September 25, 2012

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

Dear Ms. Walli:

Re: EB-2012-0087 - Union Gas Limited - 2011 Earnings Sharing & Disposition of Deferral Accounts and Other Balances – Brief of Authorities in support of Reply Argument on the Preliminary Issue

Please find enclosed two copies of the Brief of Authorities in support of the Reply Argument of Union Gas Limited for the Preliminary Issue in the above noted proceeding.

If you have any questions please contact me at (519) 436-5473.

Yours truly,

[Original signed by]

Karen Hockin
Manager, Regulatory Initiatives

cc Alexander Smith (Torys)
Crawford Smith (Torys)
EB-2012-0087 Intervenors

EB-2012-0087

ONTARIO ENERGY BOARD

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 Union Gas Limited for an order of orders amending or varying the rate or rates charged to customers as of October 1, 2012;

REPLY BRIEF OF AUTHORITIES OF UNION GAS LIMITED

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AND TO: All Intervenors (EB-2012-0087)

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TAB 1

Northwestern Utilities Limited and The Public Utilities Board of the Province of Alberta *Appellants*;

and

The City of Edmonton *Respondent.*

1977: November 28; 1978: October 3.

Present: Laskin C.J. and Ritchie, Spence, Pigeon, Dickson, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Public utilities — Application for interim rate increase — Order of Public Utilities Board permitting recovery of losses incurred before date of application — Board thereby offending provisions of s. 31 of The Gas Utilities Act, R.S.A. 1970, c. 158 — Application of s. 8 of The Administrative Procedures Act, R.S.A. 1970, c. 2, to proceedings — Matter returned to Board for continuation of hearing.

Commencing on August 20, 1974, the appellant company filed an application with the Alberta Public Utilities Board for an order determining the rate base and fixing a fair return thereon and approving the rates and charges for the natural gas supplied by the company to its customers. The application made reference to the powers under s. 31 of *The Gas Utilities Act*, R.S.A. 1970, c. 158, by asking for an order "giving effect to such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application". Finally the application sought an order fixing interim rates pending the establishment of "final rates". As a result of this application several interim orders were issued between November 15, 1974, and June 30, 1975. In response to the application of August 20, 1974, the Board by order made on September 15, 1975, established the rate base, a fair return thereon and the total utility requirement at $72,141,000. These items were respectively found and included in the order on the basis of "actual 1974" figures and "forecast 1975" figures. The Board then directed the company to file a schedule of rates "designed to generate the foregoing total utility revenue requirements approved by the Board".

On August 20, 1975, the company filed with the Board an application for an order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by [the company] to its customers"; and on September 25, 1975, it filed an application for an interim order "approving changes in existing rates, tolls

Northwestern Utilities Limited et The Public Utilities Board de la Province de l'Alberta *Appelantes*;

et

La ville d'Edmonton *Intimée.*

1977: 28 novembre; 1978: 3 octobre.

Présents: Le juge en chef Laskin et les juges Ritchie, Spence, Pigeon, Dickson, Estey et Pratte.

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

Services publics — Requête visant une augmentation provisoire de tarifs — Ordonnance de The Public Utilities Board permettant le recouvrement de pertes subies avant la date de la requête — La Commission n'a pas respecté l'art. 31 de The Gas Utilities Act, R.S.A. 1970, chap. 158 — Application aux procédures de l'art. 8 de The Administrative Procedures Act, R.S.A. 1970, chap. 2 — Affaire renvoyée à la Commission pour qu'elle en poursuive l'audition.

Le 20 août 1974, la compagnie appelante a demandé à The Public Utilities Board de l'Alberta une ordonnance établissant une base de tarification et un rendement convenable et approuvant les tarifs et droits qu'elle voulait imposer à ses clients pour le gaz naturel qu'elle distribuait. Se référant aux pouvoirs prévus à l'art. 31 de *The Gas Utilities Act*, R.S.A. 1970, chap. 158, elle demandait une ordonnance «tenant compte de la partie des pertes subies par la requérante imputables à un retard indu à entendre et à trancher la demande». En outre, elle demandait une ordonnance établissant des tarifs provisoires jusqu'à la fixation des «tarifs définitifs». En conséquence, plusieurs ordonnances provisoires ont été rendues entre le 15 novembre 1974 et le 30 juin 1975. En réponse à la requête du 20 août 1974, la Commission rendait, le 15 septembre 1975, une ordonnance qui établissait une base de tarification et un rendement convenable et fixait le revenu total nécessaire à l'entreprise à $72,141,000. Ces montants inclus dans l'ordonnance étaient calculés en fonction des «données réelles pour 1974» et des «prévisions pour 1975». La Commission a ensuite ordonné à la compagnie de produire un tarif «apte à produire le revenu total nécessaire à l'entreprise approuvé par la Commission».

Le 20 août 1975, la compagnie a présenté à la Commission une requête en vue d'obtenir une ordonnance «approuvant les modifications aux tarifs, taxes et droits actuellement perçus par [la compagnie] pour le gaz distribué et les services fournis à ses clients»; cette requête fut suivie d'une autre, datée du 25 septembre

or charges for gas supplied and services rendered by [the company] to its customers pending final determination of the matter". The application of 1975 recited the history of the 1974 application and stated that the operating costs and gas costs of the company "have increased substantially over the amounts included in the 1974 application and continue to increase". After reciting that the Board in response to the 1974 application has awarded the applicant "interim refundable rates", the 1975 application went on to state that the "existing rates charged by the applicant for natural gas do not produce revenues sufficient to provide for its present or prospective proper operating and depreciation expense and a fair return on the property used in the service to the public". Therefore the company went on to apply for an order determining the rate base, and a fair return thereon, and fixing and approving rates for natural gas supplied by the company to its customers. The company sought as well an order giving effect to "such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application". The 1975 application sought as well interim rates "pending the fixing of final rates".

By its order of October 1, 1975, the Board granted an interim increase in rates the effect of which was to allow the company to receive $2,785,000 in excess of its revenues for 1975 which would have been received under the then existing rates. The City of Edmonton appealed from this interim order to the Appellate Division of the Supreme Court of Alberta pursuant to s. 62 of *The Public Utilities Board Act*, R.S.A. 1970, c. 302. The majority of the Appellate Division set aside the order and remitted it to the Board for reconsideration on two grounds: (1) that the effect of the order was a contravention of s. 31 of *The Gas Utilities Act* in that the company was thereby granted recovery of losses incurred before the date of application, namely, August 20, 1975; and (2) that the Board failed to comply with s. 8 of *The Administrative Procedures Act*, R.S.A. 1970, c. 2, by reason of its failure to give reasons for its decision. The company and the Board appealed to this Court from the decision of the Appellate Division.

Held: The appeal should be dismissed and the matter returned to The Public Utilities Board for continuation of the hearing of the company's application of August 20, 1975.

1975, pour obtenir une ordonnance provisoire «approuvant, jusqu'à ce qu'une décision définitive soit rendue, les modifications aux tarifs, taxes et droits actuellement perçus par [la compagnie] pour le gaz distribué et les services fournis à ses clients». La requête de 1975 fait l'historique de la requête de 1974 et souligne que les frais d'exploitation de la compagnie et le coût du gaz «ont considérablement augmenté comparativement aux montants indiqués dans la requête de 1974 et continuent d'augmenter». Après avoir mentionné qu'à la suite de la requête présentée en 1974, la Commission avait accordé à la requérante des «tarifs provisoires remboursables», la requête de 1975 allègue que «les tarifs actuellement perçus par la requérante pour son gaz naturel ne produisent pas un revenu suffisant pour lui permettre de faire face à ses dépenses actuelles et futures d'exploitation et d'amortissement et d'obtenir un taux de rendement convenable sur l'investissement utilisé au service du public». La compagnie a alors demandé une ordonnance qui établisse une base de tarification et un rendement convenable, et fixe et approuve les tarifs à percevoir par la compagnie pour la distribution de gaz naturel. La compagnie a également demandé une ordonnance tenant compte de «la partie des pertes subies par la requérante imputables à un retard indu à entendre et à trancher la demande». La requête de 1975 demandait en outre une ordonnance fixant des tarifs provisoires applicables «jusqu'à l'établissement de tarifs définitifs».

Dans son ordonnance du 1er octobre 1975, la Commission a accordé une augmentation provisoire de tarifs permettant à la compagnie de percevoir un revenu supérieur de $2,785,000 à celui qu'elle aurait normalement perçu en 1975. La ville d'Edmonton a interjeté appel de cette ordonnance provisoire devant la Division d'appel de la Cour suprême de l'Alberta en vertu de l'art. 62 de *The Public Utilities Board Act*, R.S.A. 1970, chap. 302. Par un jugement rendu à la majorité, la Division d'appel a infirmé l'ordonnance et a renvoyé l'affaire devant la Commission pour un nouvel examen en se fondant sur deux motifs: (1) l'ordonnance produit un résultat qui contrevient à l'art. 31 de *The Gas Utilities Act*, car elle permet à la compagnie de recouvrer des pertes subies avant la présentation de la requête, c.-à-d. le 20 août 1975; et (2) la Commission n'a pas respecté l'art. 8 de *The Administrative Procedures Act*, R.S.A. 1970, chap. 2, en ne consignant pas les motifs de sa décision. La compagnie et la Commission ont interjeté appel devant cette Cour de cette décision de la Division d'appel.

Arrêt: Le pourvoi doit être rejeté et l'affaire doit être renvoyée à The Public Utilities Board pour qu'elle poursuive l'audition de la requête de la compagnie présentée le 20 août 1975.

The word "losses" as it is employed in s. 31 does not refer to accounting losses in the sense of a net loss occurring in a defined fiscal period but rather refers to the loss of revenue suffered by a utility during a defined period by reason of the delay in the imposition during that period of the proposed increased rates.

