and that in none of the subsequent decisions was that case considered or, at all events, that it is not referred to in the reasons for judgment. While it did not involve the interpretation of paragraph 50(1)(b) of the Act the assertion is made that the reasoning contained in that case is applicable and that we should apply it. Its relevance must now be considered.

In that case the appellant questioned the validity of certain regulations under the Food and Drugs Act, R.S.C. 1970, c. F-27 upon which the respondent relied as authorizing the seizure of a brewery product whose label did not conform to the requirements of the Regulations. The Trial Division granted relief but its decision was reversed by this Court which also granted leave to appeal to the Supreme Court of Canada because, it its view, the issues were important. The Department of Consumer and Corporate Affairs proposed to act upon the judgment of this Court even while the appeal was pending in the Supreme Court of Canada. An application to this Court for a stay of further proceedings by the respondent and action by the Department was rejected on the ground that there was nothing to be stayed and, accordingly, that it had no jurisdiction to make an order against either the respondent or the Department. After filing its notice of appeal to the Supreme Court of Canada, the appellant applied to that Court for an order, inter alia, to have further proceedings or action against it stayed pending the decision of that Court on the merits of the appeal.

The Supreme Court of Canada concluded that it has jurisdiction under its Rule 126 [Rules of the Supreme Court of Canada, C.R.C., c. 1512] to grant the stay. The rule read:

> RULE 126. Any party against whom judgment has been given, or an order made, may apply to the Court or a judge for a stay of execution or other relief against such a judgment or order, and the Court or judge may give such relief and upon such terms as may be just.

In so concluding the Court rejected a contention that the Rule related only to its own judgments or orders and not to judgments or orders of another court. It also rejected the contention that staying of the effect of the order under appeal was not within the scope of the Rule. Lakin C.J. speaking for the Court, dealt with these contentions as follows (at page 600):

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to

> me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just.

That case, of course, turned upon the interpretation of Rule 126 as it then stood and the Supreme Court of Canada decided that the Rule applied as well to a stay in the execution of an order of the Trial Division of this Court as to an order or judgment of the Supreme Court itself. That being so it found itself able to stay execution of the order (and of its effect) pursuant to the provisions of that Rule. A similar rule may be found in Rule 1909[1] of the Federal Court Rules.

Subsection 50(1) of the Act, unlike Rule 126 does not speak in terms of staying "execution" of "a judgment or order". It authorizes the Court to "stay proceedings in any cause or matter". We must decide the point in issue on the basis of the language actually used by Parliament in framing that section. What then did Parliament intend when it empowered the Court to "stay proceedings"? Did it intend to include stay of "proceedings" in addition to those pending in the Court? And, if it did, is the Board's order "proceedings"? The applicant argues that just as the Supreme court of Canada interpreted Rule 126 to include an order of a court in addition to its own so also should we interpret subsection 50(1) to include proceedings of a tribunal in addition to those of the Court itself. MECL contends that even if section 50 applies to proceedings before the Board there are not any longer "proceedings" before it.

Subsection 50(1) of the Act is not on its face limited to proceedings "before the Court".[2] The inclusion of those words or words of like effect would, I think, have removed any doubt as to the intention of Parliament. Omission of them from subsection 50(1) lends some support to an argument that by "proceedings" Parliament intended to confer power, in appropriate circumstances, to stay proceedings in addition to those pending in the Court itself. It is unnecessary here to carry the argument further because, as I see it;, the applicant has a further hurdle to surmount. If it fails in that, then a result based upon the existence of express jurisdiction must also fail.

That hurdle is whether what is sought to be stayed may properly be regarded as "proceedings". Only the Boards order is in issue. It has heard the application and has spoken. It has determined the matter in terms of its order. In short it has disposed of it so that nothing remains for it to do. MECL may enjoy the fruits of its victory without further action on its part for no new proceedings are contemplated for enforcement of the order. Only simply compliance with the formalities of section 15 of the National Energy Board Act[3] [as am. by R.S.C. 1970 (2nd Supp.), c. 10, s. 64] is required. Moreover, Parliament has made it clear in subsection 19(1) of the statute that subject to its other provisions the order is "final and conclusive". As, in my view, the order under appeal is not "proceedings" in progress before the Board, we are not authorized by paragraph 50(1)(b) of the Act to stay its execution.

Inherent Jurisdiction

The contention that the Court has inherent power to stay the Board's order can be dealt with shortly. The Federal Court, unlike a superior court of a province, is a statutory court. Its jurisdiction to hear and determine disputes must therefore be found in the language used by Parliament in conferring jurisdiction. The applicant's assertion that inherent jurisdiction exists is based upon certain observations made in the course of a further decision of the Supreme Court of Canada in Attorney General of Canada et al. v. Law Society of British Columbia et al., [1982] 2 S.C.R. 307. One aspect of that case concerned the jurisdiction of the Supreme Court of British Columbia to declare that certain provisions of the Combines Investigation Act, R.S.C. 1970, c. C-23 were either inapplicable or were ultra vires. In deciding that the Court had jurisdiction to grant the relief, Estey J. (for the Court) stated (at page 330):

> Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective. similarly courts with jurisdiction to undertake a particular lis have had the authority to maintain the status quo in the interim pending disposition of all claims arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court.

Although the language used by the learned Judge might possibly suggest that the Federal Court, too was within his contemplation I am doubtful from a reading of his judgment as a whole that it was. As was made clear by Estey J. himself (at pages 326-327) the dispute concerned only the jurisdiction of a provincial superior court:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction.

I cannot accept the applicants's contention that the case stands for the proposition that this Court has inherent jurisdiction to grant the relief sought. No other basis was suggested for the existence of such jurisdiction.

Implied Jurisdiction

I turn now to the final argument in favour of jurisdiction. It may be stated quite simply. The right of the applicant to appeal against the order of the Board is conferred by subsection 18(10 of the National Energy Board Act:

> 18.(1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal upon a question of law or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court or a judge thereof under special circumstances allows.

The jurisdiction of this Court to hear and determine the appeal is found in subsection 30(10 of the Act:

> 30.(1) The Court of Appeal has exclusive original jurisdiction to hear and determine all appeals that, under any Act of the Parliament of Canada except the Income Tax Act, the Estate Tax Act and the Canadian Citizenship Act, may be taken to the Federal Court.

It is said that because Parliament has so provided it must also have intended that this Court be able to stay execution of the order under appeal so as to effectively exercise its appellate jurisdiction. In my view there is merit to this contention. It is a concept that was commented upon in a recent judgment of this Court in National Bank of Canada v. Granda (1985), 60 N.R. 201, in the context of a decision then pending review pursuant section 28 of the Act. Mr. Justice Pratte made the following observations on his own behalf (at page 202) in the course of his reasons:

> What I have just said should not be taken to mean that the Court of Appeal has, with respect to decisions of federal tribunals which are the subject of applications to set aside under s.28, the same power to order stays of execution as the Trial Division with respect to decisions of the court.
>
> The only powers which the Court has regarding decisions which are the subject of applications to set aside under s. 28 are those conferred on it by ss.28 52(d) of the Federal Court Act. It is clear that those provisions do not expressly confer on the court a power to stay the execution of decisions which it is asked to review. However, it could be argued that Parliament has conferred this power on the court by implication, in so far as the existence and exercise of the power are necessary for the court to fully exercise the jurisdiction expressly conferred on it by s.28. In my opinion, this is the only possible source of any power the Court of Appeal may have to order a staying the execution of a decision which is the subject of an appeal under s. 28. It follows logically that, if the court can order a stay in the execution of such decisions, it can only do so in the rare cases in which the exercise of this power is necessary to allow it to exercise the jurisdiction conferred on it by s. 28.

These observations bring into focus the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory. Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance. The right of a party to an "appeal" would exist only on paper for, in reality, there would be no "appeal" to be heard, or to be won or lost. The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result. I hardly think Parliament intended that we be powerless to prevent such a state of affairs. In my view the reasoning of Laskin C.J. in the Labatt Breweriew case (at page 60) applies with equal force to the ability of this Court to prevent continued operation of an order under appeal from rendering the appeal nugatory:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pend-

> ing before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

I have concluded that this Court does possess implied jurisdiction to grant a stay if the operation of the Boards order pending the appeal would render the appeal nugatory.

Counsel for the Minister of Energy and Forestry for the Province of Prince Edward Island argues that section 29 of the Act denies this Court a power to stay the order. It reads:

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

As provision for the pending appeal is made in section 18 of the National Energy Board Act it is argued that the order below is not to be "otherwise dealt with, except to the extent and in the manner provided for in that Act". Those words, it is contended, bar this Court from granting the application. Only the Board, it is said, can grant a stay of the order and as it has refused to do so "that ends the matter".

With respect, I think the argument overlooks a vital portion of section 29. The words upon which particular reliance is made appear in a given context which provides that to the extent that the decision or order may be appealed it is not "subject to review or to be restrained prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner proved for in the Act". The entire context must be considered in interpreting the words "or otherwise dealt with" and, indeed, the section as a whole must be viewed in light of the statute read as a whole. When that is done the purpose of section 29 is made clear. Jurisdiction conferred on the Trial Division under section 18 and on this Court under subsection 28(1) of the Act is not to be invoked when an appel of the decision or order is taken pursuant to a federal statute providing for same. I would not view section 29 as a bar to this Court staying execution of an order under appeal in appropriate circumstances.

EXERCISE OF JURISDICTION

We are asked to exercise our discretion in favour of the applicant either if we find that the balance of convenience favours preservation of the status quo pending disposition of the appeal or that refusal to grant a stay would render the appeal nugatory. I propose to deal with these two tests separately.

The balance of convenience is, of course, among the criteria applied in deciding whether as interlocutory injunction should be granted and the applicant submits that the same criteria should be applied her (Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al. (1977), 17 O.R. (@d) 448 (H.C.); Wells Fargo Armcar, Inc. v. Ontario Labour Relations Board et al. (1981), 34 O.R. (2d) 99 (H.C.)). MECL argues that the balance of convenience

favours neither side. As the point was pressed in argument I propose to deal with it but without deciding upon its appropriateness as a test in a case of this kind.

The applicant asserts that revenues lost by operation of the order are required for ordinary operations and that current rates were established in light of that requirement. Those rates were based upon an assumption of success before the Board. MECL points out that a stay of the order would mean an increase in the costs of power for itself and for its customers. In the course of submissions the applicant undertook to compensate MECL for this increase in the event that the appeal be dismissed and, at the same time, MECL undertook to compensate the applicant for lost revenues in the event the appeal be successful. It is evident that both sides would be inconvenienced by a stay or by the continued operation of the order, the one as much as the other. In my judgment, this is not a case where the balance of convenience favours preservation of the status quo. Accordingly, we would not be justified in granting the application on this ground and I would decline to do so.

Although I consider the second test as entirely appropriate in this case, I am not persuaded that the particular circumstances favour a stay. While operation of the order pending the appeal will result at very least in temporary loss of revenue to the applicant it would not as such render the appeal nugatory. The substance of the appeal would remain very much intact and would hold out to the applicant the possibility that its claimed right to sell economy energy at a price in excess of that permitted by the Board's order would be upheld. Otherwise, sale of the energy at the price required by that order would continue. This Court could render an effective result in the matter. I must reject this ground for staying the order as, in my view, refusal to grant it would not render the appeal nugatory.

For the foregoing reasons I would dismiss this application with costs.

MAHONEY J.: I agree.

RYAN J.: I agree.

1

Rule 1909. A party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief against such judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

As this Rule was not expressly invoked or even referred to in argument as a possible basis for staying the order appealed from, I would refrain from expressing a view on the question whether, in light of the interpretation given a similarly-worded rule in Labatt Breweries, it might confer express jurisdiction to stay that order. Indeed, were I not of the view expressed later in these reasons that the balance of convenience does not support a stay, I would have found it necessary to call upon the parties to deal with this issue before disposing of the application.

2

See e.g. section 49 of the Act where those words appear. IN section 38(1), 54(2) and 57 thereof the words "in the Court" qualifies the word "proceedings". subsection 28(1) of the Act conferring review jurisdiction on this Court speaks of a decision or order "made by or in the course of proceedings before a federal board, commission or other tribunal" and section 29 speaks in similar terms in case of an appeal from such a decision or order. (My emphasis.)

3

> 15.(1) Any decision or order made by the Board may, for the purpose of enforcement thereof, be made a rule, order or decree of the Federal Court of Canada or of any superior court of any province of Canada and shall be enforced in like manner as any rule, order or decree of such court.
>
> (2) To make a decision or order of the Board a rule, order or decree of the Federal Court of Canada or a superior court, the usual practice and procedure of the court in such matters may be followed, or in lieu thereof the Secretary may file with the Registry of the Federal Court a certified copy of the decision or order under the seal of the Board and thereupon the decision or order becomes a rule, order or decree of the court.

TAB 33

The Canadian Broadcasting League (Appellant) v. Canadian Radio-television and Telecommunications Commission and Kingston Cable T.V. Limited (Respondents)

[1983] 1 F.C. 182

Action No. A-66-81

Federal Court of Canada
COURT OF APPEAL

URIE, LE DAIN JJ. AND KELLY D.J.

TORONTO, MARCH 24; OTTAWA, JUNE 30, 1982.

Broadcasting — Appeal from decision of CRTC allowing respondent Kingston Cable T.V. Limited to amen its cable television broadcasting licence by increasing installation fee and maximum monthly fee to subscribers — Whether CRTC authorized by statute or regulation to approve, by way of amendment of licence, such amendment — Broadcasting Act giving CRTC power to issue and amend licences, fix fees and supervise broadcasting system — Whether Commission has general authority to fix fees cable television licensee may charge — When considering validity of regulations under s. 16 or conditions to licence, one must examine whether regulations or conditions fit into one of classes in s. 3 — Where CRTC issues a cable television broadcasting licence conferring a territorial monopoly, authority to fix fees exists by necessary implication to further policy objectives of s. 3 — Specific statutory criteria not required — Appeal dismissed — Broadcasting Act, R.S.C. 1970, c. B-11, ss. 3, 15, 16(1)(b), 17(1)(a), (b) 26(1) — Cable Television Regulations, C.R.C., c. 374, s. 17 — Canadian Radio- television and Telecommunications Commission Act, S.C. 1974- 75-76, c. 49.

This is an appeal under the Broadcasting Act from a decision of the CRTC allowing the respondent Kingston Cable T.V. Limited to amend its cable television broadcasting licence by increasing the amount of the installation fee and the maximum monthly fee it may charge its subscribers. Leave was granted by the Court of Appeal on one ground only: whether the CRTC was authorized by statute or regulation to approve such an amendment. The precise issue as to the validity of the CRTC's decision is whether paragraph 17(1)(a) confers authority on the CRTC to authorize that amendment.

Held, the appeal is dismissed. Cable television is subject to regulation under the Broadcasting Act as a "broadcasting receiving undertaking" in section 2. The decision of the Commission approved an application to amend the licence of Kingston Cable T.V. Limited, thus purporting to be an exercise of the authority conferred by paragraph 17(1)(b) of the Act to amend the conditions to which a licence has been made subject by an exercise of the authority conferred by paragraph 17 (1)(a).

Because the validity of section 17 of the Regulations, which rests on the regulation-making power contained in paragraph 16(1)(b) of the Act, is also in issue the question becomes an issue of the CRTC's power, generally, to fix such fees, not just as a condition of a licence. The appellant argues that the power to regulate rates and fees must be supported by express statutory authority, which power, under the Broadcasting Act, is not given to the CRTC. In addition, it is not a power that should exist by necessary implication, as this would have far-reaching effects. The

respondents contend that the Act is comprehensive enough to support such power because a broad view is to be taken of the CRTC's powers to implement the broadcasting policy set out in section 3. Also, the power to set fees exists by necessary implication just as does the policy of the CRTC that cable television licensees enjoy a territorial monopoly. When determining the validity of a regulation made under section 16, as well as conditions to a licence made under paragraph 17 (1)(b), the same principles apply. One must determine whether the regulation or condition fits within one of the classes set out in section 3. A broad view is to be taken of what is embraced by that section having regard to the latitude or discretion that has been committed to the CRTC to determine what may be necessary in a particular case for the furtherance of its policy objectives. Where the CRTC issues a cable television broadcasting licence that confers a territorial monopoly, it must necessarily have the authority to fix as a condition the maximum fees which a licensee may charge subscribers, if it is to further the policy objective of ensuring the widest possible public access to the services of the Canadian broadcasting system, as contained in paragraph 3 (c). The CRTC is capable of considering, in the exercise of its authority, the interests of subscribers and the financial resources required by a licensee to provide the quality of service contemplated in section 3, without the need of specific statutory criteria.

CASES JUDICIALLY CONSIDERED

Applied:
Capital Cities Communications Inc., et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141; CKOY Limited v. The Queen, [1979] 1 S.C.R. 2.

Referred to:
Interprovincial Pipe Line Limited v. National Energy Board, [1978] 1 F.C. 601 (C.A.); Terra Communications Ltd. et al. v. Communicomp Data Ltd. et al (1974), 1 O.R. (2d) 682.

APPEAL.

COUNSEL:

A.J. Roman for appellant.

A. Cohen and P.A. Wylie for respondent, Canadian Radio-television and Telecommunications Commission.

P. Genest, Q.C. and I.A. Blue for respondent, Kingston Cable T.V. Limited.

SOLICITORS:

The Public Interest Advocacy Centre, Toronto, for appellant.

Canadian Radio-television and Telecommunications Commission, Ottawa, for respondent, Canadian Radio-television and Telecommunications Commission.

Cassels, Brock, Toronto, for respondent, Kingston Cable T.V. Limited.

The following are the reasons for judgment rendered in English by

LE DAIN J.: This is an appeal by leave, pursuant to subsection 26(1) of the Broadcasting Act, R.S.C. 1970, c. B-11, from Decision CRTC 80-101 [5 C.R.T. 786] issued February 12, 1980 by the Canadian Radio-television and Telecommunications Commission wherein the Commission

approved in part an application by the respondent Kingston Cable TV Limited (hereinafter "Kingston") to amend its cable television broadcasting licence by increasing the amount of the installation fee and the maximum monthly fee which it may charge to its subscribers.

The operative part of the Commission's decision reads as follows:

> Following a Public Hearing held in Toronto, Ontario on 14 November 1979, the Canadian Radio-television and Telecommunications Commission announces that it approves in part an application to amend the cable television broadcasting licence for Kingston, Ontario by increasing the installation fee from $15.00 to $25.00 and the maximum monthly fee from $6.00 to $6.50. The Commission approves an installation fee of $25.00 and a partial increase in the maximum monthly fee to $6.25.

The appeal is brought by the Canadian Broadcasting League (hereinafter "CBL"), which was an intervener before the Commission.

Leave to appeal was sought on the following three grounds:

1. Parliament does not have jurisdiction under Section 91 of the British North America Act to confer upon the Respondent, Canadian Radio-Television and Telecommunications Commission the power to fix fees charged to subscribers for the use of cable t.v. systems.
2. The Canadian Radio-Television and Telecommunications Commission is not authorized by statute to fix such installation and maximum monthly fees for the use by subscribers of cable t.v. systems;
3. The Respondent, Canadian Radio-Television and Telecommunications Commission erred in principle in fixing a rate of return which was not based on a rate of return on capital invested by the Respondent, Kingston Cable T.V. Limited.

Leave to appeal was granted by this Court on December 11, 1980 on the following terms:

> Leave to appeal is granted on the second ground only of the three grounds set forth in the applicant's notice of motion, namely, whether the Canadian Radio-Television and Telecommunications Commission was authorized by statute or regulation to approve, by way of amendment of the licence, the installation fee and the maximum monthly fee which the respondent cable television licencee [sic] may charge to its subscribers. The application is dismissed in respect of the first and third grounds.

The applicable statute and regulations are the Broadcasting Act and the Cable Television Regulations, C.R.C., c. 374. Cable television is subject to regulation under the Act as a "broadcasting receiving undertaking" within the definition of "broadcasting undertaking" in section 2. See Capital Cities Communications Inc., et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141, at page 166.

The relevant provisions of the Act for purposes of the issue in the appeal are sections 3, 15, 16(1)(b) and 17(1)(a) and (b).

Section 3 of the Act, under the heading "Broadcasting Policy for Canada", is as follows:

> 3. It is hereby declared that
>
> (a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;

(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

(e) all Canadians are entitled to broadcasting service in English and French as public funds become available;

(f) there should be provided, through a corporation established by Parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character;

g) the national broadcasting service should

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,

(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;

(h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration he shall be given to the objectives of the national broadcasting service;

(i) facilities should be provided within the Canadian broadcasting system for educational broadcasting; and

j) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances;

and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by single independent public authority.

Section 15, under the heading, "Objects of the Commission", provides:

15. Subject to this Act and the Radio Act and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this Act.

Paragraph 16(1)(b) confers authority on the Commission to make regulations as follows:

> 16.(1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may
>
> . . .
>
> (b) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences of one or more classes,
>
> (i) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3(d),
>
> (ii) respecting the character of advertising and the amount of time that may be devoted to advertising,
>
> (iii) respecting the proportion of time that may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character and the assignment of such time on an equitable basis to political parties and candidates,
>
> (iv) respecting the use of dramatization in programs, advertisements or announcements of a partisan political character,
>
> (v) respecting the broadcasting times to be reserved for network programs by any broadcasting station operated as part of a network,
>
> (vi) prescribing the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs,
>
> (vii) with the approval of the Treasury Board, fixing the schedules of fees to be paid by licensees and providing for the payment thereof,
>
> (viii) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify, and
>
> (ix) respecting such other matters as it deems necessary for the furtherance of its objects; and

Paragraphs 17(1)(a) and (b) provide in part for the licensing authority of the Commission as follows:

> 17.(1) In furtherance of the objects of the Commission, the Executive Committee, after consultation with the part-time members in attendance at a meeting of the Commission, may
>
> (a) issue broadcasting licences for such terms not exceeding five years and subject to such conditions related to the circumstances of the licensee
>
> (i) as the Executive Committee deems appropriate for the implementation of the broadcasting policy enunciated in section 3, and
>
> (ii) in the case of broadcasting licences issued to the Corporation, as the Executive Committee deems consistent with the provision, through the Corporation, of the national broadcasting service contemplated by section 3;
>
> (b) upon application by a licensee, amend any conditions of a broadcasting licence issued to him;

The relevant provision of the Cable Television Regulations is section 17, which reads:

> 17. No licensee shall charge any fee or other sum of money for
>
> (a) any service provided by its undertaking, or
>
> (b) the use of its undertaking, in excess of the amount authorized by the Commission.

Although section 16 of the Regulations refers to the installation fee it would not appear to have a direct bearing on the issue in the appeal. It prescribes the duty of a licensee to install equipment "on receipt of the amount of the installation fee authorized by the Commission", or where applicable, an amount equal to the actual expense of installation, which a licensee is authorized by section 16 to charge in certain circumstances. I may observe here, for such significance as it may have, that it was asserted by counsel for the Commission at the hearing, and as I understood not disputed, that the installation fee authorized by the Commission was also intended to be a maximum fee, although not expressed as such in the Commission's decision.

Since the decision of the Commission approves an application to amend the cable television licence of Kingston it purports to be an exercise of he the authority conferred by paragraph 17(1)(b) of the Act to amend the conditions to which a licence has been made subject by an exercise of the authority conferred by paragraph 17(1)(a). The precise issue as to the validity of the Commission's decision would appear, therefore, to be whether paragraph 17(1)(a) confers authority on the Commission to fix, as a condition of a licence, the installation fee and the maximum monthly fee which a cable television licensee may charge to its subscribers. The appeal is also argued, however, as if the validity of section 17 of the Regulations, which rests on the regulation-making authority conferred by paragraph 16(1)(b) of the Act, was directly involved as a legal foundation of the Commission's decision. That provision prohibits a licensee from charging fees in excess of those authorized by the Commission. If valid, it provides a legal basis for authorizing or fixing maximum fees, apart from paragraph 17(1)(a) of the Act. I am, therefore, inclined to agree that its validity should be considered at the same time as the authority conferred by paragraph 17(1)(a), since what is really being put in issue by the appeal is the general authority of the Commission to fix the fees which a cable television licensee may charge to its subscribers and not simply whether that can be done, as a matter of form, as a condition of a licence.

It is a curious feature of this appeal that it is the consumer-oriented CBL which challenges the authority of the Commission to control the fees of cable television licensees and it is the licensee Kingston which defends the Commission's authority, but the particular interests or motives of the parties to the appeal cannot, of course, affect the consideration of the issue of statutory construction which is raised by it.

Counsel for CBL contended that there must be express statutory authority for a power to regulate rates or fees and that the Broadcasting Act does not confer such authority on the Commission. He argued that because of the nature and effect of rate regulation and the need of authorized criteria or standards for its exercise it is not a power which should be found to exist by necessary implication. He said that an implied power of rate regulation would be a wholly arbitrary and uncontrolled power. An attempt was made to show by various examples, including the authority under section 320 of the Railway Act, R.S.C. 1970, c. R-2, to regulate tolls in respect of telegraph and telephone which was formerly vested in the Canadian Transport Commission and was transferred to the CRTC by section 14 of the Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c. 49, that such authority is always conferred by express statutory provision. It was pointed out that the issue has larger implications than the power to regulate the rates or fees which a cable television licensee may charge to its subscribers since, if such authority is found in the Act in the absence of express provision, it must

extend to the rates or fees, if any, which other broadcasting licensees may charge for service.

Counsel for Kingston, supported by counsel for the Commission, contended that judicial authority indicates that a broad view is to be taken of the Commission's powers for the purpose of implementing the broadcasting policy set out in section 3 of the Act, and that on such a view, the terms of the Act are comprehensive enough to include the power to regulate the fees which a cable television licensee may charge to its subscribers. In the alternative, it was contended that such a power exists by necessary implication on the principle that was applied by this Court in Interprovincial Pipe Line Limited v. National Energy Board, [1978] 1 F.C. 601 (C.A.) and is set out in Halsbury's Laws of England, 3rd ed., vol. 36, para. 657, page 436 as follows: "The powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured." In support of the necessity of such authority it was emphasized that by an established policy of the Commission cable television licensees enjoyed a territorial monopoly. This was not disputed by CBL, and it has been the subject of judicial notice: see Terra Communications Ltd. et al. v. Communicomp Data Ltd. et al. (1974), 1 O.R. (2d) 682 at 696; Capital Cities Communications Inc., et al. v. Canadian Radio-Television Commission et al., [1978] 2 S.C.R. 141 at pages 180-181.

Counsel for Kingston and the Commission placed particular reliance on the judgment of the Supreme Court of Canada in CKOY Limited v. The Queen on the relation of Lorne Mahoney [1979] 1 S.C.R. 2, as indicating in their submission, the broad view which must be taken of the Commission's powers. The issue in that case was the validity of a Regulation prohibiting a station or network operator from broadcasting a telephone interview or conversation with a person without that person's prior consent, unless the person telephoned the station for the purpose of participating in the broadcast. A majority of the Court held the Regulation to be valid under section 16 of the Act as being in furtherance of policy expressed in section 3. The majority found that the impugned Regulation dealt with "standards of programs" in subparagraph 16(1)(b)(i) and "programming", including high standards of programming, in paragraph 3(d), but it also found support for the Regulation in subparagraph 16(1)(b)(ix), which confers authority on the Commission to make regulations "respecting such other matters as it deems necessary for the furtherance of it objects", and thereby refers to the whole of section 3.

On the test to be applied to determine the validity of a regulation purporting to be made under section 16, Spence J., delivering the judgment of the majority, said at pages 11-12:

> The grant of power to enact regulations is given to the Commission by s. 16 of the statute. By its opening words, such a power is directed to be exercised "in furtherance of its objects". Section 15 is entitled "Objects of the Commission". For our purposes, the said objects may be briefly stated in the last words of s. 15, "with a view to implementing the broadcasting policy enunciated in section 3 of this Act". Therefore, I agree with the courts below that the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively. However, I also agree with Evans J.A. when he states:
>
> It is obvious from the broad language of the Act that Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created.
>
> Therefore, whether we consider that the impugned regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in s. 3.

With respect to subparagraph 16(1)(b)(ix) as a foundation for the Regulation, Spence J. said

at pages 13-14:

> I find a basis for the enactment of Regulation 5(k) also in s. 16(I)(b)(ix) of the statute. It is to be noted that its very broad words are not, as are those of s. 16(1)(b)(i), confined to the policy expressed in s. 3(d) and, therefore, authorize one enactment of regulations to further any policy outlined in the whole of s. 3. It was submitted that s. 16(1)(b)(ix) should be confined to matters of procedure since it followed s. 16(1)(b)(viii) enabling the Commission to require licensees to submit information. But the information which may be required under (viii) is very broad covering not only the licensees' financial affairs but "programs" and "the conduct and management of their affairs." Therefore, the information obtained under a regulation enacted by virtue of s. 16(1)(b)(viii) may well provide the basis for a regulation which the Commission might deem necessary under s. 16(1)(b)(ix). Such regulation would, of course, have to be to further the "Broadcasting Policy of Canada" but it might be difficult to fit it under any of the other numbered paragraphs of s.16(1)(b). I find it of some importance that the broad words appearing in s. 16(1)(b)(ix) "as it deems necessary" emphasize the discretion granted to the Commission in determining what is necessary for the furtherance of its objects. Therefore, even if the word "programming" were to receive the narrow meaning advanced by counsel for the appellant, then s. 16(1)(b)(ix) would authorize the enactment of Regulation 5(k). So, the said regulation may well be in furtherance of the policy set out in, for instance, s. 3(c), that is, responsibility for the programmes which the licensee broadcasts.

Spence J. also referred at page 14 to the "broad interpretation" given by Laskin C.J. "to the Commission's powers under s. 15 of the Broadcasting Act" in Capital Cities Communications, supra, where the Chief Justice spoke at p. 171 of "the embracive objects committed to the Commission under s. 15 of the Act".

I conclude from these passages in the judgment of Spence J. in the CKOY case that while it is for the Court to determine objectively whether a regulation deals with or is upon a subject referred to in section 3 of the Act, a broad view is to be taken of what is embraced by that section, having regard to the latitude or discretion that has been committed to the Commission to determine what may be necessary in a particular case for the furtherance of its policy objectives.

What was said concerning the validity of a regulation under section 16 applies equally in my opinion to the validity of a condition attached to a licence under paragraph 17(1)(a). That section begins, like section 16, with the words "In furtherance of the objects of the Commission", and empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it "deems appropriate for the implementation of the broadcasting policy enunciated in section 3", an authority that is, if anything, even broader than that which is conferred by subparagraph 16(1)(b)(ix).

Where the Commission issues a cable television broadcasting licence that confers a territorial monopoly it must surely have the authority to fix as a condition of that right the maximum fees which the licensee may charge to its subscribers. That would appear to be not only appropriate but necessary to further the policy objective of assuring the widest possible public access to the services of the Canadian broadcasting system, an objective that is explicitly referred to by the words "the right ... to receive programs in paragraph 3(c) and is implicit in the whole of section 3 because of the importance attached to broadcasting in the life of the country. In the exercise of this authority the Commission must, of course, consider not only the interests of subscribers but also the financial resources required by a licensee to provide the quality and extent of service contemplated by section 3. That is something which the Commission is capable of doing without the need of specific statutory criteria or directions.

For these reasons I am of the opinion that the Commission's decision was valid, and I would accordingly dismiss the appeal.

URIE J.: I agree.

KELLY D.J.: I concur.

TAB 34

Indexed as:

Ontario Energy Board v. Union Gas Ltd.

IN THE MATTER OF an appeal from the Ontario Energy Board; AND IN THE MATTER OF Sections 15(8), 19 and 32 of the Ontario Energy Board Act, R.S.O. 1980 Ch. 332; AND IN THE MATTER OF an application by Union Gas Limited to the Ontario Energy Board pursuant to Section 15(8) and 19 of the said Act for interim orders approving or fixing reasonable rates and other charges for the sale, distribution and storage of gas.

[1982] O.J. No. 1388

Ontario Supreme Court - High Court of Justice
Divisional Court

O'Leary, Craig and Steele JJ.

Heard: October 19 and 20, 1982.
Judgment: December 8, 1982.

(43 pp.)