The first of the two principal issues in this appeal, *i.e.*, whether the Board by its interim order of October 1, 1975, offended the provisions of s. 31 by granting as alleged by the City an order permitting the recovery of losses incurred before the date of the application, August 20, 1975, was very narrow. The issue was simply whether or not the company by not applying in the 1974 application for a further interim order caused the Board to respond to the new application in 1975 in such a way as to authorize a new tariff which when implemented by the company will have the effect of recovering from future gas consumers revenue losses incurred by the company with respect to gas deliveries made to consumers prior to the date of the application in question (August 20, 1975) or prior to the advent of the October 1, 1975, rates in a manner not authorized by s. 31.

The majority in the Court below observed that "*prima facie* the new tentative rate base includes an amount for revenue losses in 1975 up to the date of the application in August, since the figures do not purport to apportion the loss between the two periods of the year". This Court was not prepared to say that a *prima facie* case had been established that the effect of the application of the interim rates from October 1, 1975, onwards will be the recovery in the future of revenue shortfalls incurred prior to August 20, 1975. The test was not whether the "new tentative rate base includes an amount for revenue losses" but rather the question was whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue shortfalls which have occurred prior to the date of the application in question, whether or not those "shortfalls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, subject always to the Board's limited power under s. 31.

The company submitted that a determination of what is or is not a 'past loss' is a pure question of fact and as such is not subject to appeal by reason of s. 62 of *The Public Utilities Board Act*, which limits appeals from Board decisions to questions of "law or jurisdiction". The appeal before this Court involved a determination

Le mot «pertes» à l'art. 31 ne renvoie pas aux pertes comptables au sens d'une perte nette subie au cours d'une année d'imposition, mais plutôt à la perte de revenu subie par l'entreprise au cours d'une période précise en raison du retard à mettre en vigueur, durant cette période, les augmentations projetées.

La première des deux principales questions en litige dans ce pourvoi qui consiste à déterminer si l'ordonnance provisoire rendue par la Commission le 1er octobre 1975 contrevient à l'art. 31 en permettant, selon la Ville, le recouvrement de pertes subies avant la présentation de la requête, le 20 août 1975, est très limitée. Il s'agit uniquement de déterminer si, en ne demandant pas d'ordonnance provisoire supplémentaire dans sa requête de 1974, la compagnie a amené la Commission à répondre à la nouvelle requête de 1975 de manière à autoriser des tarifs qui auraient pour effet de faire supporter par les nouveaux consommateurs de gaz les pertes de revenu sur le gaz livré avant la date de la requête (soit le 20 août 1975) ou avant la mise en vigueur des tarifs du 1er octobre 1975, mais d'une façon qui n'est pas autorisée par l'art. 31.

La Cour d'appel, à la majorité, a fait remarquer que «*prima facie* la nouvelle base de tarification proposée contient un montant destiné à couvrir des pertes de revenu subies depuis le début de 1975 jusqu'à la date de la présentation de la requête, en août, car les calculs ne répartissent pas la perte entre les deux périodes de l'année». Cette Cour n'est pas prête à dire qu'il est établi *prima facie* que l'imposition des tarifs provisoires à compter du 1er octobre 1975 permettait le recouvrement dans l'avenir de pertes de revenu subies avant le 20 août 1975. Au lieu de se demander si la «nouvelle base de tarification proposée contient un montant destiné à couvrir des pertes de revenu», il faut se demander si l'imposition dans l'avenir des tarifs provisoires procurera un revenu excédant le revenu total requis selon les calculs pour la même période, suite à l'inclusion dans le calcul d'un montant destiné à couvrir les manques à gagner subis avant la date de la présentation de la requête, que ces derniers aient ou non été inclus, de quelque façon que ce soit, dans la base de tarification ou aient été inclus dans les dépenses d'exploitation prévues pour la période durant laquelle les nouveaux tarifs provisoires seront imposés, sous réserve évidemment du pouvoir limité de la Commission en vertu de l'art. 31.

La compagnie a plaidé que la détermination de ce qui constitue une «perte passée» est une question de fait, non susceptible d'appel en vertu de l'art. 62 de *The Public Utilities Board Act*; cet article limite l'appel des décisions de la Commission aux seules questions de «droit ou de compétence». Le présent pourvoi implique l'analyse

of the intent of the Legislature with respect to the Board's jurisdiction to take into account shortfalls in revenue or excess expenditures occurring or properly allocable to a period of time prior to an application for the establishment of rates under the Act. The Board's decision as to characterization of "the forecast revenue deficiency in the 1975 future test year" of the company involved a determination of the matters of which cognizance may be taken by the Board in setting rates under the statute. This is a question of law and may properly be made the subject of an appeal to a court pursuant to s. 62. The disposition of an application which involved the Board in construing ss. 28 and 31 of *The Gas Utilities Act* raises a question of law and may well go to the jurisdiction of the Board.

However, it was not possible for the reviewing tribunal in the circumstances in this proceeding to ascertain from the Board's order whether the Board acted within or outside the ambit of its statutory authority. The form and content of the Board's order were so narrow in scope and of such extraordinary brevity that one was left without guidance as to the basis upon which the rates had been established for the period October 1, 1975, onwards. Hence this submission of the company failed.

As to the second issue, namely the application to these proceedings of s. 8 of *The Administrative Procedures Act*, which provision imposes upon certain administrative tribunals the obligation of providing the parties to its proceedings with a written statement of its decision and the facts upon which the decision is based and the reasons for it, the Board in its decision allowing the interim rate increase failed to meet the requirements of this section. The failure of the Board to perform its function under s. 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal were unable to determine whether or not in discharging its functions, the Board had remained within or had transgressed the boundaries of its jurisdiction established by its parent statute. The appellants were not assisted by the decision in *Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822, to the effect that under s. 8 of *The Administrative Procedures Act* the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor could the Board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. The order of the

de l'intention du législateur relativement au pouvoir de la Commission de tenir compte des manques à gagner ou des dépenses excédentaires engagées avant la présentation d'une demande de nouveaux tarifs en vertu de la Loi. La décision de la Commission au sujet du «manque à gagner prévu pour 1975, l'année témoin», comporte la détermination de questions dont la Commission prend connaissance pour fixer les tarifs en vertu de la Loi. C'est là une question de droit susceptible d'appel en vertu de l'art. 62. Une décision relative à une requête qui oblige la Commission à interpréter les art. 28 et 31 de *The Gas Utilities Act*, soulève une question de droit pouvant mettre en cause la compétence de la Commission.

Cependant, les circonstances de la présente affaire ne permettent pas au tribunal qui examine l'ordonnance de la Commission d'établir si cette dernière a excédé sa compétence. Le libellé et le contenu de l'ordonnance de la Commission sont en effet d'une portée si limitée et d'une telle brièveté qu'il est impossible d'établir si les tarifs ont été fixés pour la période commençant le 1er octobre 1975. Cet argument de la compagnie ne peut donc être retenu.

La deuxième question en litige porte sur l'application de l'art. 8 de *The Administrative Procedures Act* aux présentes procédures; cette disposition oblige certains tribunaux administratifs à communiquer aux parties une décision écrite, exposant les conclusions de fait et les motifs sur lesquels elle est fondée; la décision de la Commission accordant l'augmentation provisoire de tarifs n'est pas conforme aux exigences de cet article. L'inobservation de l'art. 8 par la Commission comporte l'omission très grave d'exposer «les conclusions de fait sur lesquelles sa décision est fondée», de sorte qu'il est impossible pour les parties et pour le tribunal siégeant en révision de déterminer si, dans l'exercice de ses fonctions, la Commission a respecté ou excédé les limites de sa compétence qu'établit sa loi organique. Les appelantes ne trouvent aucun appui dans *Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.* (1976), 2 A.R. 453, confirmé à [1977] 2 R.C.S. 822, où il fut jugé que pour être conformes à l'art. 8 de *The Administrative Procedures Act*, les motifs doivent être appropriés, pertinents et intelligibles, et doivent permettre à la partie concernée d'évaluer les possibilités d'appel. La Commission ne peut pas invoquer non plus le caractère particulier de l'ordonnance en question, savoir une ordonnance provisoire dont les dispositions prévoient la possibilité d'un remboursement des montants perçus sous son autorité, pour se soustraire

Board revealed only conclusions without any hint of the reasoning process which led thereto. The result was that a reviewing tribunal could not with any assurance determine that the statutory mandates bearing upon the Board's process had been heeded.

As for the participation of The Public Utilities Board in these proceedings, there is no doubt that s. 65 of *The Public Utilities Board Act* confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party. That this is so is made evident by s. 63(2) under which a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself.

The policy of this Court is to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.

Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of America Local 2142 (1973), 7 N.B.R. (2d) 41; *MacDonald v. The Queen* (1976), 29 C.C.C. (2d) 257; *Re Canada Metal Co. Ltd. et al. and MacFarlane* (1973), 1 O.R. (2d) 577; *Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Ltd.*, [1961] S.C.R. 72; *Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Ltd.*, [1947] S.C.R. 336; *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* (1958), 18 D.L.R. (2d) 588; *Central Broadcasting Co. Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529*, [1977] 2 S.C.R. 112; *Canada Labour Relations Board v. Transair Ltd. et al.*, [1977] 1 S.C.R. 772, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], setting aside an order of The Public Utilities Board of the Province of Alberta granting an interim increase in rates pursuant to s. 52(2) of *The Public Utilities Board Act*, R.S.A. 1970, c. 302. Appeal dismissed.

[1] (1977), 2 A.R. 317.

à son obligation de rendre une décision motivée. L'ordonnance de la Commission ne comporte que des conclusions et est muette quant au raisonnement suivi pour y arriver, de sorte que le tribunal siégeant en révision ne peut établir avec certitude si la Commission a observé les exigences légales dans l'élaboration de sa décision.