Counsel:

G.D. Finlayson, Q.C. and D.I. Hamer, for the applicant Dow Chemical Canada Inc.
P.C.P. Thompson, Q.C., for the Industrial Gas Users Association.
J.F. Howard, Q.C. and Miss L.D. Robinson, for the respondent, Union Gas Limited.
C.E. Woollcombe, Q.C., for the Ontario Energy Board.

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1 O'LEARY J.:— This is an application by Dow Chemical Canada Inc. (hereinafter called "Dow") for leave to appeal and if leave be granted, to appeal from an order issued on February 3, 1982 by the Ontario Energy Board (hereinafter called the "Board"). By that order the Board authorized Union Gas Limited (hereinafter called "Union") to recover through increased rates and charges to its customers over a four-year period the sum of $25,544,000.00 expended by Union between December 1977 and October 31, 1981 in the purchase by it of synthetic natural gas (hereinafter called "SNG") from Petrosar Limited (hereinafter called "Petrosar"). The $25,544,000.00 represented the amount by which the cost of the SNG Union bought from Petrosar during the period mentioned exceeded the cost of an equivalent volume of gas purchased from Union's other sources of natural gas.

2 It is Dow's position that the Board's order has retroactive effect, in that present and future users of Union's gas are and will be required to pay for SNG purchased and delivered prior to October 31, 1981; and that the Board did not have authority under The Ontario Energy Board Act, R.S.O. 1980, c. 332 to make such an order. Dow further submits that the Board exceeded its jurisdiction by directing that the rate increase is to apply to Dow, as to all other of Union's customers, when Dow had a contract with Union for a twenty-year term commencing on July 1,

1972, which provided that Dow would only be responsible to pay for any rate increases which the National Energy Board granted TransCanada Pipelines Limited (hereinafter referred to as "TransCanada"), Union's major gas supplier.

3 The Industrial Gas Users Association, which appeared at and participated in the hearing of the Board which preceded its order of February 3, 1981, with leave of this Court, appeared on this application and supported the first but argued against the second of Dow's positions that I have just outlined.

4 Before dealing with the two points raised by Dow, it is necessary to review the events leading up to the Board's order and the relevant provisions of The Ontario Energy Board Act (hereinafter referred to as the "Act").

5 In 1973, based on supply-demand forecasts which it had prepared, Union concluded that increased demand for its gas would soon greatly exceed its ability to acquire and supply that gas to its customers. Indeed, throughout 1974 and into 1975, Union believed that it was facing a gas supply problem so severe that it might not be able to meet demands for its gas even at existing levels of demand. This concern resulted from its inability to contract for any significant additional supplies through TransCanada and its being informed by Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle") that its contract for the supply to Union of some 15.5 Bcf (billion cubic feet) of natural gas a year would be cancelled in 1976. All indications were that the reserves of natural gas in western Canada were dwindling to the point that gas would be in short supply. TransCanada had not been able to purchase any significant quantities of additional gas for several years.

6 In 1974, Union was convinced not only that it was facing a gas supply problem but also that the cost of gas would greatly increase. The Alberta Government had indicated its intention of increasing the price of gas leaving the Province and was supporting the linking of gas prices to the price of oil and other fuels. It is of interest to note that the Federal Government became involved in the pricing of gas in 1975 and, through agreements with the Alberta Government, the price of gas began to increase steadily. The Federal Government on February 18, 1975 announced its intention of bringing the price of natural gas in line with domestic oil prices on an energy equivalence basis, by allowing the price of gas to increase from its 1974 65% equivalent level to a 100% equivalent level in 1978. During the summer of 1975 the Federal Government revised the schedule but still forecasted parity between oil and gas prices by 1979.

7 The anticipated shortage of natural gas and rise in its price led TransCanada and Union both to examine seriously the question of coal gasification and other alternative methods of increasing the supply of natural gas. In late 1973, Union learned that a proposed Petrosar plant to be built near Sarnia, Ontario would produce SNG as a by-product and Union entered into negotiations with Petrosar for the purchase of that SNG. On November 20, 1974, Union signed a contract with Petrosar to buy approximately 7 Bcf of SNG a year for 15 years commencing in 1977 (by delays extended to 15 years from 1978). The agreed price was approximately double the price Union was paying for natural gas supplied by TransCanada and other suppliers and further the price to be paid for the SNG was tied to and would rise with the price of oil. The Board in its reasons for the decision under appeal concluded that Union was not imprudent in entering into that contract.

8 Circumstances have changed substantially since November 20, 1974. Canada is no longer facing an imminent shortage of natural gas but oil reserves are said to be declining. As a result the Federal Government changed its policy towards the oil-gas pricing relationship and no longer plans to allow the price of gas to rise so as to achieve parity with the price of oil, and has slowed the rate of increase of the price of gas.

9 In the result the amount by which the cost of SNG has exceeded the cost of natural gas from TransCanada and its other suppliers has increased substantially beyond that anticipated by Union on November 20, 1974.

10 The contract of November 20, 1974 between Union and Petrosar provided in part:

> 16.10 This Agreement and the performances by the parties of their respective obligations hereunder are subject to the valid laws,orders, rules and regulations (collectively referred to as "Approval") of all duly constituted authorities having jurisdiction. Buyer shall use its best efforts to obtain the necessary Approval from the Ontario Energy Board or any other regulatory body or bodies having jurisdiction in the matter to obtain any authorization which Buyer may require to construct facilities to accept delivery of Product hereunder. Buyer shall make such application as is necessary for the foregoing purpose as soon after the execution of this Agreement as is reasonably practicable. Buyer shall keep Seller informed of the progress and the result of such application. If the necessary Approval and/or authorization contemplated herein has not been received in terms satisfactory to the parties on or before July 31, 1975 or such later date as is agreed to in writing by the Seller, this Agreement shall become null and void and the parties shall be relieved of all further obligations to each other hereunder or in respect hereof.

11 In fulfilment of its obligation under its contract with Petrosar, Union did make application to the Board for leave to construct a metering station to receive the SNG from Petrosar. Union could not construct the station without leave of the Board because of the provisions of sections 38 and 39 of The Ontario Energy Board Act, R.S.0. 1970, c. 312, now sections 46 and 47 of the Act, which read:

> 46.-(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line.
>
> ...
>
> 47. 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.

12 The Board granted Union the leave it requested, stating in its reasons for so doing that the SNG from Petrosar "represents a valuable incremental source of gas in a period when supply shortages are feared. In the Board's opinion construction of the facilities proposed for the metering and delivery of the SNG into Union's transmission system is necessary. ... The Board has concluded that construction of the meter station is in the public interest and an order will issue".

13 The Board in granting leave for the construction of the metering station was acting under then section 40(8), now section 48(8), of the Act which reads:

> 48.-(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.

14 While the Board was satisfied that having more gas available for Union's customers was in the public interest, the Board made it clear it was not then dealing with Union's cost of servicing its customers resulting from the relatively expensive SNG to be obtained from Petrosar. In that regard, the Board stated:

> While evidence in these proceedings indicates the impact of the cost of the SNG on the overall cost of Union's gas supply, the Board cannot, in this decision, approve the

> contractual cost of this gas as a component of the company's cost of service. This approval can only flow from a future rate proceeding which would examine not just the cost of gas but the overall cost of service. At such a hearing all interested parties would be given the right to question Union's witnesses or to make their own submissions related to this incremental gas cost.

15 In December 1977, deliveries commenced under the Petrosar agreement. In the three year period following the execution of the agreement, additional supplies of natural gas were discovered, the price of crude oil escalated and with it the costs of SNG. In order to mitigate the cost consequences, Union attempted to sell the Petrosar supply for export to Northern Natural Gas Company (hereinafter called "Northern"), an American company.

16 In November 1977, pending the anticipated consummation of the export sale to Northern, Union applied for and received from the Board an interim accounting order requiring Union to accumulate the costs and volumes relating to the Petrosar supply of gas in a separate inventory account with no portion of the cost of such gas charged to expense and no rate treatment granted thereon. Subsequent interim accounting orders were issued by the Board continuing that accounting treatment of Petrosar gas costs. The result of the interim orders was that until December 31, 1980, the costs and volumes of the SNG were, by Board order, excluded from Union's utility expenses and cost of service; the costs were not considered in Union's rate applications, and therefore were not recovered in rates.

17 In February 1980 U.S. regulatory approvals were denied for the export sale to Northern. Shortly thereafter Union entered into negotiations to sell the gas for export to Transcontinental Gas Pipe Line Company of Houston, Texas (hereinafter called "Transco"). All Canadian and American regulatory approvals were obtained for the export sale to Transco and the gas has been exported on a daily basis since December 24, 1980, but at a price less than Union pays Petrosar for the SNG.

18 No one disputes the jurisdiction of the Board to make the various accounting orders that have been mentioned. The Board's authority to make those orders is to be found in the Act and the regulations thereunder.

19 Section 27 of the Act reads in part:

> 27.-(1) Subject to the approval of the Lieutenant Governor in Council, the Board may,
>
> ...
>
> (d) prescribe a uniform system of accounts applicable to any class of distributors, transmitters or storage companies.
>
> (2) Any uniform system of accounts prescribed under clause (1)(d) may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system.

20 Regulation 628 under The Ontario Energy Board Act, R.R.0. 1970 reads in part:

> 2.-(l) ... every ... gas utility shall, ... keep its accounts in accordance with such uniform system of accounts and with the approvals, consents or determinations of the Board ...

21 Section 5 of The Uniform System of Accounts provided for by Regulation 628 reads:

SUBMISSION OF QUESTIONS

> Since uniformity of accounting by gas companies in Ontario is a basic reason for this system of accounts, companies shall submit all questions of doubtful interpretation of the accounting rules to the Board for determination.

22 On June 13, 1980, Union made application to the Board for a determination of the accounts of Union to which the costs of the Petrosar gas accumulated in the inventory account pursuant to the accounting orders should be transferred, the establishment of the accounting treatment of future costs of SNG received and for the recovery in its rates of the costs of the Petrosar supply of gas.

23 The power of the Board to fix rates is found in section 19 of The Energy Board Act, subsection (1) of which reads as follows:

> 19.-(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.

24 There is nowhere in the balance of section 19, nor elsewhere in the Act, nor in the regulations, any words which purport to restrict the wide discretion given the Board by section 19 (1) to decide which costs and expenses of Union are to be recovered out of the rates fixed by the Board. If that discretion is limited, so as to prevent the Board from ordering that Union recover in future rates the cost of SNG already incurred, it must be because of judicial decisions so holding when interpreting The Ontario Energy Board Act or similar statutes. It is apparent that, until March 8, 1979, when Union learned it was not going to be able to sell the SNG to Northern at the price originally agreed to because the Economic Regulatory Administration of the Department of Energy of the United States of America (ERA) denied the import of the SNG primarily due to its high price, Union did not anticipate that it would suffer any loss on the SNG. Its proposed contract with Northern had provided that Northern would take delivery of all the SNG Union received from Petrosar or equivalent amounts of natural gas, at prices in excess of those paid Petrosar by Union. After the original Northern contract fell through, Union renegotiated the agreement with Northern but at a lower sale price for the SNG. In February 1980 ERA still refused import of the SNG into the United States. Union then began negotiations to sell the SNG for export to Transco but Union did not know until it had made firm arrangements to export the gas to Transco just how great the difference would be between its purchase price and its sale price of the SNG. Accordingly it would have been pointless for Union to have applied to the Board sooner than it did for the recovery in its rates to customers of the costs of the SNG received from Petrosar.

25 Both Dow and the intervenor, The Industrial Gas Users Association, were fully aware that the financial aspects of the purchase of the SNG were being recorded in a special account and played no part in the fixing of Union's rates to customers prior to June of 1980. In its reasons for decision dated July 7, 1978 in regard to a rate application by Union, and referring to what had transpired on October 31, 1977 at a hearing before the Board at which hearing both Dow and The Industrial Gas Users Association were represented, the Board stated at page 7:

> Mr. Thomson, on behalf of Dow Chemical of Canada, Limited, stated his client's only interest was in regard to Union's contract to take synthetic natural gas from Petrosar Limited ("Petrosar") and withdrew from active participation, subject to recall, upon being given reasonable assurance that an accounting order applied for by Union and pending Board approval would effectively exclude Petrosar gas from consideration during the hearing.

26 Further, at page 12, the Board stated as follows:

> Accounting Order re Petrosar Gas
>
> In the early stages of the hearing of the main application, Union sought and was granted an accounting Order to set aside the cost of the synthetic gas from Petrosar, including the cost of its financing, in anticipation of approval of applications to the appropriate regulatory bodies for permission for Union to supply such gas by displacement to Northern Natural Gas Company ("Northern Natural") of Omaha, Nebraska, under a pending contract. The consequent exclusion of the cost of gas from Petrosar reduced the indicated revenue deficiency of the Applicant by some $11 million in the test year and, along with other causes, necessitated substantial revisions to the supporting evidence, which Union submitted as Exhibit 19E on December 15, 1977. The claimed revenue deficiency, according to that exhibit, was $17,330,000 as shown in Appendix B.

27 At page 30 of that decision, the Board stated:

> The Board assumes that Union's self-interest will prompt it to apply, in good time and with supporting evidence, for rate adjustments if the contract with Northern Natural is not completed. The Board cannot make the same assumption if the contract is completed and if it provides for some contribution to over-all system costs. As already mentioned, this is expected to happen, if at all, before the final determination of rates in the present application. The Board, therefore, will direct Union to furnish the Board, as soon as the information is available to Union, with its estimate of such contribution during the initial year of the Northern Natural contract so that the Board may, if it then sees fit, deduct the amount from the revenue requirements used in the final determination of rates in Phase II of this case.

28 The failure by Union to get permission prior to December 31, 1980 to export the SNG, combined with the various accounting orders in regard to the SNG made by the Board, meant that the SNG received to that date had not been sold at any price to any customer of Union. Rather the SNG or equivalent volumes of natural gas were placed in inventory by Union as received from Petrosar.

29 The effect of the Board's accounting order and a short history of the SNG problem to that date is to be found in a letter from Union to the Board dated March 29, 1979 from which I quote:

> As the Board is aware, Union is receiving and paying for the Petrosar SNG. The accounting for this supply to date has been in accordance with Accounting Order U.A. 30. Union has reported monthly since December, 1978 to the Energy Returns Officer concerning the accumulated quantity and cost of this supply. At March 31, 1979 the total accumulated supply from Petrosar is estimated to amount to 7.3 trillion Btu's (7.3 billion cubic feet on the basis of 1,000 Btu's per cubic foot), at a cost of approximately $24.8 million. Including interest accumulated against these payments the total cost is estimated to be $26.0 million.
>
> Union originally entered into the Petrosar contract at a time when governmental authorities, both in Ontario and federally, were stating that there would be a serious, significant, on-going shortage of natural gas in Canada. Union became aware that Petrosar was negotiating for the sale of its SNG to a United States buyer and, after consulting with the Ontario government, entered into the Petrosar contract in order to preserve this gas supply in Canada for Union's customers. Union considered that contracting for this gas supply was not only in the interest of its customers but also in

the interest of Canada in that the supply would increase the amount of gas available for allocation, a subject on which discussions were then under way. Union understands that, but for it having contracted for this SNG, the SNG would have been sold to a Michigan purchaser even though at the time there was an impending significant gas shortage in Canada. Intervening developments such as OPEC, the Petroleum Administration Act, the federal government's policy of seeking equivalent pricing for natural gas and oil, the economic turn-down, conservation, and the so-called 'gas bubble' have had the effect of the Petrosar contract becoming a burden rather than the benefit perceived by all parties concerned at the time of its execution. Accordingly in an effort to mitigate this burden, Union has agreed to extend the date by which regulatory authority approvals must be obtained for the Northern Natural gas service agreement and, in light of the recent ERA decision, has agreed to a lower sales price to Northern Natural. The originally proposed sales price to Northern Natural would have resulted in proceeds exceeding the cost of the Petrosar supply; the new lower price, however, is less than such cost. Nevertheless, it is considered that the Northern Natural extension agreement, having regard to the time constraints and regulatory considerations, is the only practical way of mitigating the costs that flow to Union and its customers from the Petrosar contract. The new lower price is the highest price which Northern Natural is prepared to agree to in light of the recent ERA decision.

...

It is Union's position that, as the proceeds in excess of the cost of the Petrosar supply to have been derived from the Northern Natural contract would have gone into cost of service as a benefit to Union's customers, the apparent short-fall which will result from the new amended Northern Natural contract should also go into cost of service. At this time Union is not in a position to know the amount of the costs in respect of which relief will be required and will not have this knowledge at least until Northern Natural's import application has been dealt with by regulatory authorities.

For these reasons Union requests extension of Accounting Order U.A. 30 substantially in its present form, except that it should not expire until the Board has dealt with the Petrosar contract for rate making purposes, whether in the light of a termination of the Northern Natural agreement or its approval by U.S. regulatory authorities. ...

30 In its application to the Board, of June 13, 1980, Union requested.

(1) that the total volume of SNG accumulated in the separate inventory account be transferred to the regular inventory account valued at the average cost of all gas purchased;

(2) that the balance in the separate account representing the excess of the cost of the Petrosar supply over the average costs (the "SNG premium") be transferred to a deferred charge account (the "premium account") amortized over 5 years with the amortization included as a charge to cost of service, and

(3) that the balance in the premium account be recognized as a component of rate-base.

31 Between the time of filing the original application in June, 1980, and the disposition of the case in December of 1981, Union changed the basis of accounting for the SNG purchases. The interim accounting orders had required segregation of the Petrosar volumes and costs in a separate inventory account for two reasons: (1) the proposed agreement with Northern required Union to segregate receipts of SNG for future delivery to Northern and (2) to withhold the costs

from expense and cost of service until the board ruled on the accounting and rate treatment.

32 Three factors required a change in the accounting as of December 31, 1980:

(i) the termination of the agreement with Northern;

(ii) the agreement with Transco for an export sale with commencement of deliveries in December, 1980;

(iii) the size of the Petrosar inventory account in December, 1980, which would have exceeded actual inventory had purchases been allowed to accumulate in the Petrosar inventory account.

33 As a result, Union transferred the Petrosar volumes from the separate inventory account to its regular inventory account valued at the average cost of its other gas purchases as of December 31, 1980. From this time forward the SNG volumes became available for delivery to customers of Union.

34 In its disposition of the application the Board approved the accounting treatment of the SNG premium as outlined. The Board did not, however, accede to Union's request that the balance in the premium account be recognized as a rate base component with return thereon. It treated the SNG premium as a cost of gas item and rejected Union's proposal for future interest on those costs. As already indicated, it directed that this cost of gas item be collected by means of increased rates over a four-year period.

35 It should perhaps be noted that the Board was required by section 19 of The Energy Board Act (on the application before it), to determine a rate base before fixing the rates Union was to charge consumers. As mentioned earlier this requirement did not detract from the discretion given the Board by section 19(1) to decide which costs of Union were to be recovered out of the rates fixed. The requirement that the Board determine a rate base is contained in subsections 19 (2) and (3) of the Act, which read:

> 19.(2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.
>
> (3) The rate base to be determined by the Board under subsection (2) shall be the total of,
>
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
>
> (b) a reasonable allowance for working capital; and
>
> (c) such other amounts as, in the opinion of the board, ought to be included.

36 I turn now to a consideration of the first issue raised on this application, namely: Whether the Board erred in law or exceeded its jurisdiction in permitting Union to recover the amount in the SNG premium account by amortizing such amount over the following four years.

37 Nowhere in The Ontario Energy Board Act is there any express prohibition against including in future rates, costs incurred in the past. Apart from certain provisions relating to the determination of rate base, there is no mechanical procedure laid down in the Act as to how the Board is to perform its function of fixing just and reasonable rates.

38 Under section 27(1)(d) of the Act, the Board may by Regulation prescribe a Uniform System of Accounts applicable to a gas distributor such as Union. That Uniform System of Accounts now appears in R.R.O. 1980, Regulation 702. Under section 27(2) of the Act the Uniform System of Accounts may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system. As already mentioned, Section 5 of the Uniform System of Accounts provides:

> 5. Submission of Questions
>
> Since uniformity of accounting by gas companies in Ontario is a basic reason for this system of accounts, companies shall submit all questions of doubtful interpretation of the accounting rules to the Board for determination.

39 At the time Union applied to and obtained from the Board the accounting orders referred to, the question of how Union should account for the purchase of the Petrosar gas was doubtful and required Board determination. The effect of the accounting orders was to postpone rate treatment of the SNG premium until it was determined whether the Petrosar gas could be sold to Northern and if so, at what price and on what terms. Shortly after the Northern transaction fell through, Union entered into a contract with Transco. At that time, the Board extended the accounting order then outstanding until the pending rate case could be decided.

40 The accounting order of the Board of June 30, 1980 reads in part:

> 1. IT IS ORDERED THAT Union is hereby authorized to continue to carry in a separate inventory account the volumes and costs of the Petrosar gas being purchased pursuant to a contract dated November 20, 1974, from the first delivery of such gas to Union while this order is in effect,and during such time no portion of the costs of the Petrosar gas shall be charged by Union to expenses; details of the accounting including the accumulation of interest, shall be in accordance with Appendix "B" attached hereto;
> 2. THIS ORDER shall be in effect from July 1, 1980, and remain in effect until November 1, 1980, or until the appropriate ratemaking treatment and accounting treatment of the Petrosar gas have been determined, whichever comes sooner.

41 By order of the Board dated November 7, 1980 the Board's order was further extended as follows:

> IT IS ORDERED THAT Clause 2 of accounting order U.A. 38 dated June 30, 1980, be amended to read as follows:
>
> 2. THIS ORDER shall be in effect from July 1, 1980, and remain in effect until otherwise ordered by the Board.

42 The accounting treatment ordered by the Board caused Union to carry in a separate inventory account the costs of the Petrosar gas and for the duration of the accounting orders to charge no part of such costs to expense. The costs of the Petrosar gas were not passed on to Union's customers in rates, did not appear on Union's income statement and accordingly, did not affect its financial results in any year.

43 What occurred in this case was a postponement of the determination of an expense for rate-making purposes for a period of time for reasons determined by the Board to be valid.

44 Section 19(1) of the Act which gives the Board power to make orders approving or fixing

just and reasonable rates for the sale of gas by a gas distributor such as Union, is made subject to the Regulations under the Act, one of which is the Uniform System of Accounts.

45 Where the Board by ordering the setting up of the SNG account (an order made under the Regulations under the Act), has in effect agreed to a postponement of a determination of the issue as to whether the premium cost of SNG should be recovered from Union's customers in its rates, and where the power of the Board is specifically by section 19(1) of the Act made "Subject to the regulations", it would be most remarkable if the Board had somehow lost the power to deal with that issue as soon as the full particulars of that cost became known.

46 Yet it is the position of Dow and The Industrial Gas Users Association that the Board did not have the power to order that the premium cost of the SNG accumulated prior to October 31, 1981 be recovered out of future rates to customers. It is submitted by them that such is the effect of the decisions in Edmonton v. Northwestern Utilities (1961), 28 D.L.R. (2d) 125 (S.C.C.) and Re Northwestern Utilities Ltd. et al. and City of Edmonton (1978), 89 D.L.R. (3d) 161 (S.C.C.).

47 In Edmonton v. Northwestern Utilities the Board of Public Utility Commissioners, in exercising its jurisdiction to fix rates under The Public Utilities Board Act, 1960 (Alta.) c. 85, concluded initially, and before the Act was amended in that regard, that it had no power to permit the Utility to recover in future rates, losses (referred to as "transitional losses") suffered by reason of the delay in raising rates between the date of the application to raise rates and the date when the new rates would become effective. In commenting on that decision of the Board, Locke J. stated at page 133:

> While the reasons given do not explain the grounds upon which the Board proceeded, it may, I think, be fairly assumed that it was based upon the language of s. 67(a) which speaks of rates which shall be imposed, observed and followed thereafter by any proprietor.

48 Section 67(a) of The Public Utilities Board Act reads:

> 67. The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage and other special rates, which shall be imposed, observed and followed thereafter by any proprietor.

49 The comparable section of The Ontario Energy Board Act reads:

> 19.-(8) Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

50 The subsection just quoted does not contain the word "thereafter" and once again includes the phrase "Subject to the regulations".

51 Before the Board in the Edmonton v. Northwestern Utilities case actually fixed the rates, The Public Utilities Board Act was amended by the addition of the following subsection:

> 67.-(8) It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as

the Board may determine has been due to undue delay in the hearing and determining of the application.

52 The decision of the Supreme Court of Canada was simply that such amendment empowered the Board to authorize the Utility to recover "transitional losses" in future rates. In arriving at that conclusion, Locke J. made the following comments as to construction of statutes, at page 134:

> In the Sussex Peerage case (1844), 11 Cl. & Fin. 85 at p. 143, 8 E.R. 1034, Tindal, L.C.J., said that -
>
> the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.
>
> In Vacher & Sons Ltd. v. London Society of Compositors, [1913] A.C. 107, where the question was as to the interpretation of a section of the Trade Disputes Act of 1906, Viscount Haldane, L.C., said (p. 113) that he proposed -
>
> to exclude consideration of every-thing excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to cons true any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.
>
> Section 9 of the Interpretation Act, R.S.A. 1955, c. 160, declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> In my opinion, the language of the subsection makes its meaning perfectly clear and it is unnecessary to resort to any outside aid to interpretation.

53 The court in Edmonton v. Northwestern Utilities also had to deal with the propriety of the Board including in the terms of the rate structure what was referred to as "a purchased gas adjustment clause". Northwestern Utilities Ltd. had large natural gas reserves of its own but in addition purchased large quantities of natural gas for use in its operations from the operators of other gas and oil wells. The Board's estimate of its expense for its purchased gas for 1959 was $3,825,690.00 and for 1960 was $3,722,300.00.

54 Locke J. stated at page 128:

> It was impossible in the circumstances disclosed by the evidence for the respondent to determine with certainty in advance the amounts it would expend for purchased gas from year to year, and the figures above mentioned were, of necessity, estimates only. The respondent, accordingly, asked that the order to be made by the Board should contain what was called a purchased gas adjustment clause, a provision which, it was said, was approved by public utility boards in various states of the Union. The practical effect of such a clause would be that, assuming by way of illustration that the estimate of the cost of purchased gas for the year 1959 should prove to be $800,000 less than the actual expenditure for that purpose, this amount would be recouped by the company by an increase in the price of gas to consumers for the year 1960. Should, however, the estimated figure for this cost, used in approving the rates for the year 1959, be greater than the actual expenditure, the

rates fixed for the year following would be reduced to give to the purchasers of gas the benefit of the saving.

and at p. 130:

Dealing with the proposed purchased gas adjustment clause and the objections raised to the application of any such principle, the Board said in part:

The board undoubtedly has jurisdiction to fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof as well as other special rates which shall be imposed, observed and followed thereafter by any proprietor. It appears to the board that it has jurisdiction to say that the rate would be a certain amount per MCF. or per therm plus the cost of purchased gas or a certain rate plus or minus an adjustment for any variation in the cost of purchased gas which is in effect what is done by the adoption of a purchased gas adjustment clause.

After pointing out that the cost of purchased gas was one of the main items of expense of the company and that it was obvious that it is entitled to recover this expense through the rates charged, the Board said:

After reviewing very carefully all the evidence in this respect and giving consideration to what was said in argument this board is convinced that a provision for purchased gas adjustment is in the best interests of the consumer and is essential to the company if its financial integrity is to be maintained, which of course is also in the best interests of the consumer.

and at pp. 136 and 137:

In approving rates which will yield a fair return to the utility upon its rate base, it is, of course, essential for the Board to estimate the expenses which will necessarily be incurred thereafter in rendering the service. ... The Board can only come to a conclusion as to what rates should be approved by determining as closely as may be done in advance the probable amount of these expenditures.

...

That, in determining what was a fair return and deciding what rates should be authorized to earn such a return, the expenses of operation must be estimated as accurately as is reasonably possible is not questioned by anyone. The Board was apparently satisfied that, in the circumstances, it was not possible to estimate for years in advance the cost to which the respondent would be put for purchased gas from year to year, and concluded that such a provision as was proposed was in the best interests of the consumers and essential to the company if its financial integrity was to be maintained.

What was proposed was that the utility should submit to the Board, and to such other interested parties as the Board might direct should be notified, not later than November 1st in each year, the figures as to its cost for purchased gas during the first 9 months of the year and its estimate of the amounts required for such purpose during the months of October, November and December. Dependent upon whether these costs were in excess of or less than the amount estimated, in approving the rates the Board would be asked to make such adjustments in the rates for the following year to carry out the purpose above explained.

> ... however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

55 In spite of the fact that section 67 of The Public Utilities Act provided that the Board was to "fix just and reasonable ... rates ... which shall be ... followed thereafter ...", Locke J. held that the Board was entitled to include in its rate structure a purchased gas adjustment clause which empowered the Board to adjust future rates to compensate for any proven inaccuracy in the predictions as to the cost of gas purchased by Northwestern Utilities Ltd. Such adjusted rate would, following the date of adjustment, compensate or penalize Northwestern to the extent it had prior to that date been paid more or less than its predicted cost for purchased gas - and so would have retrospective effect. Locke J. held that dealing with an uncertain cost of gas in such fashion "was an administrative matter for the Board to determine", given its duty to allow the utility a fair return on its investment.

56 In my view the Board in the case before us faced with the duty to allow Union a reasonable return on its investment and with a far greater uncertainty as to the cost of the SNG was entitled to in effect postpone dealing with that cost until it was ascertained and to permit it to be collected in future rates. Edmonton v. Northwestern Utilities supports the decision of the Board in that regard.

57 In Re Northwestern Utilities Ltd. et al. and City of Edmonton (1978), 89 D.L.R. (3d) 161, the Supreme Court of Canada held that, apart from section 31 (which relates to losses or profits occurring after the making of an application to the Board), "there is nothing in the Act [The Gas Utilities Act, R.S.A. 1970, c. 158] to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application" (Estey J., p. 163), and "that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods" (Estey J., p. 164).

58 In the final result, as was said by Estey J. in Nova v. Amoco Canada Petroleum Company Ltd et al. (1981), 128 D.L.R. (3d) 1 at page 9, "... each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes".

59 In regard to The Ontario Energy Board Act, I note in particular:

(1) Section 16 provides:

> The Board in making an order may impose such terms and conditions as it considers proper,

(2) Section 27 provides:

> ... the Board may, ... prescribe a uniform system of accounts".

(3) The Uniform System of Accounts provided for by Regulation 702 provides:

> ... companies shall submit all questions of doubtful interpretation of the

accounting rules to the Board for determination.

(4) Section 19 provides in part:

> Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates ...

(5) Section 30 provides:

> The Board may at any time ... rescind or vary any order made by it.

60 Employing the cannons of interpretation of statutes already quoted from the judgment of Locke J. in Edmonton v. Northwestern Utilities, I conclude that, unlike The Gas Utilities Act, The Ontario Energy Board Act does empower the Board where it has for sound administrative reasons postponed consideration of an expense for ratemaking purposes to include that past expense as an expense to be collected in future rates. If the Board had the power to direct Union to segregate those expenses pending a rate application, it must by necessary implication have the power to direct Union to deal with the expenses so separated in a future rate application. It cannot reasonably be presumed that the legislature intended to so truncate the Board's jurisdiction as to allow it to accomplish only a partial result, with no power to finalize and complete a regulatory order. When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it. Accepting that ordinarily current expenses should be matched with current revenues for rate-making purposes, the Uniform System of Accounts under The Ontario Energy Board Act contemplates that the Board may cause postponement of rate-making treatment in regard to an uncertain or undetermined expense, as it did in this case.

61 I deal now with the second issue raised on this application: Whether the Board had jurisdiction to apply the rate increase to Dow the holder of a vintage contract which stipulated that Dow would have to pay only for increases in rates granted TransCanada by the National Energy Board and that Union would not ask the Board to increase Dow's rates.

62 In fact Union did not ask the Board to increase Dow's rates and the proposal it made to the Board as to rate increases did not propose any increase in Dow's rates; rather, it suggested that the rates to its other customers be increased sufficiently to give it the return determined by the Board without changing Dow's rate.

63 Section 19(8) of The Ontario Energy Board Act provides:

> Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board which is not bound by the terms of any contract.
>
> [Emphasis added.]