En ce qui concerne la participation de The Public Utilities Board aux présentes procédures, il est évident que l'art. 65 de *The Public Utilities Board Act* confère à la Commission le droit de participer à l'appel de ses décisions, mais en l'absence d'indication précise de l'intention du législateur, ce droit est limité. La Commission a un *locus standi* et son droit de participer aux procédures d'appel s'apparente à celui d'un *amicus curiae* et non à celui d'une partie. Cela ressort clairement du par. 63(2) qui fait une distinction entre les «parties» qui interjettent appel de la décision de la Commission ou qui étaient représentées devant la Commission, et la Commission elle-même.

Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître.

Jurisprudence: *Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of America Local 2142* (1973), 7 N.B.R. (2d) 41; *MacDonald c. La Reine* (1976), 29 C.C.C. (2d) 257; *Re Canada Metal Co. Ltd. et al. and MacFarlane* (1973), 1 O.R. (2d) 577; *Labour Relations Board of the Province of New Brunswick c. Eastern Bakeries Ltd.*, [1961] R.C.S. 72; *Labour Relations Board of Saskatchewan c. Dominion Fire Brick and Clay Products Ltd.*, [1947] R.C.S. 336; *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* (1958), 18 D.L.R. (2d) 588; *Central Broadcasting Co. Ltd. c. Conseil canadien des relations du travail et la Fraternité internationale des ouvriers en électricité, Section locale nº 529*, [1977] 2 R.C.S. 112; *Conseil canadien des relations du travail c. Transair Ltd. et autres*, [1977] 1 R.C.S. 772.

POURVOI à l'encontre d'un arrêt de la Division d'appel de la Cour suprême de l'Alberta[1] infirmant une ordonnance de The Public Utilities Board de la province de l'Alberta qui accordait une augmentation provisoire de tarifs en vertu du par. 52(2) de *The Public Utilities Board Act*, R.S.A. 1970, chap. 302. Pourvoi rejeté.

[1] (1977), 2 A.R. 317.

T. Mayson, Q.C., for the appellant Northwestern Utilities Ltd.

W. J. Major, Q. C., and *C. K. Sheard*, for the appellant Public Utilities Board of the Province of Alberta.

M. H. Patterson, Q. C., for the respondent.

The judgment of the Court was delivered by

ESTEY J.—This is an appeal by The Public Utilities Board for the Province of Alberta and Northwestern Utilities Limited from a decision of the Appellate Division of the Supreme Court setting aside an order of the Board granting an interim increase in rates pursuant to s. 52(2) of *The Public Utilities Board Act*, R.S.A. 1970, c. 302.

The majority of the Court of Appeal set aside the order and remitted it to the Board for reconsideration on two grounds:

(1) That the effect of the order was a contravention of s. 31 of *The Gas Utilities Act*, R.S.A. 1970, c. 158, in that Northwestern Utilities Limited was thereby granted recovery of losses incurred before the date of application, namely, the 20th of August 1975; and

(2) That the Board failed to comply with s. 8 of *The Administrative Procedures Act*, R.S.A. 1970, c. 2, by reason of its failure to give reasons for its decision.

The appellant, The Public Utilities Board (herein referred to as 'the Board'), is constituted under *The Public Utilities Board Act* to "deal with public utilities and the owners thereof as provided in this Act" (s. 28(1)), and is given more specific duties and powers with respect to gas utilities under *The Gas Utilities Act*. The appellant, Northwestern Utilities Limited (herein referred to as 'the Company'), is a gas utility regulated under these statutes.

The Board is by the latter statute directed to "fix just and reasonable ... rates, ... tolls or charges ..." which shall be imposed by the Company and other gas utilities and in connection therewith shall establish such depreciation and

T. Mayson, c.r., pour l'appelante Northwestern Utilities Ltd.

W. J. Major, c.r., et *C. K. Sheard*, pour l'appelante Public Utilities Board de la province de l'Alberta.

M. H. Patterson, c.r., pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE ESTEY—Ce pourvoi est interjeté par The Public Utilities Board de la province de l'Alberta et Northwestern Utilities Limited à l'encontre d'un arrêt de la Division d'appel de la Cour suprême de l'Alberta annulant une ordonnance aux termes de laquelle la Commission accordait une augmentation provisoire de tarifs en vertu du par. 52(2) de *The Public Utilities Board Act*, R.S.A. 1970, chap. 302.

La majorité en Cour d'appel a infirmé l'ordonnance et renvoyé l'affaire devant la Commission pour deux motifs:

[TRADUCTION] (1) L'ordonnance produit un résultat qui contrevient à l'art. 31 de *The Gas Utilities Act*, R.S.A. 1970, chap. 158, car elle permet à Northwestern Utilities Limited de recouvrer des pertes subies avant la date de la requête, c.-à-d. le 20 août 1975; et

(2) La Commission n'a pas respecté l'art. 8 de *The Administrative Procedures Act*, R.S.A. 1970, chap. 2, en ne consignant pas les motifs de sa décision.

L'appelante, The Public Utilities Board (ci-après appelée la «Commission»), a été créée par *The Public Utilities Board Act* pour [TRADUCTION] «connaître des questions concernant les entreprises de services publics et leurs propriétaires, conformément à la présente loi» (par. 28(1)); *The Gas Utilities Act* lui confère en outre des devoirs et pouvoirs plus spécifiques à l'égard des entreprises de distribution de gaz. L'appelante Northwestern Utilities Limited (ci-après appelée la «Compagnie») est une entreprise de distribution de gaz régie par ces lois.

L'article 27 de *The Gas Utilities Act* habilite la Commission à [TRADUCTION] «fixer les tarifs, ... taxes ou droits ... justes et raisonnables» que la Compagnie et les autres entreprises de distribution de gaz seront autorisées à percevoir et, ce faisant,

other accounting procedures as well as "standards, classifications [and] regulations ..." for the service of the community by the gas utilities (s. 27, *The Gas Utilities Act*). In the establishment of these rates and charges, the Board is directed by s. 28 of the statute to "determine a rate base" and to "fix a fair return thereon". The Board then estimates the total operating expenses incurred in operating the utility for the period in question. The total of these two quantities is the 'total revenue requirement' of the utility during a defined period. A rate or tariff of rates is then struck which in a defined prospective period will produce the total revenue requirement. The whole process is simply one of matching the anticipated revenue to be produced by the newly authorized future rates to future expenses of all kinds. Because such a matching process requires comparisons and estimates, a period in time must be used for analysis of past results and future estimates alike. The fiscal year of the utility is generally found to be a convenient but not a mandatory period for these purposes. It is a process based on estimates of future expenses and future revenues. Both according to the evidence fluctuate seasonally and both vary according to many uncontrollable forces such as weather variations, cost of money, wage rate settlements and many other factors. Thus the rate when finally established will be such as the Board deems just and reasonable to allow the recovery of the expenses incurred by a utility in supplying gas to its customers, together with a fair return on the investment devoted to the enterprise. We are here concerned only with the rate establishing process and, hence, this summation of the Board's functions and powers is limited to that aspect of its statutory operations.

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*

à déterminer la méthode d'amortissement et autres procédures comptables de même que les [TRADUCTION] «normes, catégories [et] règlements» applicables aux entreprises de distribution de gaz en tant que services publics. Pour établir ces tarifs et droits, la Commission doit, en vertu de l'art. 28 de la Loi, [TRADUCTION] «établir une base de tarification [et] fixer un taux de rendement convenable». La Commission doit ensuite évaluer les dépenses totales d'exploitation de l'entreprise pendant la période considérée. Le total de ces deux éléments forme le «revenu total nécessaire» à l'entreprise pour une période donnée. Le tarif est alors établi pour la période à venir de façon à produire le revenu total nécessaire. En fait, il s'agit de faire correspondre les revenus que produiront les nouveaux tarifs autorisés pour la période à venir au total des diverses dépenses futures. Etant donné que ce calcul se fait sur la base de comparaisons et d'estimations, l'analyse des résultats obtenus dans le passé et des estimations faites pour l'avenir doit être fondée sur une période de temps précise. Sans être la règle, l'année d'imposition de l'entreprise est généralement considérée une base adéquate. Le processus est fondé sur une estimation des dépenses et revenus futurs. Selon la preuve, ces deux éléments varient d'une saison à l'autre et dépendent de facteurs incontrôlables tels les conditions météorologiques, le coût de l'argent, les ententes salariales, et ainsi de suite. Ainsi, le tarif établi par la Commission doit être celui qu'elle juge juste et raisonnable pour permettre le recouvrement des dépenses engagées par une entreprise de distribution de gaz pour desservir ses clients et la réalisation d'un taux de rendement convenable sur l'investissement dans l'entreprise. La seule question qui nous occupe en l'espèce est la méthode de détermination des tarifs et, en conséquence, cet aperçu des fonctions et pouvoirs de la Commission se limite à cet aspect du rôle que lui prescrit la loi.

Bien que la Loi ne le dise pas expressément, ses prescriptions et dispositions habilitantes sont rédigées en termes prospectifs. Mis à part l'art. 31, rien dans la Loi n'indique que la Commission ait le pouvoir d'établir rétroactivement des tarifs de façon à permettre à l'entreprise de recouvrer des pertes d'aucun genre subies avant la date de la requête. (Voir l'arrêt *Ville d'Edmonton et autres*

Edmonton et al. v. Northwestern Utilities Limited[2], *per* Locke J. at pp. 401, 402).

The rate-fixing process was described before this Court by the Board as follows:

The PUB approves or fixes utility rates which are estimated to cover expenses plus yield the utility a fair return or profit. This function is generally performed in two phases. In Phase I the PUB determines the rate base, that is the amount of money which has been invested by the company in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

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. There are many provisions in the Act which make this clear and I take but one example, found in s. 35, which provides:

(1) No change in any existing rates ... shall be made by a ... gas utility ... until such changed rates or new rates are approved by the Board.