64 Section 41(a) of the Act also provides as follows:

> (a) every distributor affected by a regulation, an order of the Board or an allocation plan approved under this part, and every consumer affected by an order of the Board, shall comply therewith in accordance with its terms notwithstanding anything in any contract between a distributor and a consumer;

[Emphasis added.]

65 Union may therefore only sell gas to a customer, including Dow, in accordance with a Board order. In determining that a rate increase shall apply to Dow, it is clear that the Board is not bound by a contractual provision which provides for a different rate or price and attempts to exempt Dow from rate increases.

66 It was submitted by Dow that even if the Board has power to reflect Union's SNG premium costs in rates and charges imposed on Dow, that the Board can exercise such power only after due consideration of Dow's existing contractual arrangements, and that the Board ought to have had regard to the question of whether or not excluding Dow from the effect of SNG costs would cast an excessive burden onto Union's other customers.

67 There is no indication that the Board ignored the provisions of the Dow contract or failed to consider its contractual arrangements. In fact, Dow's written argument was before the Board, was referred to by the Board in its reasons for decision, and Dow's position was clearly considered by the Board.

68 The Board dealt with the issue of whether Dow should be treated differently in a previous decision in a rate application brought by Union. Dow was an intervenor in that proceeding and was represented at the hearing. At page 85 of its reasons for decision dated September 14, 1981, the Board said:

> The Board has concluded that Dow Chemical will not be exempt from rate increases and to the extent that this affects the revenue return from that class of customer, adjustments will be made so that the total increase in revenues is equal to the revenue deficiency found by the Board.

and at page 97:

> The Board has directed that Dow Chemical should not be excluded from the rate increases and should make its contribution towards the revenue deficiency.

69 Dow maintains that it did not receive any of the SNG gas purchased by Union from Petrosar. There is no evidence on this issue in this case. The SNG received by Union is mixed with supplies received from TransCanada and subject to the flow in the storage, transmission and distribution system, the combined gas may go to any customer. If Dow contends that it should be treated differently from Union's other large industrial customers, then, surely, it ought to have laid a foundation in fact for that argument by introducing the appropriate evidence. Dow did not call evidence at the hearing. The Board treated all large industrial customers in the same way.

70 By so doing, it reached a proper conclusion and perhaps the only conclusion it could reach on the evidence before it.

71 The result is that leave to appeal is granted but the appeal is dismissed. Costs are to be spoken to.

O'LEARY J.
STEELE J.
CRAIG J.

qp/s/jjh

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TAB 35

Re

Dow Chemical Canada Inc. et al. and Union Gas Ltd. et al.

42 O.R. (2d) 731

150 D.L.R. (3d) 267

ONTARIO
COURT OF APPEAL
ZUBER, WEATHERSTON

AND GOODMAN JJ.A.

16TH AUGUST 1983.

Public utilities — Rates — Retroactivity — Ontario Energy Board empowered to fix "just and reasonable rates" for sale of gas by distributor — Whether board can order recovery of past expenses in future rates — Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 19.

Pursuant to s. 19(1) of the Ontario Energy Board Act, R.S.O. 1980, c. 332, the Ontario Energy Board is empowered to fix "just and reasonable rates and other charges for the sale of gas" by a gas distributor, subject to the regulations. By a series of accounting orders the board authorized Union Gas Ltd. to charge the cost of synthetic natural gas ("S.N.G.") to a separate inventory account because of difficulty of estimating the net cost of future S.N.G. purchases. In rate applications the costs associated with S.N.G. were excluded from consideration. Subsequently, the board approved the closing of the separate inventory account and directed that the S.N.G. premium be amortized over four years and surcharged on regular rates to customers. An appeal by a customer on the ground that this was a retroactive rate increase not authorized by the Act was dismissed by the Divisional Court. On further appeal to the Court of Appeal, held, the appeal should be dismissed.

Until the natural gas represented by the separate inventory account was withdrawn from inventory it could not be a factor in the rate approval process. The order of the board approving the closing of the separate inventory account and directing the surcharge on regular rates was, therefore, prospective in effect. The S.N.G. premium was not a "crystallized loss" which was sought to be recouped out of future rates.

Public utilities — Rates — Applicability — Contract providing that rates will be changed only in specified circumstances — Ontario Energy Board granting rate increase — Whether increase applicable to contracting party — Ontario Energy Board Act, R.S.O. 1980, c. 332, s. 19(8).

A provision in a contract for the supply of natural gas providing that a consumer will pay increased rates only in specified circumstances, which do not include an Ontario Energy Board order, does not prevent the Ontario Energy Board from ordering the consumer to pay a rate increase, since s. 19(8) of the Ontario Energy Board Act, R.S.O. 1980, c. 332, provides that the board is not bound by the terms of any contract. A board order directing that a consumer should not be excluded from a rate increase is valid, provided the board had regard to relevant considerations in making that order.

Cases referred to

Guardians of Bradford Union v. Clerk of Peace for County of Wilts (1868), L.R. 3 Q.B. 604; City of

Edmonton et al. v. Northwestern Utilities Ltd., [1961] S.C.R. 392, 28 D.L.R. (2d) 125, 34 W.W.R. 600, 82 C.R.T.C. 129; Northwestern Utilities Ltd. et al. v. City of Edmonton, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 23 N.R. 565

Statutes referred to

Ontario Energy Board Act, R.S.O. 1970, c. 312 Ontario Energy Board Act, R.S.O. 1980, c. 332, ss. 19, 27

Rules and regulations referred to

R.R.O. 1970, Reg. 628, s. 2(1)
R.R.O. 1980, Reg. 702, Account Nos. 152, 627

APPEAL from a judgment of the Divisional Court, 141 D.L.R. (3d) 641, dismissing an appeal from an order of the Ontario Energy Board.

G. D. Finlayson, Q.C., and D. I. Hamer, for appellant.

J. F. Howard, Q.C., and L. D. Robinson, for respondent.

R. L. Falby, Q.C., for Ontario Energy Board.

The judgment of the court was delivered by

WEATHERSTON J.A.:— In 1974, fearing an impending shortage in the supply of natural gas from its usual suppliers, Union Gas Limited ("Union") entered into a long-term agreement with Petrosar Limited for the delivery of synthetic natural gas ("SNG") at a price substantially greater than the going rate. Delivery actually commenced in December, 1977, but before that date new gas fields were discovered in western Canada and Union's management realized that the SNG was not needed to meet the demands forecast for the next several years. Union therefore entered into an agreement with Northern Natural Gas Co. for the export to the United States of equivalent volumes at a sale price that would yield a slight profit. Approval of this transaction was denied by the U.S. authorities, and finally a new agreement was negotiated with Transcontinental Gas Pipe Corporation ("Transco") for the sale at a loss of all SNG to be delivered by Petrosar. That agreement was approved, and gas began to flow in late 1980.

Because of the pending agreement for the resale of the SNG to the United States, it was impossible to estimate the net cost of future SNG purchases, so as to include it as a "cost of service" in rate applications. So, by a series of accounting orders, the Ontario Energy Board directed Union to keep the entire cost of the SNG in a special inventory account. The SNG was notionally stored underground, but it was in fact mixed with other supplies. By December, 1980, the special inventory account had grown to the point where it exceeded, or would soon exceed, the value of the actual inventory. So, on December 31, 1980, without a further order of the board, Union transferred the reserves of SNG from the special inventory account to its regular inventory account, at a value, after adjustment for heat content, equal to the average cost of other supplies of gas, and retained the extra cost in an account called the SNG Premium account. The continuing losses on the sale of SNG to Transco would be added to this account. It is this SNG Premium, which I have described simplistically if not with perfect accuracy, that was the subject of the special board order now under review.

In June, 1980, before Union had transferred the inventory account, it made an application to the board for a final determination of the accounting treatment of the SNG purchases. The board order was made December 24, 1981, and it authorized Union to recoup the net amount of the

SNG Premium accumulated up to October 31, 1981, by amortizing it over a period of four years, and surcharging the ordinary approved rates to customers. That SNG Premium was calculated by Union at $31,259,000 when the special inventory account was closed on December 31, 1980, but the board directed a recalculation and that figure has been revised, as of October 31, 1980, to $24,544,000.

The appellant, Dow Chemical Canada Inc. ("Dow"), has an agreement with Union for the purchase of large quantities of natural gas over a 20-year term commencing in 1972, at a price governed by the price paid by Union to its principal supplier, Trans Canada Pipe Lines Limited. Notwithstanding that agreement, a proportionate part of the surcharge for the SNG Premium is authorized by the board's order to be added to the contract price.

The Divisional Court dismissed Dow's appeal from the board's order. On this appeal, Mr. Finlayson for Dow has advanced two main arguments:

1. The SNG Premium was a loss incurred by Union before the board's order was made, and it was beyond the board's power to order the recoupment of that loss through future rate increases;
2. The board exceeded its jurisdiction in authorizing an increase in the rates charged to Dow, contrary to the express terms of the contract.

Recoupment of the SNG Premium

By s. 19 of the Ontario Energy Board Act, R.S.O. 1980, c. 332, the board:

> 19(1) ... may make orders approving or fixing just and reasonable rates and other charges for the sale of gas ...

In Guardians of Bradford Union v. Clerk of Peace for County of Wilts (1868), L.R. 3 Q.B. 604 at pp. 616-7, Cockburn C.J. said as to legislation authorizing the making of an order for the public maintenance of a lunatic:

> Prima facie this language is prospective, there is nothing which treats of past maintenance, and we start with the proposition, that in all such cases the rate must be prospective and not retrospective, so that the expenses shall fall on the ratepayers who are ratepayers at the moment of the expenses being incurred; whereas by doing what in effect would amount to the same thing as making a retrospective rate, the expenses of past years are made to fall on the ratepayers of the present year. That being a principle adopted long ago and long acted on, whenever the legislature has thought it expedient to authorize the making of restrospective rates or orders, it has fixed the period as to which the rate or order may be retrospectively made ...

And in City of Edmonton et al. v. Northwestern Utilities Ltd., [1961] S.C.R. 392 at p. 402, 28 D.L.R. (2d) 125 at p. 133, 34 W.W.R. 600, a gas rate case, Locke J. said that although the vast majority of the consumers who purchased gas from the utility during the first eight months of the year 1959 continued as customers thereafter, nevertheless, the new rates approved in August of that year, while prospective, created a new obligation in respect of transactions already past in the case of these consumers, and, in that respect, were retroactive.

Thus, if rates are approved that enable a utility to recoup past losses, the rates are retrospective in two senses; first, in that they impose an obligation on new customers to pay for losses incurred before they become customers; and, second, they impose an obligation on continuing customers to pay more than what would be a fair rate based on current costs. In either case there is a measure of unfairness to the customers; and if new rates are approved that are retrospective in either sense, the statute must be scrutinized to see if the Legislature has authorized the

approving body to approve such rates.

The rate approval provisions in the Ontario Energy Board Act are similar to those in the Gas Utilities Act, an Alberta statute that was considered by the Supreme Court in City of Edmonton et al. v. Northwestern Utilities Ltd., supra, and Northwestern Utilities Ltd. et al. v. City of Edmonton, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, 7 Alta. L.R. (2d) 370. In the later case, Estey J. said at pp. 690-1 S.C.R., p. 163 D.L.R.:

> While the statute does not precisely so state, the general pattern of its directing and empowering provisions is phrased in prospective terms. Apart from s. 31 there is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application (vide City of Edmonton et al. v. Northwestern Utilities Limited, [1961] S.C.R. 392, per Locke J. at pp. 401, 402).

and at p. 691 S.C.R., p. 164 D.L.R.:

> The statutory pattern is founded upon the concept of the establishment of rates in futuro for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility. It is clear from many provisions of The Gas Utilities Act that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

and at p. 699 S.C.R., p. 170 D.L.R.:

> It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. It is quite a different thing to design a future rate to recover for the utility a "loss" incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.

The Ontario Energy Board Act provides by s. 19 as follows:

> 19(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (2) In approving or fixing rates and other charges under subsection (1), the Board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base produced or to be produced by such rates and other charges is reasonable.
>
> (3) The rate base to be determined by the Board under subsection (2) shall be the total of,
>
> (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;

(b) a reasonable allowance for working capital; and

(c) such other amounts as, in the opinion of the Board, ought to be included.

. . . . .

(8) Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

What Estey J. said as to the Alberta statute is equally applicable to the Ontario Energy Board Act, but I do not believe that the prospective nature of the Act inflexibly circumscribes the power of the board so as to limit it to the consideration only of future costs and expenses. Its primary duty under s. 19(1) is to "make orders approving or fixing just and reasonable rates and other charges". In City of Edmonton et al. v. Northwestern Utilities Ltd., supra, the court approved a "purchased gas adjustment clause" in a board's order approving rates. Because it was impossible in the circumstances disclosed by the evidence in that case for the utility to determine with certainty in advance the amounts it would expend for purchased gas from year to year, that clause reserved to the board the power to adjust rates each year up or down according to the actual costs, and to either enable the utility to recoup the following year the amount by which it had underestimated costs, or, if it had overestimated costs, to give to customers the following year the benefit of the saving. Such a clause was undeniably retrospective, but Locke J. said at p. 406 S.C.R., p. 137 D.L.R., that how the utility should from year to year be enabled to realize, as nearly as may be, a fair return was an administrative matter for the board to determine.

In the present case, the Ontario Energy Board was faced with a situation where, in 1974, Union had entered into a contract which at the time was thought to be for the benefit not only of Union, but also of its customers. Although the contract appears in retrospect to have been improvident, the board has expressly found that Union was not imprudent in entering into it. When the SNG began to be delivered in 1977, the board could, on a rate application, have directed that its cost and that of natural gas purchased from other sources be averaged, and included in the Union's cost of service for rate approval purposes. But that would have been unfair to customers because it was then expected that the entire supply of SNG would be sold to Northern Natural Gas Co. at a profit. So, by a series of accounting orders, the board authorized Union to charge the cost of the SNG to a separate inventory account No. 152 until the matter would be finally determined. The board had that power under s. 27 of the Act, which reads in part as follows:

27(1) Subject to the approval of the Lieutenant Governor in Council, the Board may,

. . . . .

(d) prescribe a uniform system of accounts applicable to any class of distributors, transmitters or storage companies.

(2) Any uniform system of accounts prescribed under clause (1)(d) may require the approval, consent or determination of the Board in respect of any of the matters provided for in such system.

Regulation 628 [of R.R.O. 1970], under the Ontario Energy Board Act, R.S.O. 1970, c. 312, provides:

2(1) ... every ... gas utility shall ... keep its accounts in accordance with such uniform system of accounts and with the approvals, consents or determinations of the Board ...

Account No. 152 prescribed by the board by its Regulation 702 [R.R.O. 1980], is:

> 152. Gas Stored Underground -- Available for Sale
>
> This account shall include the cost of gas purchased or produced and stored in depleted or partially depleted gas or oil fields or other underground reservoirs, and held for use in meeting gas service requirements of customers.
>
> Gas included in this account shall be valued at cost on a consistent basis. Transmission expenses for company facilities used in moving gas to the storage area and expenses of storage facilities shall not be included in the inventory of gas except as may be authorized by the Board.
>
> That portion of the stored gas in excess of the amount properly includible in account No. 458, "Base Pressure Gas" shall be included in this account.
>
> Amounts debited to this account for gas placed in storage shall be credited to account No. 628, "Gas Delivered to Underground Storage (Credit)". Amounts credited to this account for gas withdrawn from storage shall be debited to account No. 627, "Gas Withdrawn from Underground Storage".
>
> In the operation of storage projects the company shall maintain such procedures of verification as will disclose and result in prompt accounting recognition of significant losses.

The effect of these accounting orders was that the cost of SNG was kept separate from the cost of gas purchased from other sources. In the several rate approval applications made by Union before the present order of the board was made, all costs in any way associated with the SNG were excluded from consideration, either as a component of the rate base, or of the cost of service. Customers were not affected by this account, nor could they be until Union was authorized to debit amounts to account No. 627, "Gas Withdrawn from Underground Storage". Since the gas was required to be valued at cost, the debits to account No. 627 would also be at cost, and they would then, and only then form part of Union's cost of service.