(2) Upon approval, the changed rates ... come into force on a date to be fixed by the Board and the Board

[2] [1961] S.C.R. 392.

c. Northwestern Utilities Limited[2], le juge Locke, aux pp. 401 et 402.)

Voici en quels termes la Commission a décrit à cette Cour sa méthode de détermination des tarifs:

[TRADUCTION]—La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, «le revenu nécessaire prévu». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

L'économie de la législation repose sur le principe que la détermination des tarifs pour l'avenir doit permettre à l'entreprise de percevoir intégralement le revenu nécessaire prévu calculé par la Commission. La détermination des tarifs consiste donc à faire correspondre le montant des revenus prévus produits par les tarifs projetés au revenu total nécessaire à l'entreprise. Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser. Plusieurs dispositions de la Loi le confirment d'ailleurs, notamment l'art. 35:

[TRADUCTION] (1) Les entreprises de distribution de gaz ... ne doivent pas modifier les tarifs en vigueur ... avant d'avoir obtenu l'approbation de la Commission.

(2) Après leur approbation, les tarifs modifiés ... entrent en vigueur à la date fixée par la Commission et

[2] [1961] R.C.S. 392.

may either upon written complaint or upon its own initiative herein determine whether the imposed increases, changes or alterations are just and reasonable.

Section 32 likewise refers to rates "to be imposed thereafter by a gas utility". The 1959 version of the legislation before the Court in this proceeding was examined by the Alberta Court of Appeal in *City of Calgary and Home Oil Co. Ltd. v. Madison Natural Gas Co. Ltd. and British American Utilities Ltd.*[3] wherein Johnson J.A. observed at p. 661:

The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine "the just and reasonable price" or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.

Vide also *Regina v. Board of Commissioners of Public Utilities (N.B.), Ex parte Moncton Utility Gas Ltd.*[4], at p. 710; *Bradford Union v. Wilts*[5], at p. 616.

There is but one exception in this statutory pattern and that is found in s. 31 which is critical in these proceedings. It is convenient to set it out in full.

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 an owner of a gas utility 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.

It should be noted that s. 31 has been amended by s. 5 of *The Attorney General Statutes Amendment Act, 1977*, 1977 (Alta.), c. 9, which received Royal Assent on May 18, 1977. However, s. 5(3) of that Act provides that s. 31 "as it stood immediately before the commencement of" s. 5 "... continues to apply to proceedings initiated ..." before

[3] (1959), 19 D.L.R. (2d) 655.
[4] (1966), 60 D.L.R. (2d) 703.
[5] (1868), L.R. 3 Q.B. 604.

cette dernière peut, à la suite d'une plainte écrite ou d'office, déterminer si les augmentations ou modifications accordées sont justes et raisonnables.

L'article 32 parle également de tarifs [TRADUCTION] «imposés à l'avenir par l'entreprise de distribution de gaz». La législation en cause devant cette Cour a fait l'objet, dans sa version de 1959, des remarques suivantes du juge Johnson de la Cour d'appel de l'Alberta dans l'arrêt *City of Calgary and Home Oil Co. Ltd. v. Madison Natural Gas Co. Ltd. and British American Utilities Ltd.*[3], à la p. 661:

[TRADUCTION] Les pouvoirs de The Natural Gas Utilities Board ont été précisés plus haut. La Commission a le devoir de fixer les «prix justes et raisonnables» à payer. Elle doit établir les tarifs pour l'avenir et, ceci fait, elle n'a plus compétence aux fins de cette requête. Pour que la Commission ait le pouvoir de prendre des mesures rétroactives, il faudrait que la Loi le prévoie expressément; or, rien en l'espèce ne révèle l'intention de conférer un tel pouvoir à la Commission.

Voir également *Regina v. Board of Commissioners of Public Utilities (N.B.), Ex parte Moncton Utility Gas Ltd.*[4], à la p. 710; *Bradford Union v. Wilts*[5], à la p. 616.

Il existe cependant une disposition importante qui se distingue du reste de la Loi sur cette question; il s'agit de l'art. 31, qui est capital en l'espèce. Il convient de le citer intégralement:

[TRADUCTION] Il est par les présentes déclaré qu'en fixant des tarifs justes et raisonnables, la Commission peut tenir compte de la partie des excédents de revenu perçus ou des pertes subies par le propriétaire d'une entreprise de distribution de gaz après sa demande de nouveaux tarifs, si la Commission estime que ces excédents ou pertes sont imputables à un retard indu à entendre et à trancher la demande.

Il convient de souligner que l'art. 31 a été modifié par l'art. 5 de *The Attorney General Statutes Amendment Act, 1977*, 1977 (Alta.), chap. 9, qui a reçu la sanction royale le 18 mai 1977. Cependant, le par. 5(3) de la Loi dispose que l'art. 31 [TRADUCTION] «existant avant l'entrée en vigueur de [l'art. 5] continue de s'appliquer aux

[3] (1959), 19 D.L.R. (2d) 655.
[4] (1966), 60 D.L.R. (2d) 703.
[5] (1868), L.R. 3 Q.B. 604.

May 18, 1977. Accordingly, this case stands to be determined in accordance with s. 31 as set out above.

The interpretative difficulties raised by s. 31 are manifold. For one thing, the word 'losses' which is not defined in the Act is employed with reference to the Board's power to establish rates with respect to the period after an application has been made and before the Board has fully disposed of the application by taking into account "excess revenues and losses" which the Board determines have been "due to undue delay in the hearing and determination of the application". It is in my view apparent once the statute is examined as a whole that 'losses' as the word is employed in s. 31 does not refer to accounting losses in the sense of a net loss occurring in a defined fiscal period but rather refers to the loss of revenue suffered by a utility during a defined period by reason of the delay in the imposition during that period of the proposed increased rates. The word in short is an abbreviation for 'lost revenue' which may indeed be suffered by a utility during a period when the utility is not in a net loss position in the accounting sense of that term. This Court had occasion to consider s. 31 collaterally in *City of Edmonton et al. v. Northwestern Utilities Limited, supra.* Locke J. writing on behalf of the whole Court on this point so interpreted and applied the word "losses" as it appears in this section.

Much of the difficulty encountered before the Board and again reflected in the judgment of the Court of Appeal has arisen by the use of the expression 'loss' sometimes to refer to a net loss for a period in the past and sometimes by applying the term to a shortfall of revenue in the sense in which I believe the Legislature uses the term in s. 31. This difficulty appears to have been obviated by the new s. 31 which is not now before the Court (*vide The Attorney General Statutes Amendment Act, 1977, supra*).

Section 52(2) of *The Public Utilities Board Act* should also be noted:

The Board may, instead of making an order final in the first instance, make an interim order and reserve

procédures instituées ...» avant le 18 mai 1977. Le présent litige doit donc être tranché en fonction de la version précitée de l'art. 31.

Les problèmes d'interprétation que soulève l'art. 31 sont nombreux. Par exemple, le mot «pertes», qui n'est pas défini dans la Loi, est utilisé dans le contexte du pouvoir de la Commission de fixer des tarifs pour la période qui suit la date de la demande et qui précède la décision finale de la Commission sur le sujet en tenant compte des «excédents de revenu et des pertes» qu'elle considère «imputables à un retard indu à entendre et à trancher la demande». Il est à mon avis évident, dans le contexte général de la Loi, que le mot «pertes» à l'art. 31 ne renvoie pas aux pertes comptables au sens d'une perte nette subie au cours d'une année d'imposition, mais plutôt à la perte de revenu subie par l'entreprise au cours d'une période précise en raison du retard à mettre en vigueur, durant cette période, les augmentations projetées. Il s'agit en fait d'une façon abrégée de décrire la «perte de revenu» que peut subir une entreprise durant une certaine période sans que pour autant elle subisse une perte nette au sens comptable de cette expression. Cette Cour a déjà eu l'occasion d'étudier incidemment le sens de l'art. 31 dans l'arrêt *Ville d'Edmonton et autres c. Northwestern Utilities Limited*, précité. Exposant l'opinion de la Cour à ce sujet, le juge Locke a interprété et appliqué de cette façon le mot «pertes» employé dans ledit article.

La difficulté éprouvée devant la Commission, qui se reflète aussi dans le jugement de la Cour d'appel, vient en grande partie du fait que le mot «perte» est parfois utilisé pour désigner une perte nette subie au cours d'une période antérieure, et parfois pour désigner un manque à gagner (sens que lui donne, à mon avis, le législateur à l'art. 31). Il semble que le texte du nouvel art. 31, non applicable en l'espèce, ait fait disparaître cette difficulté (voir *The Attorney General Statutes Amendment Act, 1977*, précitée).

Le paragraphe 52(2) de *The Public Utilities Board Act* mérite également d'être cité:

[TRADUCTION] La Commission peut prononcer une ordonnance provisoire, au lieu de rendre une ordonnance

further direction, either for an adjourned hearing of the matter or for further application.

Section 54 provides in similar language the authority for the Board to make such interim orders *ex parte*. These interim orders are couched in the same terms as the final or basic orders establishing rates and tariffs and hence are likewise prospective.

Against this statutory background a brief outline of the historical facts of this proceeding and its origins bring the two issues now before the Court into sharper focus. Commencing on August 20, 1974, the Company filed an application for an order determining the rate base and fixing a fair return thereon and approving the rates and charges for the natural gas supplied by the Company to its customers. The application made reference to the powers under s. 31 by asking for an order "giving effect to such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application". Finally the application sought an order fixing interim rates pending the establishment of "final rates". As a result of this application several interim orders were issued between November 15, 1974, and June 30, 1975. In response to the application of August 20, 1974, the Board by order made on September 15, 1975, established the rate base, a fair return thereon and the total utility revenue requirement at $72,141,000. These items were respectively found and included in the order on the basis of "actual 1974" figures and "forecast 1975" figures. The Board then directed the Company to file a schedule of rates "designed to generate the foregoing total utility revenue requirements approved by the Board".

The practice and terminology historically adopted by the Board in the discharge of its statutory functions are no doubt clear to the industry and to persons attending upon the Board in the discharge of its functions but leaves something to be desired in the sense that the terminology does not precisely fit that employed by the legislation to which reference has been made. It is clear, however, that in its order with respect to the August 1974 application,

définitive, et remettre sa décision à une audition ultérieure de la demande ou à la présentation d'une nouvelle demande.

L'article 54 habilite la Commission, en des termes semblables, à rendre de telles ordonnances provisoires *ex parte*. Ces ordonnances provisoires sont rédigées de la même façon que les ordonnances définitives ou initiales fixant les tarifs et, comme elles, ne s'appliquent que pour l'avenir.

Cet historique de la législation doit être complété d'un rappel des faits à l'origine de ce pourvoi afin de bien mettre en évidence les deux questions en litige devant cette Cour. Le 20 août 1974, la Compagnie demandait une ordonnance établissant une base de tarification et un rendement convenable et approuvant les tarifs et droits qu'elle voulait imposer à ses clients pour le gaz naturel qu'elle distribuait. Se référant aux pouvoirs prévus à l'art. 31, elle demandait une ordonnance [TRADUCTION] «tenant compte de la partie des pertes subies par la requérante imputables à un retard indu à entendre et à trancher la demande». En outre, elle demandait une ordonnance établissant des tarifs provisoires jusqu'à la fixation des «tarifs définitifs». En conséquence, plusieurs ordonnances provisoires ont été rendues entre le 15 novembre 1974 et le 30 juin 1975. En réponse à la requête du 20 août 1974, la Commission rendait, le 15 septembre 1975, une ordonnance qui établissait une base de tarification et un rendement convenable et fixait le revenu total nécessaire à l'entreprise à $72,141,000. Ces montants inclus dans l'ordonnance étaient calculés en fonction des «données réelles pour 1974» et des «prévisions pour 1975». La Commission a ensuite ordonné à la Compagnie de produire un tarif [TRADUCTION] «apte à produire le revenu total nécessaire à l'entreprise approuvé par la Commission».

Je ne doute pas que les usages et le vocabulaire adoptés par la Commission dans l'exercice des devoirs que lui confère la Loi soient clairs pour les gens de l'industrie ou les personnes qui comparaissent devant la Commission, mais la terminologie employée suscite une certaine confusion car elle diffère de celle de la législation, à laquelle j'ai fait référence plus haut. Toutefois, il est clair que c'est en fonction de la période à venir que la Commis-

the Board has attempted to establish in the prospective sense those rates which the Company will require to enable it to carry on its business as a gas utility in the future and until such further and other rates are established by the Board. Had the Company then responded to the September 15 order by filing a proposed schedule of rates the Board would no doubt in completion of its statutory response to the August 1974 application by the Company have established the appropriate schedule of rates to be brought into effect by the Company in its billings from and after a date prospectively prescribed by the Board.

The complication which gives rise to these proceedings occurred on August 20, 1975, when the Company filed with the Board an application (not to be confused with the application filed on August 20, 1974) for an order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers"; together with an application on September 25, 1975, for an interim order "approving changes in existing rates, tolls or charges for gas supplied and services rendered by Northwestern Utilities Limited to its customers pending final determination of the matter". The application of 1975 recites the history of the 1974 application and states that the operating costs and gas costs of the Company "have increased substantially over the amounts included in the 1974 application and continue to increase". After reciting that the Board in response to the 1974 application had awarded the applicant "interim refundable rates", the 1975 application went on to state:

> The existing rates charged by the Applicant for natural gas do not produce revenues sufficient to provide for its present or prospective proper operating and depreciation expense and a fair return on the property used in the service to the public.

Therefore the Company went on to apply for an order determining the rate base, and a fair return thereon, and fixing and approving rates for natural gas supplied by the Company to its customers. The

sion a essayé, dans l'ordonnance relative à la requête du 20 août 1974, de fixer les tarifs devant permettre à la Compagnie de poursuivre l'exploitation de son entreprise de distribution de gaz jusqu'à ce que la Commission fixe de nouveaux tarifs. Si la Compagnie avait produit un projet de tarif, en réponse à l'ordonnance du 15 septembre, la Commission se serait sans nul doute acquittée des devoirs que lui impose la Loi pour la requête d'août 1974 en fixant le tarif approprié que la Compagnie aurait pu commencer à appliquer dans sa facturation à partir d'une date prescrite par la Commission de façon prospective.

Le litige actuel remonte au 20 août 1975, date à laquelle la Compagnie a présenté à la Commission une requête (à ne pas confondre avec la requête produite le 20 août 1974) en vue d'obtenir une ordonnance [TRADUCTION] «approuvant les modifications aux tarifs, taxes et droits actuellement perçus par Northwestern Utilities Limited pour le gaz distribué et les services fournis à ses clients»; cette requête fut suivie d'une autre, datée du 25 septembre 1975 pour obtenir une ordonnance provisoire [TRADUCTION] «approuvant, jusqu'à ce qu'une décision définitive soit rendue, les modifications aux tarifs, taxes et droits actuellement perçus par Northwestern Utilities Limited pour le gaz distribué et les services fournis à ses clients». La requête de 1975 fait l'historique de la requête de 1974 et souligne que les frais d'exploitation de la Compagnie et le coût du gaz [TRADUCTION] «ont considérablement augmenté comparativement aux montants indiqués dans la requête de 1974 et continuent d'augmenter». Après avoir mentionné qu'à la suite de la requête présentée en 1974, la Commission avait accordé à la requérante des [TRADUCTION] «tarifs provisoires remboursables», la requête de 1975 allègue:

> [TRADUCTION] Les tarifs actuellement perçus par la requérante pour son gaz naturel ne produisent pas un revenu suffisant pour lui permettre de faire face à ses dépenses actuelles et futures d'exploitation et d'amortissement et d'obtenir un taux de rendement convenable sur l'investissement utilisé au service du public.

La Compagnie a alors demandé une ordonnance qui établisse une base de tarification et un rendement convenable, et fixe et approuve les tarifs à percevoir par la Compagnie pour la distribution de

Company sought as well an order giving effect to "such part of any losses incurred by the applicant as may be due to any undue delay in the hearing and determining of the application", apparently paraphrasing s. 31 of *The Gas Utilities Act*. The 1975 application seeks as well interim rates "pending the fixing of final rates".

It is also relevant to note in passing that the 1974 application indeed had its own roots in a prior procedure before the Board initiated by the Board itself under s. 27 of *The Gas Utilities Act* in 1974. In June 1974, the Company applied for an interim rate increase and after a hearing in July 1974 the application was denied on August 19, 1974, and the application of August 20, 1974, was thereupon filed.

By its order of October 1, 1975, the Board granted an interim increase in rates the effect of which was to allow the Company to receive $2,785,000 in excess of its revenues for 1975 which would have been received under the then existing rates. The question immediately arises as to whether this sum represents increased expenses to be incurred by the Company for the period after the interim rates became effective (October 1, 1975) or whether it represents expenses incurred and unrecovered in the past. It was from this interim order that the City of Edmonton (herein referred to as 'the City') appealed to the Appellate Division of the Supreme Court of Alberta pursuant to s. 62 of *The Public Utilities Board Act*:

(1) Subject to subsection (2) [the requirement of leave], upon a question of jurisdiction or upon a question of law, an appeal lies from the Board to the Appellate Division of the Supreme Court of Alberta.

The Appellate Division of the Supreme Court of Alberta set aside the Board order of October 1, 1975, and referred the matter to the Board "for further consideration and redetermination". One preliminary argument can be disposed of at the outset. It was argued in the Courts below, as well

gaz naturel. La Compagnie a également demandé une ordonnance tenant compte de [TRADUCTION] «la partie des pertes subies par la requérante imputables à un retard indu à entendre et à trancher la demande», paraphrasant apparemment l'art. 31 de *The Gas Utilities Act*. La requête de 1975 demandait en outre une ordonnance fixant des tarifs provisoires applicables [TRADUCTION] «jusqu'à l'établissement de tarifs définitifs».

Il est également pertinent de souligner ici que la requête présentée en 1974 résulte d'une procédure antérieure entamée la même année par la Commission elle-même en vertu de l'art. 27 de *The Gas Utilities Act*. En effet, en juin 1974, la Compagnie avait demandé à la Commission de fixer une augmentation provisoire de tarifs; après une audience tenue en juillet 1974, la Commission a rejeté cette requête, le 19 août 1974, et la Compagnie est revenue à la charge en déposant sa requête du 20 août 1974.

Dans son ordonnance du 1er octobre 1975, la Commission a accordé une augmentation provisoire de tarifs permettant à la Compagnie de percevoir un revenu supérieur de $2,785,000 à celui qu'elle aurait normalement perçu en 1975. Il faut immédiatement se demander si cette différence correspond à une augmentation des dépenses après la date d'entrée en vigueur de l'augmentation provisoire de tarifs (soit le 1er octobre 1975) ou à des dépenses déjà engagées mais non recouvrées. C'est précisément de cette ordonnance provisoire dont la ville d'Edmonton (ci-après appelée la «Ville») a interjeté appel devant la Division d'appel de la Cour suprême de l'Alberta en vertu de l'art. 62 de *The Public Utilities Board Act*, qui dispose:

[TRADUCTION] (1) Sous réserve du paragraphe (2) [l'autorisation d'appel], les décisions de la Commission sont susceptibles d'appel à la Division d'appel de la Cour suprême de l'Alberta sur une question de compétence ou de droit.