It makes no difference that the SNG was in fact mixed with gas purchased from other sources -- the fact is that there was an inventory of gas, the cost of which was carried in a separate account. Until delivery of SNG to Transco commenced in late 1980, volumes of gas equivalent to the entire supply of SNG were stored underground, and were carried in Union's accounts at the cost of SNG.

It does not offend me that there is an element of artificiality in giving importance to the fact that the SNG costs were kept in a separate account. Banks have always been allowed to keep separate accounts with their customers, so as to circumvent the rule in Clayton's case, or for other purposes. In the present case, the board had power to authorize a separate account, and Union did in fact maintain a separate inventory account until December 31, 1980. Until the gas represented by that account was withdrawn from inventory it could not be a factor in the rate approval process. The present order of the board, approving the closing of the separate inventory account and directing that the SNG Premium be amortized over four years and surcharged on the regular rates, is therefore, prospective in effect. The SNG Premium was not a "crystallized loss" which is sought to be recouped out of future rates.

The Dow contract

The Dow contract was to purchase only natural gas, and the price paid by Dow would not, by its terms, be affected by the cost of SNG. It was tied to the price paid by Union to Trans Canada Pipe Lines Limited. The proposition put to us is that the board erred in law and exceeded its

jurisdiction in ignoring the express provisions of the contract, and, in effect, setting aside or rewriting the contract.

I have already quoted s. 19(8) of the Act, by which it is provided that the board is not bound by the terms of any contract. The Dow contract was made before Union agreed to buy SNG from Petrosar. In the ordinary commercial world, Union would be obligated to honour its contract with Dow, whatever the cost. Mr. Finlayson makes the point that the exercise of the statutory power to override the express terms of a commercial contract can be justified only if the result would be to otherwise cast an excessive burden onto a utility's other customers, or if the resulting burden is one that cannot be fairly borne by the utility's shareholders, or would be so large as to impair the utility's financial integrity and hence the public interest.

I agree with these general propositions. It is true that they were not discussed in the board's reasons for its decision in the present case, the board merely directing Union "to submit its proposals for uniform rate increases to all customers, including Dow". But in an application by Union for a general rate increase, initiated January 7, 1981, E.B.R.O. 380, at which Dow was represented and made submissions to the same effect as those advanced on this appeal, the board said, at p. 97 of its reasons for an interim order made September 14, 1981:

> The board has directed that Dow Chemical should not be excluded from the rate increases and should make its contribution towards the revenue deficiency.

I cannot conclude that the board failed to have regard to the relevant considerations and that its decision should be set aside on this account.

Mr. Finlayson further submits that Dow contracted only for natural gas, and that the board has, in effect, required Dow to pay a surcharge, not for the gas contracted for, but for SNG purchased by other customers. But the SNG was in fact mixed with natural gas purchased from other customers. It is possible that Union's distribution lines are so laid out that Dow received only natural gas, but the evidence is not clear as to that. Assuming, as the board found, that the contract with Petrosar for the supply of SNG was not an imprudent one in the circumstances, but was made to ensure a sufficient supply of gas for all customers, then Dow benefited by it as well as the others, and should bear its share of the burden.

In my opinion, Dow's appeal fails on all grounds, and should be dismissed with costs.

Appeal dismissed.

TAB 36

CHAPTER B-11

An Act to implement a broadcasting policy for Canada

CHAPITRE B-11

Loi ayant pour objet de mettre en œuvre, pour le Canada, une politique de la radiodiffusion

SHORT TITLE

Short title

1. This Act may be cited as the *Broadcasting Act*. 1967-68, c. 25, s. 1.

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur la radiodiffusion*. 1967-68, c. 25, art. 1.

PART I

GENERAL

Interpretation

Definitions

2. In this Act

"broadcaster" «*radiodiffuseur*»

"broadcaster" means a person licensed by the Commission to carry on a broadcasting transmitting undertaking;

"broadcasting" «*radiodiffusion*»

"broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;

"broadcasting licence" «*licence*. . .»

"broadcasting licence" or, in Parts II and III, "licence" means a licence to carry on a broadcasting undertaking issued under this Act;

"broadcasting undertaking" «*entreprise*. . .»

"broadcasting undertaking" includes a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada;

"Commission" «*Conseil*»

"Commission" means the Canadian Radio-Television Commission established by Part II;

"Corporation" «*Société*»

"Corporation" means the Canadian Broadcasting Corporation established by Part III;

"licensee" «*titulaire*. . .»

"licensee" means a person licensed by the

PARTIE I

DISPOSITIONS GÉNÉRALES

Interprétation

Définitions

2. Dans la présente loi

«Conseil» «*Commission*"

«Conseil» désigne le Conseil de la Radio-Télévision canadienne établi par la Partie II;

«entreprise de radiodiffusion» «*broadcasting undertaking*"

«entreprise de radiodiffusion» comprend une entreprise d'émission de radiodiffusion, une entreprise de réception de radiodiffusion et l'exploitation d'un réseau situé en tout ou en partie au Canada ou sur un navire ou un aéronef immatriculé au Canada;

«exploitation temporaire d'un réseau» «*temporary*. . .»

«exploitation temporaire d'un réseau» désigne l'exploitation d'un réseau en ce qui concerne une certaine émission ou une série d'émissions s'étendant sur une période d'au plus un mois;

«licence de radiodiffusion» ou «licence» «*broadcasting licence*"

«licence de radiodiffusion», ou, aux Parties II et III, «licence», désigne une licence d'exploitation d'une entreprise de radiodiffusion, attribuée en vertu de la présente loi;

«Ministre» «*Minister*"

«Ministre» désigne, dans les Parties II et III, le secrétaire d'État du Canada;

«radiocommunication» «*radiocommunication*"

«radiocommunication» désigne toute transmission, émission ou réception de signes,

Commission to carry on a broadcasting undertaking;

"Minister" «*Ministre*»

"Minister" in Parts II and III means the Secretary of State of Canada;

"network" «*réseau*»

"network" includes any operation involving two or more broadcasting undertakings whereby control over all or any part of the programs or program schedules of any of the broadcasting undertakings involved in the operation is delegated to a network operator;

"radiocommunication" «*radiocommunication*»

"radiocommunication" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide;

"temporary network operation" «*exploitation. . .*»

"temporary network operation" means a network operation with respect to a particular program or series of programs extending over a period not exceeding one month. 1967-68, c. 25, s. 3.

signaux, écrits, images, sons ou renseignements de toute nature, au moyen d'ondes électromagnétiques de fréquences inférieures à 3,000 gigacycles par seconde transmises dans l'espace sans guide artificiel;

«radiodiffuseur» «*radiodiffuseur*» "*broadcaster*"

«radiodiffuseur» désigne une personne autorisée par une licence du Conseil à faire exploiter une entreprise d'émission de radiodiffusion;

«radiodiffusion» "*broadcasting*"

«radiodiffusion» désigne toute radiocommunication dans laquelle les émissions sont destinées à être captées directement par le public en général;

«réseau» "*network*"

«réseau» comprend toute exploitation à laquelle participent deux ou plusieurs entreprises de radiodiffusion et où le contrôle de l'ensemble ou d'une partie des émissions ou des programmes d'émissions de toute entreprise de radiodiffusion participant à l'exploitation est délégué à un exploitant de réseau;

«Société» "*Corporation*"

«Société» désigne la Société Radio-Canada établie par la Partie III;

«titulaire d'une licence» ou «titulaire» "*licensee*"

«titulaire d'une licence» ou «titulaire» désigne une personne autorisée par une licence du Conseil à faire exploiter une entreprise de radiodiffusion. 1967-68, c. 25, art. 3.

Broadcasting Policy for Canada

Broadcasting policy for Canada

3. It is hereby declared that

(*a*) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;

(*b*) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(*c*) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

(*d*) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity

Politique de la radiodiffusion pour le Canada

Politique de la radiodiffusion pour le Canada

3. Il est, par les présentes, déclaré

a) que les entreprises de radiodiffusion au Canada font usage de fréquences qui sont du domaine public et que de telles entreprises constituent un système unique, ci-après appelé le système de la radiodiffusion canadienne, comprenant des secteurs public et privé;

b) que le système de la radiodiffusion canadienne devrait être possédé et contrôlé effectivement par des Canadiens de façon à sauvegarder, enrichir et raffermir la structure culturelle, politique, sociale et économique du Canada;

c) que toutes les personnes autorisées à faire exploiter des entreprises de radiodiffusion sont responsables des émissions qu'elles diffusent, mais que le droit à la liberté d'expression et le droit des personnes de capter les émissions, sous la seule réserve des lois et règlements généralement applicables, est incontesté;

d) que la programmation offerte par le

for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

(*e*) all Canadians are entitled to broadcasting service in English and French as public funds become available;

(*f*) there should be provided, through a corporation established by Parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character;

(*g*) the national broadcasting service should

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,

(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;

(*h*) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service;

(*i*) facilities should be provided within the Canadian broadcasting system for educational broadcasting; and

(*j*) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances;

and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority. 1967-68, c. 25, s. 2.

système de la radiodiffusion canadienne devrait être variée et compréhensive et qu'elle devrait fournir la possibilité raisonnable et équilibrée d'exprimer des vues différentes sur des sujets qui préoccupent le public et que la programmation de chaque radiodiffuseur devrait être de haute qualité et utiliser principalement des ressources canadiennes créatrices et autres;

e) que tous les Canadiens ont droit à un service de radiodiffusion dans les langues anglaise et française, au fur et à mesure que des fonds publics deviennent disponibles;

f) qu'il y aurait lieu d'assurer, par l'intermédiaire d'une corporation établie par le Parlement à cet effet, un service national de radiodiffusion dont la teneur et la nature soient principalement canadiennes;

g) que le service national de radiodiffusion devrait

(i) être un service équilibré qui renseigne, éclaire et divertisse des personnes de tous âges, aux intérêts et aux goûts divers, et qui offre une répartition équitable de toute la gamme de la programmation,

(ii) être étendu à toutes les régions du Canada, au fur et à mesure que des fonds publics deviennent disponibles,

(iii) être de langue anglaise et de langue française, répondre aux besoins particuliers des diverses régions et contribuer activement à la fourniture et à l'échange d'informations et de divertissements d'ordre culturel et régional, et

(iv) contribuer au développement de l'unité nationale et exprimer constamment la réalité canadienne;

h) que, lorsqu'un conflit survient entre les objectifs du service national de radiodiffusion et les intérêts du secteur privé du système de la radiodiffusion canadienne, il soit résolu dans l'intérêt public mais qu'une importance primordiale soit accordée aux objectifs du service national de radiodiffusion;

i) que le système de la radiodiffusion canadienne devrait être doté d'un équipement de radiodiffusion éducative; et

j) que la réglementation et la surveillance du système de la radiodiffusion canadienne devraient être souples et aisément adaptables aux progrès scientifiques ou techniques;

TAB 37

Source: http://scc.lexum.org/en/2004/2004scc25/2004scc25.html

Garland *v.* Consumers' Gas Co., [2004] 1 S.C.R. 629, 2004 SCC 25

Gordon Garland *Appellant*

v.

Enbridge Gas Distribution Inc., previously known as

Consumers' Gas Company Limited *Respondent*

and

Attorney General of Canada, Attorney General for Saskatchewan,

Toronto Hydro-Electric System Limited, Law Foundation

of Ontario and Union Gas Limited *Interveners*

Indexed as: Garland *v.* Consumers' Gas Co.

Neutral citation: 2004 SCC 25.

File No.: 29052.

2003: October 9; 2004: April 22.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Restitution — Unjust enrichment — Late payment penalty — Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code — Whether customers have claim for unjust enrichment — Defences that can be mounted by utility to resist claim — Whether other ancillary orders necessary.

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies

represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by

the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: *Peter v. Beblow*, [1993] 1 S.C.R. 980; **explained:** *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; **referred to:** *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112; *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31; *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107; *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690; *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470; *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7; *Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22; *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

Statutes and Regulations Cited

Civil Code of Quebec, S.Q. 1991, c. 64, arts. 1493, 1494.

Constitution Act, 1867, ss. 91(19), (27), 92(13).

Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 45.02.

Authors Cited

Constantineau, Albert. *A Treatise on the De Facto Doctrine.* Toronto: Canada Law Book, 1910.

Fridman, Gerald Henry Louis. *Restitution*, 2nd ed. Scarborough, Ont.: Carswell, 1992.

Goff of Chieveley, Robert Goff, Baron, and Gareth Jones. *The Law of Restitution*, 6th ed. London: Sweet & Maxwell, 2002.

Lange, Donald J. *The Doctrine of Res Judicata in Canada.* Markham, Ont.: Butterworths, 2000.

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution.* Aurora, Ont.: Canada Law Book, 1990.

McInnes, Mitchell. "Unjust Enrichment — Restitution — Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459.

Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211.

Ziegel, Jacob S. "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [2000] O.J. No. 1354 (QL). Appeal allowed.

Michael McGowan, *Barbara L. Grossman*, *Dorothy Fong* and *Christopher D. Woodbury*, for the appellant.

Fred D. Cass, *John D. McCamus* and *John J. Longo*, for the respondent.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Alan H. Mark and *Kelly L. Friedman*, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, *Q.C.*, for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and *M. Paul Michell*, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 IACOBUCCI J. — At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

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

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B

> **25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

347. (1) Notwithstanding any Act of Parliament, every one who

(*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or

(*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

(*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or

(*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant

consideration was whether the express statutory language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?

(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?

(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?

(c) Is the appellant engaging in a collateral attack on the orders of the Board?

(d) Does the "regulated industries" defence exonerate the respondent?

(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?

(b) Should this Court make a declaration that the LPPs need not be paid?

(c) What order should this Court make as to costs?

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel*, *supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter*, *supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element — absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter*, *supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic approach" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel*, *supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel*, *supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978]

2 S.C.R. 436, at p. 455 (adopted in *Pettkus*, *supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> . . . the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter*, *supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> . . . The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking

whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust Enrichment — Restitution — Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a

category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel*, *supra*, where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:

> . . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference*, *supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; *New Solutions*, *supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks*, *supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks*, *supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

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

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli*, *supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369–70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was

valid at the time — the Board orders — they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> . . . the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which . . . recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies . . . . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755):

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business — no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax*, *supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598):

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

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

TAB 38

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0120

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

AND IN THE MATTER OF by the Canadian Distributed Antenna Systems Coalition for certain orders under the *Ontario Energy Board Act, 1998.*

NOTICE OF APPLICATION AND HEARING

On April 25, 2011, the Canadian Distributed Antenna Systems Coalition ("CANDAS") filed an application on behalf of its member companies with the Ontario Energy Board (the "Board") seeking the following:

1. Orders under subsections 70(1.1) and 74(1) of the *Ontario Energy Board Act, 1998* (the "Act"): (i) determining that the Board's RP-2003-0249 Decision and Order dated March 7, 2005 (the "CCTA Order") requires electricity distributors to provide "Canadian carriers", as that term is defined in the *Telecommunications Act*, S.C. 1993, c. 38, with access to electricity distributor's poles for the purpose of attaching wireless equipment, including wireless components of distributed antenna systems ("DAS"); and (ii) directing all licensed electricity distributors to provide access if they are not so doing;

2. in the alternative, an Order under subsection 74(1) of the Act amending the licences of all electricity distributors requiring them to provide Canadian carriers with timely access to the power poles of such distributors for the purpose of attaching wireless equipment, including wireless components of DAS;

3. an interim Order under subsection 21(7) of the Act directing electricity distributors to refrain from adopting, implementing or enforcing, as the case may be, any policy or conduct that denies Canadian carriers timely access to

the power poles of such distributors for purposes of attaching wireless equipment, including DAS, pending disposition of the applicant's requests for final orders;

4. an interim Order under subsection 21(7) of the Act directing Toronto Hydro Energy Services Inc. ("THESI") to identify THESI's light standards, poles or other structures classified as distribution assets in accordance with the Board's EB-2009-0180 Decision and Order issued on February 11, 2010 and to refrain from removing, selling or disposing of any DAS facilities currently affixed to any of the foregoing, pending disposition of the applicant's requests for final orders;

5. an Order under subsections 74(1) and 70(2)(c) of the Act amending the licences of all licensed electricity distributors requiring them to include, in their Conditions of Service, the terms and conditions of access to power poles by Canadian carriers, including the terms and conditions of access for the purpose of deploying the wireless and wireline components of DAS, such terms and conditions to provide for, without limitation: commercially reasonable procedures for the timely processing of applications for attachments and the performance of the work required to prepare poles for attachments ("Make Ready Work"); technical requirements that are consistent with applicable safety regulations and standards; and a standard form of licensed occupancy agreement, such agreement to provide for attachment permits with terms of at least 15 years from the date of attachment and for commercially reasonable renewal rights;

6. its costs of this proceeding in a fashion and quantum to be decided by the Board pursuant to section 30 of the Act; and

7. such further and other relief as the Board may consider just and reasonable.