La Division d'appel de la Cour suprême de l'Alberta a infirmé l'ordonnance de la Commission rendue le 1er octobre 1975 et lui a renvoyé l'affaire [TRADUCTION] «pour nouvel examen et décision». On peut tout de suite trancher une question préliminaire: on a soutenu devant les tribunaux d'ins-

as in this Court, that the interim order under appeal (dated October 1, 1975) was made pursuant to the 1974 rate application, either as a variance of the 1974 order pursuant to s. 56 of *The Public Utilities Board Act*, or as an interim order in respect of the 1974 application. That submission, whatever its effect, was rejected by the Court of Appeal and must be rejected here. On the face of the interim order is found a reference to "the application of N.U.L. dated the 20th day of August, 1975". That reference, when read with the transcript of the evidence at the hearing leaves no doubt that the interim order was made with respect to the 1975 application which clearly was an independent application to establish, pursuant to the aforementioned sections of *The Gas Utilities Act*, the statutory prerequisites to a new tariff of rates, and then a new tariff of rates.

I turn then to the first issue as to whether the Board by its interim order of October 1, 1975, has offended the provisions of s. 31 of *The Gas Utilities Act* by granting as alleged by the City an order permitting the recovery of losses incurred before the date of the application, August 20, 1975. It was not argued before this Court that the Board could not through s. 31 reach back to August 20, 1975, and grant a rate increase to recover costs thereafter incurred. The recitals to the order of October 1975 make it difficult to determine whether in fact the Board has invoked s. 31 in the interim rates established by the order or whether the Board has simply made an interim order under s. 51(2) of *The Public Utilities Board Act*. We need not determine the answer to that question in order to deal with this issue.

The issue is at this stage very narrow. No contest is raised as to the validity of the September 15, 1975, order nor the various interim rates authorized in the 1974 application. The issue is simply whether or not the Company by not applying in the 1974 application for a further interim order has caused the Board to respond to the new application in 1975 in such a way as to authorize a new tariff which when implemented by the Company will have the effect of recovering from future gas consumers revenue losses incurred by the

tance inférieure et devant cette Cour que l'ordonnance provisoire (du 1er octobre 1975) contestée en appel faisait suite à la requête présentée en 1974 et constituait soit une modification de l'ordonnance rendue en 1974 en vertu de l'art. 56 de *The Public Utilities Board Act* soit une ordonnance provisoire se rapportant à la requête faite en 1974. Nous devons, comme la Cour d'appel, rejeter cet argument sans en examiner la portée. L'ordonnance provisoire mentionne «la requête de NUL en date du 20 août 1975». Cette mention, et la transcription de la preuve présentée à l'audition, indiquent clairement que l'ordonnance provisoire suit la requête présentée en 1975; cette dernière était totalement indépendante et visait à fixer, conformément aux articles susmentionnés de *The Gas Utilities Act*, les bases légales d'un nouveau tarif et ledit nouveau tarif.

J'en viens à la première question en litige: l'ordonnance provisoire rendue par la Commission le 1er octobre 1975 contrevient-elle à l'art. 31 de *The Gas Utilities Act* en permettant, selon la Ville, le recouvrement de pertes subies avant la présentation de la requête, le 20 août 1975? On n'a pas soutenu devant cette Cour que la Commission n'avait pas le pouvoir, en vertu de l'art. 31, de faire ses calculs à partir du 20 août 1975 et d'accorder une augmentation de tarifs pour couvrir les dépenses engagées après cette date. Les attendus de l'ordonnance d'octobre 1975 ne permettent pas d'établir si la Commission s'est fondée sur l'art. 31 pour fixer une augmentation provisoire ou a simplement rendu une ordonnance provisoire en vertu du par. 51(2) de *The Public Utilities Board Act*. Il n'est pas nécessaire de trancher cette question pour régler le point en litige.

La question soumise à cette Cour est très limitée. La validité de l'ordonnance rendue le 15 septembre 1975 et des nombreuses augmentations provisoires accordées à la suite de la requête présentée en 1974 n'est pas contestée. Il s'agit uniquement de déterminer si, en ne demandant pas d'ordonnance provisoire supplémentaire dans sa requête de 1974, la Compagnie a amené la Commission à répondre à la nouvelle requête de 1975 de manière à autoriser des tarifs qui auraient pour effet de faire supporter par les nouveaux consom-

Company with respect to gas deliveries made to consumers prior to the date of the application in question (August 20, 1975) or prior to the advent of the October 1, 1975, rates but in a manner not authorized by s. 31.

The Appellate Division of the Supreme Court of Alberta in both the judgments of Clement J.A. and McDermid J. A., as well as counsel before this Court, devoted a considerable amount of attention to the accounting evidence filed by the Company with reference to the total revenue requirement of the Company in the years 1974 and 1975 and to the possibility that the inclusion in the rate base or the operating expenses established in Phase I of the 1975 application of the additional expenses which gave rise to the 1975 application, will have the effect of violating or going beyond s. 31 by authorizing rates which will have the effect of recovering past losses. We are here not concerned with capitalized losses because there is no suggestion that the rate base will be enlarged by the inclusion of any historical loss in the sense of an accounting deficit in prior fiscal intervals but rather with revenue losses other than those which may be recovered pursuant to s. 31 and which relate to the period from and after August 20, 1975. These losses of course have no relationship to a rate base computed and established pursuant to s. 28 of *The Gas Utilities Act*. We are concerned only with whether or not the Board in its processes has determined the total operating expenses for some period, as well as the fair return on the rate base, so as to enable the Board to calculate prospectively the anticipated total revenue requirement of the utility and thereby establish rates which prospectively will produce future revenues to match the estimated future total revenue requirement.

This procedure was the subject of comment by Porter J.A. in *Re Northwestern Utilities Ltd.*[6] at p. 290, and which comments I find apt in the circumstances now before us:

One effect of this ruling is that future consumers will have to pay for their gas a sum of money which equals that which consumers prior to August 31, 1959 ought to have paid but did not pay for gas they had used. In

[6] (1960), 25 D.L.R. (2d) 262.

mateurs de gaz les pertes de revenu sur le gaz livré avant la date de la requête (soit le 20 août 1975) ou avant la mise en vigueur des tarifs du 1er octobre 1975, mais d'une façon qui n'est pas autorisée par l'art. 31.

Les juges Clement et McDermid, qui ont rendu le jugement de la Division d'appel de la Cour suprême de l'Alberta, et les avocats devant cette Cour se sont longuement penchés sur la preuve comptable soumise par la Compagnie au sujet du revenu total nécessaire pour les années 1974 et 1975 et sur la possibilité que l'inclusion des dépenses supplémentaires à l'origine de la requête de 1975 dans la base de tarification ou dans les dépenses d'exploitation établies dans le cadre de la première étape de l'étude de la requête de 1975 contrevienne à l'art. 31 en autorisant des tarifs qui permettaient de compenser des pertes passées. Il ne s'agit pas de pertes capitalisées, car on n'a pas prétendu que la base de tarification avait été augmentée par l'inclusion d'une perte passée, au sens d'un déficit comptable d'années d'imposition précédentes; il s'agit plutôt de pertes de revenu autres que celles visées par l'art. 31 et qui auraient été subies après le 20 août 1975. Il est bien évident que ces pertes n'ont aucun lien avec la base de tarification calculée et établie en conformité de l'art. 28 de *The Gas Utilities Act*. La seule question à trancher à cet égard est de savoir si la Commission a établi les dépenses totales d'exploitation pour une période donnée et le rendement convenable sur la base de tarification afin d'être en mesure de calculer, pour l'avenir, le revenu total nécessaire à l'entreprise et donc fixer des tarifs pouvant produire suffisamment de revenus dans l'avenir pour correspondre au revenu total nécessaire ainsi déterminé.

Cette façon de procéder a fait faire au juge Porter, dans l'arrêt *Re Northwestern Utilities Ltd.*[6] à la p. 290, un commentaire qui me semble pertinent en l'espèce:

[TRADUCTION] Cette décision a notamment l'effet de faire payer aux nouveaux consommateurs de gaz une somme égale à ce que les consommateurs desservis avant le 31 août 1959 auraient dû payer, mais n'ont pas payé,

[6] (1960), 25 D.L.R. (2d) 262.

short, the undercharge to one group of consumers for gas used in the past is to become an overcharge to another group on gas it uses in the future. When the Board capitalized this sum, it made all the future consumers debtors to the company for the total amount of the deficiency, payable ratably with interest from their respective future gas consumption.

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 evidence submitted by the Company on the hearing of the 1975 application centred largely upon the urgent need for interim refundable rates by which the Company;

can recover its costs of service and earn an adequate return on its utility assets for the year 1975. If the interim rates requested are nor granted, the costs of providing natural gas service would not be fully recovered.

The evidence goes on to outline the utility income under existing rates for the years 1975 and 1976 and it is stated that these rates unless augmented by interim rates as proposed will produce a shortfall in revenue of approximately $700,000 per month. The accounts so filed reveal computations which show the need for an additional $2.785 million for the year 1975 of which operating expenses represent $2.105 million. Unhappily, the record does not reveal whether all the components of the additional $2.785 million are recurring expenses and costs, or legitimate demands for return on capital, which will run evenly into the future. It may be that in the quarterly period of 1975 remaining at the time of the order, these projections will exceed or be less than the actual expenses to be incurred in that very quarterly period. On this the evidence is strangely silent. The

pour le gaz qu'ils ont utilisé. Bref, une perception insuffisante dans le passé à l'égard d'un groupe de consommateurs de gaz entraîne une surcharge à l'égard d'un autre groupe de consommateurs pour le gaz qu'il utilisera à l'avenir. En capitalisant cette somme, la Commission a rendu tous les consommateurs éventuels de gaz débiteurs envers la Compagnie d'un montant correspondant au manque à gagner avec intérêts, à payer en proportion de leur consommation future.