On May 3, 2011, CANDAS withdrew its request for interim relief in relation to directing THESI to identify THESI's light standards, poles or other structures classified as distribution assets in accordance with the Board's EB-2009-0180 Decision and Order issued on February 11, 2010 and to refrain from removing, selling or disposing of any DAS facilities currently affixed to any of the foregoing, pending disposition of the applicant's requests for final orders (i.e., #4, above).

As a preliminary matter, the Board intends to hear the applicant's remaining request for interim relief (i.e., #3, above) by way of an oral hearing. The Board will determine, in due course, whether the applicant's remaining requests for relief will be heard orally or in writing.

How to see the Application

Copies of the application are available for inspection at the Board's office in Toronto and at the office of the Counsel for the applicant and may be posted on its website.

How to Participate

You may participate in this proceeding in one of three ways:

1. Become an Intervenor

Intervenors participate actively in the proceeding (i.e., submit written questions, evidence, and arguments, and cross-examine witnesses at an oral hearing).

A request for intervenor status must be made by letter of intervention and be received by the Board no later than **10 days** from the publication or service date of this notice. A letter of intervention must include: (a) a description of how you are, or may be, affected by the outcome of this proceeding; (b) if you represent a group, a description of the group and its membership; and (c) whether you intend to seek an award of costs and the grounds for your cost award eligibility.

You must provide a copy of your letter of intervention to the applicant.

Everything an intervenor files with the Board, including the intervenor's name and contact information, will be placed on the public record, which means that all filings will be available for viewing at the Board's offices and will be placed on the Board's website.

If you already have a user ID, please submit your intervention request through the Board's web portal at www.errr.ontarioenergyboard.ca. Additionally, two paper copies must be submitted to the address set out below.

If you do not have a user ID, visit the Board's website under e-Filing Services and complete a user ID/password request form. For instructions on how to submit documents and naming conventions please refer to the RESS Document Guidelines found at www.ontarioenergyboard.ca/OEB/Industry, e-Filing Services.

The Board also accepts interventions by e-mail, at the address below, and again, two additional paper copies are required. Those who do not have internet access are required to submit their intervention request on a CD in PDF format, along with two paper copies.

2. Send a Letter with your Comments to the Board

If you wish to comment on the proceeding without becoming an intervenor, you may submit a letter of comment to the Board Secretary.

All letters of comment sent to the Board will be placed on the public record, which means that the letters will be available for viewing at the Board's offices and will be placed on the Board's website.

Before placing the letter of comment on the public record, the Board will remove any personal (i.e., not business) contact information from the letter of comment (i.e., the address, fax number, phone number, and e-mail address of the individual). However, the name of the individual and the content of the letter of comment will become part of the public record.

A complete copy of your letter of comment, including your name, contact information, and the content of the letter, will be provided to the applicant and the Hearing Panel.

Your letter of comment must be received by the Board no later than **30 days** from the publication or service date of this notice. The Board accepts letters of comment by either post or e-mail at the addresses below.

3. Become an Observer

Observers do not participate actively in the proceeding but receive documents issued by the Board in the proceeding. There is no fee for observers to receive documents issued by the Board.

A request for observer status must be made in writing and be received by the Board no later than **10 days** from the publication or service date of this notice. The Board accepts observer request letters by either post or e-mail at the addresses below.

All letters requesting observer status will become part of the public record, which means that the letters will be available for viewing at the Board's offices and will be placed on the Board's website.

Before placing the request for observer status on the public record, the Board will remove any personal (i.e., not business) contact information from the request (i.e., the address, fax number, phone number, and e-mail address of the individual). However, the name of the individual and the content of the request for observer status will become part of the public record.

Observers may also request documents filed by the applicant and other parties to the proceeding but must request these documents directly from the relevant party. Observers may be required to pay for the costs of reproducing and delivering the material.

If you already have a user ID, please submit your intervention request through the Board's web portal at www.errr.ontarioenergyboard.ca. Additionally, two paper copies are required. If you do not have a user ID, please visit the Board's website under e-filings and fill out a user ID password request. For instructions on how to submit and naming conventions please refer to the RESS Document Guidelines found at www.ontarioenergyboard.ca, e-Filing Services. The Board also accepts interventions by e-mail, at the address below, and again, two additional paper copies are required. Those who do not have internet access are required to submit their intervention request on a CD or diskette in PDF format, along with two paper copies.

How to Contact Us

In responding to this notice, please reference Board file number EB-2011-0120 in the subject line of your e-mail or at the top of your letter. It is also important that you provide your name, postal address and telephone number and, if available, an e-mail address and fax number. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

Need More Information?

Further information on how to participate may be obtained by visiting the Board's website at www.ontarioenergyboard.ca or by calling our Consumer Relations Centre at 1-877-632-2727.

Addresses

The Board	**Applicant**
Attention: Board Secretary Ontario Energy Board P.O. Box 2319 2300 Yonge Street, 27th Floor Toronto, ON M4P 1E4 Filings: https://www.errr.ontarioenergyboard.ca/ E-mail: boardsec@ontarioenergyboard.ca Tel: 1-888-632-6273 (Toll free) Fax: 416-440-7656	Canadian Distributed Antenna Systems Coalition **Counsel to the Applicant** Fraser Milner Casgrain LLP 77 King Street West, Suite 400 Toronto Dominion Centre Toronto, ON M5K 0A1 Attention: Helen T. Newland Tel: 416-863-4471 Fax: 416-863-4592 E-mail: helen.newland@fmc-law.com Attention : Michael D. Schafler Tel : 416-863-4457 Fax : 416-863-4592 E-mail : michael.schafler@fmc-law.com

ISSUED at Toronto, May 11, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB 39

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2010-0184

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

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

BEFORE: Cathy Spoel
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

PROCEDURAL BACKGROUND

On May 27, 2010, the Ontario Energy Board (the "Board") received an Amended Notice of Motion from the Consumers Council of Canada and Aubrey LeBlanc ("CCC") regarding the constitutionality of assessments issued by the Board pursuant to section 26.1 of the *Ontario Energy Board Act, 1998* (the "OEB Act") (the " Motion").

On May 11, 2010, the Board issued a Notice of Hearing and Procedural Order No. 1 which set out a number of preliminary questions arising from the Motion.

The following parties requested and were granted intervenor status in this proceeding: Canadian Manufacturers & Exporters ("CME"); the Industrial Gas Users Association; Toronto Hydro Electric System Limited; Vulnerable Energy Consumers Coalition

("VECC"), Enbridge Gas Distribution Inc.; Union Gas Limited ("Union Gas"); and the Association of Power Producers of Ontario. The Attorney General of Ontario (the "Attorney General") is the respondent on the Motion.

On July 13, 2010, the Board held an oral hearing to address the questions set out in the Notice of Hearing Procedural Order No. 1. On August 5, 2010, the Board issued its Decision with Reasons with respect to certain preliminary issues. The Board held that it had jurisdiction to hear the Motion and would proceed to do so.

The full record of this proceeding can be found on the Board's website under case number EB-2010-0184.

The Attorney General filed an affidavit of Mr. Barry Beale, and various intervenors cross-examined on it. The Beale evidence described what the Attorney General contends is the relevant regulatory scheme, and provided information on the two programs which are funded by the assessment recovered pursuant to section 26.1 of the OEB Act: the Home Energy Savings Plan ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"). These programs are discussed in further detail below.

CCC, and a number of intervenors that supported the relief sought by CCC - namely, CME, Union Gas and VECC - filed written final arguments with the Board on September 6 and 7, 2011. On September 20, 2011, the Attorney General filed its written final argument with the Board. Board staff filed a written submission with the Board on September 26, 2011.

On October 6, 2011, the Board held an oral hearing and heard argument from the parties that had filed written submissions.

FACTS

There is little dispute concerning the facts in this case. Section 26.1(1) of the OEB Act requires the Board to issue assessments ("Assessments", or, in the case of the actual assessment issued in 2009/2010, the "Assessment") to recover specific costs of the Ministry of Energy in respect of energy conservation programs or renewable energy programs. Although section 26.1 would permit Assessments against natural gas distributors, the regulation authorizing the actual Assessment in question (Ontario Regulation 66/10) only imposed the Assessment on licensed electricity distributors

("distributors") and the Independent Electricity System Operator (the "IESO"). Section 26.1(2) of the OEB Act then authorizes the distributors to collect these Assessments from consumers or classes of consumers as prescribed by regulation and in the manner prescribed by regulation. Section 26.1(2) authorizes the IESO to collect its portion of the Assessment from market participants as further described in Ontario regulation 66/10. The Assessments, therefore, are ultimately "passed on" to market participants and to distributors' customers.

Section 26.2(2) of the OEB Act describes the "special purposes" for which amounts collected under section 26.1 relating to Assessments are paid to Ontario. They are:

1. To fund conservation or renewable energy programs aimed at decreasing the consumption of two or more of the following fuels:
   i. natural gas,
   ii. electricity,
   iii. propane,
   iv. oil,
   v. coal, and
   vi. wood.

2. To fund conservation or renewable energy programs aimed at causing consumers of fuel to change from one or more of the fuels listed in paragraph 1 to any other fuel or fuels listed in that paragraph.

3. To fund conservation or renewable energy programs aimed at decreasing peak electricity demand, while increasing or decreasing the consumption of another type of fuel.

4. To fund research and development or other engineering or scientific activities aimed at furthering the conservation or the efficient use of fuels.

5. To fund conservation or renewable energy programs aimed at a specific geographical, social, income or other sector of Ontario.

6. To reimburse the Province for expenditures it incurs for any of the above purposes.

Section 7 of Regulation 66/10, passed pursuant to section 26.1 of the OEB Act, sets out the formula for the determination of the amounts to be assessed from each distributor and the formula by which each distributor can recover the amounts assessed from the consumers to whom it distributes electricity. The amount of the Assessment for the 2009/2010 fiscal year was $53,695,310 . By letter dated April 9, 2010 (the "Assessment Letter"), the Board issued the Assessment to distributors pursuant to Section 26.1 of the OEB Act. Attached to the Board's letter was an invoice setting out the amount that each distributor receiving the letter was being assessed. The amounts assessed to each distributor are sometimes referred to as the "special purpose charge".

The funds collected by the Assessment were intended to fund the provincial portion of two federal energy efficiency programs: the Home Energy Savings Program ("HESP") and the Ontario Solar Thermal Heating Initiative ("OSTHI"). The HESP pays for certain building retrofits undertaken by homeowners. The OSTHI provides incentives to large commercial and industrial entities for solar installations. In November, 2010, the Minister of Energy announced in the Legislature that the government has no plans to reintroduce the Assessment for future years.

The Board's role with respect to the Assessment was essentially an administrative one. It did not set the total amount of the charge, nor did it decide against whom it should be levied. The Board also had no role in developing or administering the HESP or the OSTHI. The Board simply applied the formula as set in Regulation 66/10 to allocate the Assessment amongst distributors and the IESO.

It is the position of CCC, and the parties supporting CCC, that the Assessment amounts to an indirect tax, and is therefore outside the constitutional powers of the provincial government, and should be overturned. CCC argues that the tax is indirect because, although it is levied against distributors and the IESO, those entities are then authorized to recover those costs from ratepayers. Ratepayers, in other words, are indirectly paying the levy. CCC recognizes that a levy is not an indirect tax if it can properly be characterized as a regulatory charge; however it is CCC's position that the Assessment does not meet the test for a regulatory charge, and is therefore *ultra vires* the powers of the province, and should be overturned. The Attorney General disputes this claim, and submits that the Assessment is a regulatory charge, and therefore within the powers of the province.

ISSUES

The only real issue between the parties in this proceeding is whether or not the Assessment can properly be characterized as a regulatory charge. If it is a regulatory charge, it is not an indirect tax, and is therefore not prohibited by the *Constitution Act, 1867* (the "Constitution Act").

The provinces derive their taxation power from s. 92(2) of the Constitution Act, which states:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, [...]
>
> **2.** Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

The province does not have the constitutional jurisdiction to enact or authorize the imposition of an indirect tax (as opposed to a direct tax). However, if what otherwise appears to be an indirect tax can properly be described as a regulatory charge, it is not constitutionally forbidden.

No one has argued that the Assessment is a direct tax. No one has suggested that the province has the constitutional power to impose an indirect tax. All appear to agree that if the Assessment cannot be characterized as a regulatory charge, then it must be an indirect tax and therefore *ultra vires* the constitutional powers of the province.

ANALYSIS

Tax versus Regulatory Charge

The key issue in this case is whether the Assessment is a tax (specifically, an indirect tax) or a regulatory charge.

The Supreme Court of Canada has identified five fundamental features of a "tax": (1) a tax is compulsory and enforceable by law; (2) it is imposed under the authority of the legislature; (3) it is levied by a public body; (4) it is intended for a public purpose; and (5)

it is unconnected to any form of a regulatory scheme. If a levy has all the above features, then "the levy in question will generally be described as a tax".[1]

It is the fifth feature (i.e. it is unconnected to any form of regulatory scheme) that is key in determining if a charge is a tax as opposed to a regulatory charge. The Supreme Court established a two part test for determining if a levy is connected with a regulatory scheme in Westbank: first it must be determined if there is a relevant legislative scheme. There are four indicia that should be considered in determining if there is a relevant legislative scheme:

> (i) a complete, complex and detailed code of regulation;
> (ii) a regulatory purpose which seeks to affect some behaviour;
> (iii) the presence of actual or properly estimated costs of the regulation; and
> (iv) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.[2]

If the first part of the test is satisfied (i.e. if there is a relevant legislative scheme), it must be determined if there is a relationship between the levy and the scheme itself. If both of these elements of the test are satisfied, then a levy will be considered a regulatory charge and not an indirect tax. It will therefore be *intra vires* the powers of the province.

On these basic principles the parties are in substantial agreement. Where they disagree is how the facts of this case apply to the legal principles.

CCC's position

CCC notes that the indicia of a regulatory scheme as identified in Westbank were not intended to be exhaustive, and that what constitutes a regulatory scheme must be determined on the particular facts of each case.

The thrust of CCC's argument appears to be that the Board exercises little or no real control over the Assessment and the two programs that the Assessment supports, and that it therefore is not a regulatory scheme. CCC provides various examples of

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[1] *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 ("Westbank"), para. 43; *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 ("Connaught"), para. 25.
[2] Westbank, para. 24.

existing undertakings pursuant to the OEB Act that do, in its view, constitute a detailed code of regulation: for example, the Board's powers to approve the rates charged by distributors, and the Board's powers to issue codes.

CCC also noted that since the Board has no real discretion with respect to how the Assessment is levied, it cannot perform its traditional role in a rate setting type exercise: in other words ensure that the costs for underlying programs are appropriate. Given its lack of discretion, the Board also has essentially no ability to exercise its objectives pursuant to section 1 of the OEB Act. CCC further states that the programs supported by the Assessment are markedly different from the types of conservation programs typically approved by the Board, for which the Board requires a detailed cost/benefit analysis.

CCC observes that the regulatory schemes recognized by the Supreme Court in *Ontario Home Builders Association v. York Region Board of Education*[3] and Connaught cases share certain elements. For example, both involved an exercise of discretion by a regulator, in both cases those against whom the charge was levied benefited from the regulation that imposed the charge, in both cases those against whom the charge was levied operated a business which required them to abide by a complex set of rule, and in both cases the Court found that the levies were proper estimates of the cost of regulation.