Il est admis que la Loi n'empêche pas la Commission de tenir compte de l'expérience passée pour mieux évaluer les revenus et les dépenses à venir d'une entreprise de services publics. Mais ce n'est pas la même chose d'établir un tarif qui permette à l'entreprise de compenser une «perte» ou une insuffisance de revenus subie au cours d'une période antérieure à la date de la requête considérée. Une perte identifiée ou capitalisée doit, de toute façon, être exclue de la base de tarification et, en conséquence, elle ne peut se refléter dans les tarifs établis pour une période à venir.

La preuve fournie par la Compagnie à l'audition de la requête de 1975 a principalement porté sur le besoin urgent de tarifs remboursables pour lui permettre

[TRADUCTION]de recouvrer ses frais d'exploitation et d'obtenir un rendement convenable sur son investissement pour l'année 1975. Si les tarifs provisoires demandés ne sont pas accordés, le prix du service de distribution de gaz naturel ne sera pas complètement couvert.

En ce qui concerne les revenus produits par les tarifs prévus pour les années 1975 et 1976, la preuve révèle qu'à moins d'être augmentés par les tarifs provisoires proposés, ils entraîneront un manque à gagner d'environ $700,000 par mois. La preuve comptable comprend en outre des calculs établissant le besoin de $2,785,000 supplémentaires pour l'année 1975, dont $2,105,000 pour les frais d'exploitation. Malheureusement, le dossier n'indique pas si la somme de $2,785,000 est entièrement composée de dépenses et de frais périodiques ou de réclamations légitimes relatives au rendement sur l'investissement, qui s'étaleraient régulièrement sur les périodes à venir. Il se peut qu'au cours du trimestre de 1975 restant à courir à l'époque de l'ordonnance, ces prévisions s'avèrent plus élevées ou plus faibles que les dépenses véritablement engagées au cours de ce trimestre. La

evidence of the treasurer of the Company deals with the revenues for the year 1975 as follows:

A. The revenues from gas sales for the test year 1975 of $87,265,000 as shown on line 6 of Statement 2.01 (Forecast—Proposed Rates) constitutes $84,480,000 of revenues forecast under existing rates as shown on Line 6 of Statement 2.01 (Forecast—Existing Rates) and $2,785,000 of additional revenues to earn a utility rate of return of 9.93%. The increase is that estimated to be derived from introduction on October 1, 1975, of the requested interim rates, including an increase in franchise tax of $120,000.

Q. On what year are the interim rates designed?

A. 1975 was chosen as the test year and rates were designed to recover 1975 costs.

In its application for interim rates the Company reduces the effect of the anticipated loss of revenue to the conclusion:

The rate of return on the base rate drops from 9 percent in 1974 to 8.43 percent in 1975 and further declines to 6.77 percent in 1976. The requested rate of return on rate base for 1975 under the proposed rates is 9.93 percent. This difference of 1½ percent represents $1,600,000 in utility income.

This reference would appear to be to the difference between the prevailing rates in 1975 prior to October 1st and the rates which would prevail in 1975 under the proposal made for the rates effective October 1, 1975. The application for the interim rates goes on to state:

Without rate relief in the form of interim rates for the balance of 1975, the imputed return on common equity drops to 10.2 percent compared to the recommended equity return of 14⅝ percent to 15⅛ percent . . .

From this and like excerpts from evidence, testimentary and documentary, the City has taken the view that the augmentation to rates for the last quarter of 1975 sought by the Company and granted by the Board has in effect been a recognition of a deemed increase in the rate base or operating expenses by the inclusion therein of an

preuve n'éclaire absolument pas cette question. Le trésorier de la Compagnie a présenté le témoignage suivant au sujet des revenus de l'année 1975:

[TRADUCTION] R. Les revenus de $87,265,000 provenant de la vente de gaz pour l'année témoin 1975, inscrits à la sixième ligne du relevé 2.01 (Prévisions—tarifs suggérés) comprennent $84,480,000 de revenus prévus selon les tarifs actuellement en vigueur figurant à la sixième ligne du relevé 2.01 (Prévisions—Tarifs actuels) et $2,785,000 de revenus supplémentaires destinés à permettre un taux de rendement de 9.93%. L'augmentation correspond à l'estimation du montant résultant de la demande d'augmentation provisoire des tarifs présentée le 1er octobre 1975 et à l'augmentation de $120,000 des droits sur la concession.

Q. Sur la base de quelle année les tarifs provisoires sont-ils établis?

R. L'année 1975 a été choisie comme l'année témoin et les tarifs ont été établis en fonction des coûts de cette année-là.

Dans sa demande de tarifs provisoires, la Compagnie ramène l'effet de la perte anticipée de revenus à la conclusion suivante:

[TRADUCTION] Le taux de rendement sur la base de tarification tombe de 9 pour cent en 1974 à 8.43 pour cent en 1975 et à 6.77 pour cent en 1976. Le taux de rendement pour 1975 compte tenu du tarif suggéré est de 9.93 pour cent. Cette différence de 1½ pour cent représente un revenu de $1,600,000 pour l'entreprise.

Il s'agit, semble-t-il, de la différence entre les tarifs en vigueur en 1975, jusqu'au 1er octobre, et les tarifs proposés à partir du 1er octobre 1975. La demande de tarifs provisoires dit en outre:

[TRADUCTION] Sans l'augmentation provisoire des tarifs pour le reste de l'année 1975, le rendement sur l'avoir des actionnaires ordinaires sera de 10.2 pour cent alors qu'il devrait être de 14⅝ à 15⅛ pour cent . . .

Se fondant sur cela, et sur d'autres preuves testimoniales et documentaires, la Ville prétend que l'augmentation des tarifs pour le dernier trimestre de 1975, demandée par la Compagnie et accordée par la Commission, revient à admettre une augmentation de la base de tarification ou des dépenses d'exploitation pour y inclure une perte qui ne

otherwise unrecoverable loss in that part of the year 1975 preceding the 1975 application filed on August 20. Additionally, or perhaps more accurately, alternatively, the City has put the argument that the Company by its interim rate proposal has sought to recover in 1975 additional costs of $2.785 million without in any way establishing that the revenue so sought is required to match expenses to be incurred either during the effective period of the new interim rates, or is to recover lost revenue in the manner authorized by s. 31. In support of this argument, the City points out that the sum of $2.1 million, which is said to be required to meet increases in operating expenses, is not isolated and shown to be additional expenses to be incurred in the last quarter of 1975 but rather is the excess of 1975 expenses over and above those forecast in the earlier proceedings and which excess is forecast on the basis of actual expenditures in the first 6 months of 1975 together with anticipated expenditures in the last 6 months of 1975.

The Company meets this argument by the submission that losses contemplated by s. 31 cannot be discerned until the close of the fiscal period selected as the basis for the application for new rates and that this is peculiarly so in the case of a gas utility by reason of fluctuating conditions beyond the control of the utility. The Board in disposing of these opposing positions states simply:

AND THE BOARD having considered the argument of counsel for Interveners that the application for interim refundable rates by N.U.L. should be rejected, in whole or in part, on the grounds that the increased interim refundable rates are for the purpose of recovering "past losses" which they claim have been incurred by N.U.L. since January 1, 1975:

AND THE BOARD considering that the forecast revenue deficiency in the 1975 future test year requested by N.U.L. cannot be properly characterized as "past losses".

The terminology "past losses", employed perhaps by all parties before the Board and adopted by the Board in its order, makes it difficult in reviewing the record as well as the various orders of the Board to determine whether or not the

serait autrement pas remboursable pour la partie de l'année 1975 précédant le 20 août 1975, date de la présentation de la requête. En outre, ou, pour être plus précis, subsidiairement, la Ville a soutenu que l'augmentation provisoire réclamée par la Compagnie visait à compenser en 1975 un coût supplémentaire de $2,785,000 sans prouver soit que le revenu supplémentaire réclamé correspond aux dépenses engagées au cours de la période d'application des nouveaux tarifs provisoires soit qu'il vise à recouvrer une perte de revenu de la manière prévue à l'art. 31. A l'appui de cet argument, la Ville fait valoir que la somme de $2,100,000 réclamée pour faire face à l'augmentation des dépenses d'exploitation n'a été ni isolée ni identifiée comme correspondant à des dépenses supplémentaires à engager au cours du dernier trimestre de 1975. Selon la Ville, cette somme représenterait au contraire l'excédent des dépenses engagées en 1975 sur celles prévues au départ, cet excédent étant lui-même calculé en fonction de dépenses engagées durant le premier semestre de 1975 et sur les prévisions de dépenses pour le dernier semestre de cette année-là.

La Compagnie répond à cet argument que les pertes visées à l'art. 31 ne peuvent être identifiées avant la fin de la période d'imposition choisie pour l'application des nouveaux tarifs et ajoute que c'est particulièrement vrai dans le cas d'une entreprise de distribution de gaz, en raison de fluctuations incontrôlables. Tranchant ces thèses contradictoires, la Commission a simplement déclaré:

[TRADUCTION] ET CONSIDÉRANT l'argumentation des avocats des intervenants en faveur du rejet, en totalité ou en partie, de la requête de NUL pour l'obtention de tarifs provisoires remboursables, au motif que l'augmentation provisoire et remboursable des tarifs vise à recouvrer des «pertes passées» subies par NUL depuis le 1er janvier 1975;

ET CONSIDÉRANT que le manque à gagner prévu par NUL pour 1975, l'année témoin, ne constitue pas véritablement des «pertes passées».