In summary, CCC addresses the 4 elements to the test for a regulatory scheme as follows:

> (i) **There is no complex or detailed code of regulation**: the programs are merely manifestations of government policy. The programs were created specifically to avoid regulatory oversight. The programs do not create rules or obligations.
> (ii) **There is no specific regulatory purpose**: the programs do not attempt to affect behaviour. They are voluntary. In addition, there is no assessment as to the extent to which, or if at all, they influence energy conservation.
> (iii) **There are no proper estimates of the cost of regulation**: there is no regulation surrounding the programs, and as such their costs are related to the reimbursement of subsidies. The Assessment has been calculated to offset only

[3] [1996] 2 S.C.R. 929 ("Ontario Home Builders")

the costs of the programs. However, no such constraint is found in section 26.1 of the OEB Act.

(iv) **The ratepayers against whom the charge is ultimately levied do not benefit or cause the need for the programs or Assessment**: the purposes of the programs and resulting Assessment are so broadly defined by the Attorney General as to benefit the entire population – not only the ratepayers liable to pay the charge. Moreover, ratepayers are liable to pay for the charge regardless of their participation in the programs

CCC's position was substantially supported by the three intervenors: Union, CME, and VECC.

Union submits that the Assessment does not meet any of the elements of the test to be considered a regulatory charge. Union argues that, although there may be a regulatory scheme associated with conservation and renewable power, the Assessment is in no way connected to that scheme. It notes that previously the provincial share for HESP and OSTHI were funded from general revenues; however the programs are unchanged and there is no clear reason why they should now be funded through a regulatory charge. The Attorney General was unable to show that the HESP and OSTHI programs actually resulted in a reduction in peak demand, improved grid reliability or reduced greenhouse gas emissions.

Union argues that the Assessment is too broad to be "necessarily incidental" to a discrete and identifiable "regulatory scheme" within the meaning of the case law.

It argues that the purposes for which the Assessment can be used are extremely broad, and that it is simply not possible to identify a discrete regulatory institutional enterprise that is enabled or furthered by the Assessment.

CME argues that in order for a charge to be considered a regulatory charge, it must be connected to a regulatory scheme. CME argues that that there is in fact no comprehensive or cohesive scheme. CME further argues (like Union) that HESP and OSTHI were previously funded from general revenues, and should be considered an effort to replenish program spending overruns.

VECC submits that the Assessment cannot be considered a regulatory charge, as it is not part of a regulatory scheme. VECC submits that there is insufficient evidence of a

complex and detailed code, no regulatory purpose to affect behaviour, and no properly estimated costs.

The Attorney General's Position

The Attorney General offered a detailed response to CCC's arguments, and put forward its analysis as to why it believed the Assessment meets the Westbank test and should be considered a regulatory charge. The Attorney General agrees with CCC in that the Westbank indicia are a guide and not necessarily exhaustive. The critical point, however, is that there must be a regulatory scheme and that it must be relevant to the parties being regulated.

i. Complete and detailed code of regulation

The Attorney General argues that a regulatory scheme will often be comprised of multiple statutes and regulations. In Ontario Home Builders, for example, there were nine different statutes that comprised parts of the "comprehensive regulatory framework" governing land development and land use planning in Ontario to which the educational development charges were related. The Court stated:

> While the regulatory scheme of which [education development charges] are only a small part is clearly very complex, the complexity is necessitated by the very scope of the matter regulated – urban planning. It is to be expected that a variety of provincial actors would be involved in the various phases of the scheme's operation. However, this fact does not serve to invalidate the regulatory nature of the scheme. In my view, the appellants impose an artificial and rigid distinction between the school board and the municipality. The distinction fails to reflect the true nature of the regulatory framework.[4]

The Attorney General further submits that the "narrow" approach referred to in Ontario Home Builders was again rejected in Connaught. In that case, although the appellants argued the regulatory scheme in question related solely to the regulation of alcoholic beverages or of business in the park, the Court held that the regulatory scheme was in fact much broader, and included the administration and operation of the whole of Jasper National Park.

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[4] Ontario Home Builders, para. 65

The Attorney General argues that it is not surprising that the regulatory scheme in this case (which it states governs electricity, energy and energy conservation) is comprised of multiple statutes and associated regulations. The OEB Act (and the Board) are not the only components to the scheme, but this in no way detracts from the existence of the scheme, and is in fact very similar to the situation in Ontario Home Builders. The HESP and OSTHI programs are authorized by the *Ministry of Energy Act, 2011*. The section of the OEB Act authorizing the Assessment specifically refers to conservation programs under the *Ministry of Energy Act, 2011* (and the *Green Energy and Green Economy Act 2009* as well). The Attorney General submits that they are not "stand alone" programs as alleged by CCC, but are in fact part of a comprehensive scheme involving multiple statutes and regulations.

ii. A specific regulatory purpose which seeks to affect some behaviour

In Westbank, the Court described the second part of the test as follows:

> 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. [...] [A] regulatory scheme usually "delineates certain required or prohibited conduct". [...] In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.[5]

The Attorney General notes that a regulatory purpose that seeks to change behaviour may be based on incentives that encourage voluntary behaviour – for example, a deposit-refund charge on bottles.[6]

The Attorney General argues that HESP and OSTHI clearly seek to affect the behaviour of individuals. In particular, the programs provide financial incentives to conserve energy and reduce reliance on non-renewable energy sources.

iii. Actual or properly estimated costs of regulation

The amount of the Assessment ($53,695,310) was the Ministry of Energy's best estimate of the total electricity related cost of the HESP and OSTHI programs for the

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[5] Westbank, paras. 24 and 26.
[6] Westbank, para. 29; *Cape Breton Beverages v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) ("Cape Breton Beverages")

fiscal year 2009/2010. The actual cost for these programs, determined at the end of the fiscal year, was $51,253,901 – which is within 5% of the estimated costs. The Attorney General notes that perfection is not required in the cost estimation process, and that given the small margin of error it is clear that program costs were properly estimated.

iv. A relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it

The Attorney General submits that the fourth part of the test is disjunctive; in other words, that all that is required for the indicium to be satisfied is that a fee payor "either" cause the need "or" derive a benefit from the regulation. Further, the fee payors need not be the sole group that obtains a benefit or causes the need for the regulation. The Attorney General cites the Ontario Home Builders, Connaught and *Allard Contractors Ltd. v. Coquitlam (District)*[7] cases in support of this contention.

The Attorney General submits that in this case all those that are subject to the Assessment – consumers, distributors, and the IESO – either cause the need for the programs or derive a benefit from the programs. In short, customers cause the need for the programs through their consumption of electricity and the consequent strains this can place on the reliability of the electricity grid. The Attorney General argues that relatively modest reductions in electricity consumption can improve system reliability. Consumers also benefit from the programs through improved grid reliability, and possibly by the deferral of costs for certain system upgrades.

Although the distributors and the IESO do not ultimately bear the cost of the Assessment (which is passed on to consumers), the Attorney General argues that they too receive a benefit from HESP and OSTHI – largely through improved grid reliability.

The Attorney General further submits that the actual effectiveness of the programs in attaining the objectives of the scheme is irrelevant to the constitutional analysis. In *Reference re Firearms Act*, the Supreme Court stated: "The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis."[8]

Relationship between the Charge and the Scheme

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[7] [1993] 4 S.C.R. 371 ("Allard")
[8] [2000] 1 S.C.R. 783, Para. 18.

The Westbank and Connaught cases established that a relationship between the charge and the scheme will exist where there is a nexus between the revenues raised and the costs of regulation.[9] Citing Allard, the Attorney General argues that it is not the role of a tribunal to undertake rigorous analysis of a government's accounts, and that the government is permitted reasonable leeway in determining a fee structure intended to recover the costs of a regulatory scheme.[10]

The Attorney General submits that there is a clear nexus between the revenues raised through the charge and the costs of the HESP and OSTHI programs. As described above, the amount recovered through the Assessment was based on an estimate of the programs' costs, and that estimate proved to be reasonably accurate.

In summary, the Attorney General stated as follows:

> In conclusion, it is clear that the cost recovery charge established under s. 26.1 of the *OEBA* and Regulation 66/10 constitutes a regulatory charge ancillary to a regulatory scheme governing electricity consumption and distribution, and not a tax. The first step of the *Westbank/Connaught* test is met in this case, as the indicia of a regulatory scheme are clearly satisfied:
> (1) The HESP and OSTHI programs form part of a "complete, complex and detailed code of regulation" governing electricity, energy, and energy conservation. This code comprises multiple statutes, and the regulations, rules and codes thereunder.
> (2) The HESP and OSTHI programs funded by the regulatory charge provide financial incentives to homeowners and institutions, seeking to alter their energy consumption behaviour. There is a clear regulatory purpose of encouraging energy conservation and reducing reliance on non-renewable energy sources.
> (3) The electricity-related costs of these programs were properly estimated; and
> (4) Consumers, LDCs and the IESO all benefit from and/or cause the need for the energy conservation programs.

Board staff largely supported the position of the Attorney General. Board staff submitted that the regulatory scheme as described by the Attorney General very likely meets the four criteria for a regulatory scheme as set out in Westbank. Board staff

[9] Westbank, para. 44; Connaught, para. 27.
[10] Allard, para. 72-73

disagreed with the contention of CCC that the scheme in question is limited to the OEB Act, and submitted that the courts have rejected such a narrow approach. Board staff reviewed all of the Supreme Court cases dealing with this issue, and submitted that the Court has taken a broad approach in determining what constitutes a regulatory scheme.

DECISION

The Board finds that the Assessment is a regulatory charge. It is therefore not an indirect tax, and it is not u*ltra vires* the constitutional powers of the province.

As noted above, there is essentially no dispute amongst the parties regarding the test to be employed or the relevant cases. The central issue before the Board is whether or not the Assessment is a regulatory charge, and therefore within the constitutional powers of the province.

Although there is no real dispute about the test, there is disagreement amongst the parties regarding the application of the test to the facts in this case. The Board largely accepts the arguments of the Attorney General and Board staff in this regard.

The Board must determine whether the Assessment is in "pith and substance" a regulatory charge or a tax - it is the levy's primary purpose that is determinative.[11]

The first step in the Westbank test is to determine if there is a relevant legislative scheme. There are four indicia to consider in making this assessment (although the list is not exhaustive):

> (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.[12]

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[11] Westbank,, para. 30.
[12] Westbank para. 43

Complete, complex, detailed code of regulation

The Board finds that there is a complete, complex and detailed code of regulation with respect to energy (including energy conservation). The Attorney General argued that there are numerous statutes and regulations which comprise the regulatory scheme: for example the *Electricity Act, 1998*, the *Green Energy and Green Economy Act, 2009*, and the OEB Act itself (including Regulation 66/10). Taken together, the Board accepts that these statutes and regulations comprise a complete, complex and detailed code of regulation, of which energy conservation is a part. As Board staff noted, the Supreme Court has taken a broad approach to it consideration of the existence of a regulatory scheme, most notably in the Ontario Home Builders and Connaught decisions. In Ontario Home Builders, for example, the Supreme Court accepted that education development charges were a component of a very broad integrated regulatory scheme that covered the entirety of planning, zoning, subdivision and development of land in the province.[13] The Board finds that the provincial regulatory scheme with respect to energy (and energy conservation) is at least as complete, complex and detailed as the provinces land development scheme as recognized in Ontario Home Builders.

The Board does not accept the arguments of CCC that the entire code of regulation is (or must be) contained in the OEB Act. The Supreme Court has adopted a much broader approach in determining the existence of a code of regulation, and has accepted that the code can comprise of multiple statutes and regulations. Similarly, the fact that HESP and OSTHI are not themselves specifically described in a statute or regulation (as argued by Union) does not appear to be relevant to the analysis.

Is there a regulatory purpose that seeks to affect behaviour?

The Board accepts that there is a regulatory purpose behind the programs supported by the Assessment that seeks to affect behaviour. Although HESP and OSTHI are voluntary, this does not mean they do not seek to affect behaviour. As noted by the Attorney General, the *Cape Breton Beverages* case (where the levy in question was upheld as a regulatory charge) was similarly a voluntary program. The HESP and OSTHI programs provide incentives to encourage consumers to reduce their energy usage. The effectiveness of these programs is not an issue for the Board to consider. The Board finds that their clear intent is to affect behaviour.

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[13] Ontario Home Builders, para. 57.

Are there actual or properly estimated costs of regulation?

As described by the Attorney General, the government engaged in a "thorough and rigorous cost estimation methodology"[14] to determine the costs of the OSTHI and HESP programs in advance. This estimate ($53,695,310) was included in Regulation 66/10. The actual costs for the programs was $51,253,901. As noted by the Attorney General, the courts have not required precision with respect to this indicium, and the Board accepts that there was a properly estimated cost for the regulation.

Is there a relationship between the regulation and the person regulated?

The Board accepts that there is a relationship between the regulation and the persons regulated.

The Attorney General provided several reasons why the person being regulated (largely consumers, the IESO and distributors as well) derive a benefit from the HESP and OSTHI programs: improved grid reliability, reduced overall costs, and environmental benefits. Although not all consumers will participate in the HESP and OSTHI programs, consumers cause the need for these programs through their use of electricity.

Union and CCC argue that there is no evidence that HESP and OSTHI actually achieve any of the benefits described by the Attorney General. The courts have been clear, however, that the efficacy of programs is not a matter for the courts (or tribunals) to consider; that is a matter for the legislature.

The Supreme Court has adopted a broad approach in considering this indicium: for example in Connaught, the Court found that bar owners benefitted from the regulation of Jasper National Park because that regulation resulted in greater tourism.[15]

The Board therefore accepts that there is a relevant regulatory scheme. In the Board's view, many of CCC's arguments are not relevant to the test that the Supreme Court has established. Although the Board's role in assessing the Assessment is largely administrative, this does not lead to a conclusion that there is no regulatory scheme. The special purpose charge (i.e. the portion of the Assessment charged to each individual distributor) is not a "rate", and therefore the Board's section 78 just and

[14] Beale affidavit, para. 57.
[15] Connaught, para. 34.

reasonable rates mandate is not engaged. As the cases discuss, a regulatory scheme can encompass multiple governmental ministries and/or agencies. The regulatory scheme in the current case is multi-faceted, and the Board (and the OEB Act) are only a part of the scheme. CCC states that the Assessment is not part of a regulatory scheme embodied in the OEB Act. There may be some truth to this, as the OEB Act comprises only one component of the greater regulatory scheme. Ultimately, however, this is not the test, and the courts have recognized that multiple statutes and governmental actors can together form a single regulatory scheme.

Is there a relationship between the Assessment and the regulatory scheme?

The Board has considered the indicia in Westbank, and has concluded that there is indeed a relevant legislative regulatory scheme. The second part of the test is whether there is a sufficient relationship or nexus between the Assessment itself and the regulatory scheme. The Board finds that there is.

Again, the Supreme Court has adopted a broad approach to the consideration of this question. The Court has found that governments must make a reasonable attempt to match the revenues from an assessment to the costs of the regulation, and that governments will be given reasonable leeway in fixing its charges.[16] Only in cases where there appears to be no nexus whatsoever between the charge in question and the regulatory scheme has the Supreme Court found that a charge fails this portion of the test. In *Re Eurig Estate*, the Court found that the evidence failed to disclose "any correlation between the amount charged for grants of letters probate and the cost of providing the service"[17], and in Westbank the Court found that none of the costs of the regulatory scheme had even been identified.[18]

As noted by the Attorney General, the government's estimates of the programs costs were quite accurate. The amounts recovered through the Assessment more or less matched the actual costs of the programs. The Board therefore finds that there is a relationship between the Assessment and the regulatory scheme.

For the reasons provided above, the CCC Motion is dismissed.

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[16] Connaught, paras. 40; Allard, p. 411
[17] [1998] 2 S.C.R. 565, para. 22.
[18] Westbank, para. 38.

COSTS

The Board notes that eligible parties' claims for costs until April 21, 2011 in this proceeding were processed. The Board will therefore make provision for eligible parties to file their claims for costs for the period after April 21, 2011 to the end of the Oral hearing on October 6, 2011.

THE BOARD ORDERS THAT:

1. Parties that have been found eligible for an award of costs may file their cost claims for the relevant period by **December 30, 2011**. Cost claims must be filed in accordance with the Board's Practice Direction on Cost Awards.

2. All filings to the Board must quote file number EB-2010-0184, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

3. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.