L'expression «pertes passées» employée par toutes les parties ou presque devant la Commission, et reprise par cette dernière dans son ordonnance, ne facilite pas l'examen du dossier et des diverses ordonnances de la Commission lorsqu'il

Board was indeed attempting to isolate the elements to be taken into account by the Board in discharging its functions under ss. 27, 28 and 29 of *The Gas Utilities Act* with reference to specific parts of the calendar year 1975. If, for example, the Board had assumed that the additional revenue sought in the application of September 25, 1975, for an interim order pending the determination of the application of August 20, 1975, was to match expenses forecast to be incurred by the Company in the last quarter of 1975, then there would be no attempt by the Board to take into account revenue losses incurred prior to August 20, 1975, and thus no failure on the part of the Board to comply with the statute and with s. 31 in particular. The process of matching forecast revenues to be realized from the proposed interim rates against the forecast expenses comprising the total revenue requirements for the last quarterly period would be complete. It is impossible to discern whether or not that is the result which is sought to be reflected by the Board in its order of October 1, 1975. Such may well be the case, but on the other hand, it might be as submitted by the City that these additional expenses totalling $2.785 million are in whole or in part the result of annualizing expenses incurred before and/or after August 20, 1975, so that the total revenue requirement for the "test year" need be augmented by $2.785 million in order to meet the total revenue requirements for the year. It is in my view wholly unnecessary to enter the debate as to whether or not in making the estimates for future expenses a fiscal period of a year, two years, a half year, etc., need be selected. What is required by the statute is an estimate by the Board of the future needs of the utility which are recognized in the statute to be compensable by the operation in the future of the rates prescribed by the Board. Similarly the forecast of revenues to be recovered by the proposed rates need not be predicated necessarily upon a hypothetical or real fiscal year or a shorter period. Obviously in a seasonal enterprise such as the gas utility business a full calendar fiscal period represents the marketing picture throughout the four seasons of the year. Equally obviously, recurring cash outlays relevant to expenses unevenly incurred throughout the year can be annualized

s'agit de déterminer si cette dernière a effectivement tenté d'isoler les éléments dont elle devait tenir compte pour s'acquitter de ses fonctions en vertu des art. 27, 28 et 29 de *The Gas Utilities Act*, relativement à des périodes précises de l'année civile 1975. Si, par exemple, la Commission a présumé que le revenu supplémentaire réclamé dans la requête du 25 septembre 1975, visant une ordonnance provisoire applicable en attendant que soit tranchée la requête du 20 août 1975, correspondait aux dépenses que la Compagnie prévoyait effectuer au cours du dernier trimestre de 1975, alors on peut dire que la Commission n'a pas cherché à tenir compte des pertes de revenu subies avant le 20 août 1975 et qu'elle n'a en conséquence pas violé la Loi ni, plus précisément, l'art. 31. L'objectif, qui est de faire correspondre le montant des revenus projetés provenant des tarifs provisoires proposés au montant des dépenses projetées formant le revenu total nécessaire pour le dernier trimestre, serait donc atteint. Mais il est impossible de savoir si c'est effectivement le résultat recherché par la Commission dans son ordonnance du 1er octobre 1975. Il se peut fort bien que ce soit le cas; en revanche, il se peut aussi, comme le prétend la Ville, que ces dépenses supplémentaires de $2,785,000 soient fondées, en totalité ou en partie, sur des dépenses antérieures et/ou postérieures au 20 août 1975, de sorte que le revenu total nécessaire pour «l'année témoin» doit être augmenté de $2,785,000 pour correspondre au revenu total nécessaire pour l'année. Il est à mon avis inutile de débattre la question de savoir si les estimations des dépenses à venir doivent être fondées sur l'année d'imposition, sur deux ans ou sur un semestre. La Commission est tenue d'évaluer les besoins futurs de l'entreprise dont la Loi autorise la compensation par les tarifs prescrits par la Commission pour l'avenir. Les prévisions des revenus que devront produire les tarifs proposés ne doivent pas non plus nécessairement être fondées sur une année d'imposition hypothétique ou réelle ou sur une période plus courte. Il est bien évident lorsqu'il s'agit d'une entreprise saisonnière, comme un service de distribution de gaz, qu'une année complète d'imposition donne une image fidèle des ventes de l'entreprise au cours des quatre saisons de l'année. Il est également évident que les dépen-

either by an accounting adjustment where the expense incurred relates to a longer period or extends beyond the fiscal year in question, or can be annualized where the expense incurred relates to a segment of the fiscal period. In any case the administrative mechanics to be adopted in the discharge of the function mandated by *The Gas Utilities Act* are exclusively within the power of the Board. We need not here deal with the question of arbitrariness in the discharge of administrative functions for there is no evidence on the record before this Court raising any such issue. This Court is concerned only with the issue as to whether the Board in the performance of its duties under the statute has exceeded the power and authority given to it by the Legislature. Clement J.A. has observed in his reasons:

> [*P*]*rima facie* the new tentative rate base includes an amount for revenue losses in 1975 up to the date of the application in August, since the figures do not purport to apportion the loss between the two periods of the year.

I am not prepared to say that a *prima facie* case has been established that the effect of the application of the interim rates from October 1, 1975, onwards will be the recovery in the future of revenue shortfalls incurred prior to August 20, 1975. Indeed, in my respectful view, the test is not whether the "new tentative rate base includes an amount for revenue losses" but rather the question is whether or not the interim rates prospectively applied will produce an amount in excess of the estimated total revenue requirements for the same period of the utility by reason of the inclusion in the computation of those future requirements of revenue shortfalls which have occurred prior to the date of the application in question, whether or not those "shortfalls" have been somehow incorporated into the rate base or have been included in the operating expenses forecast for the period in which the new interim rates will be applied, subject always to the Board's limited power under s. 31.

The Company submitted to this Court that a determination of what is or is not a 'past loss' is a

ses de capital qui reviennent périodiquement et qui sont engagées à différentes époques de l'année peuvent être calculées sur une base annuelle avec les rectifications comptables appropriées lorsque la dépense est engagée pour une période plus longue, ou va au-delà de l'année d'imposition, ou même lorsqu'elle a trait à une partie seulement de l'année d'imposition. Quoi qu'il en soit, les techniques administratives auxquelles la Commission a recours pour s'acquitter du rôle que lui confère *The Gas Utilities Act* sont exclusivement de son ressort. Il ne saurait être question ici d'exécution arbitraire des fonctions administratives puisque le dossier soumis à cette Cour ne contient rien à cet égard. La seule question soumise à cette Cour consiste à déterminer si, dans l'exercice de ses fonctions, la Commission a excédé les pouvoirs que lui a conférés la Législature. Le juge Clement fait la remarque suivante dans ses motifs:

> [TRADUCTION] *Prima facie*, la nouvelle base de tarification proposée contient un montant destiné à couvrir des pertes de revenu subies depuis le début de 1975 jusqu'à la date de la présentation de la requête, en août, car les calculs ne répartissent pas la perte entre les deux périodes de l'année.

Je ne suis pas prêt à dire qu'il est établi *prima facie* que l'imposition des tarifs provisoires à compter du 1er octobre 1975 permettait le recouvrement dans l'avenir de pertes de revenu subies avant le 20 août 1975. Avec égards, je suis d'avis qu'au lieu de se demander si la «nouvelle base de tarification proposée contient un montant destiné à couvrir des pertes de revenu», il faut se demander si l'imposition dans l'avenir des tarifs provisoires procurera un revenu excédant le revenu total requis selon les calculs pour la même période, suite à l'inclusion dans le calcul d'un montant destiné à couvrir les manques à gagner subis avant la date de la présentation de la requête, que ces derniers aient ou non été inclus, de quelque façon que ce soit, dans la base de tarification ou aient été inclus dans les dépenses d'exploitation prévues pour la période durant laquelle les nouveaux tarifs provisoires seront imposés, sous réserve évidemment du pouvoir limité de la Commission en vertu de l'art. 31.

La Compagnie a plaidé devant cette Cour que la détermination de ce qui constitue une «perte

pure question of fact and as such is not subject to appeal by reason of s. 62 of *The Public Utilities Board Act, supra*, which limits appeals from Board decisions to questions of "law or jurisdiction". The appeal before this Court involves a determination of the intent of the Legislature with respect to the Board's jurisdiction to take into account shortfalls in revenue or excess expenditures occurring or properly allocable to a period of time prior to an application for the establishment of rates under the Act. The Board's decision as to the characterization of "the forecast revenue deficiency in the 1975 future test year" of the Company involves a determination of the matters of which cognizance may be taken by the Board in setting rates under the statute. This is a question of law and may properly be made the subject of an appeal to a court pursuant to s. 62. The disposition of an application which, as I have said, involved the Board in construing ss. 28 and 31 of *The Gas Utilities Act*, raises a question of law and may well go to the jurisdiction of the Board.

However, it is not possible for the reviewing tribunal in the circumstances in this proceeding to ascertain from the Board order whether the Board acted within or outside the ambit of its statutory authority. The form and content of the Board's order are so narrow in scope and of such extraordinary brevity that one is left without guidance as to the basis upon which the rates have been established for the period October 1, 1975, onwards. Hence this further submission of the Company must fail.

I turn now to the second issue, namely the application of s. 8 of *The Administrative Procedures Act* of Alberta, *supra*, to these proceedings. This provision imposes upon certain administrative tribunals the obligation of providing the parties to its proceedings with a written statement of its decision and the facts upon which the decision is based and the reasons for it. Section 8 states:

> Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (*a*) the findings of fact upon which it based its decision, and

passée» est une question de fait, non susceptible d'appel en vertu de l'art. 62 de *The Public Utilities Board Act*, précité; cet article limite l'appel des décisions de la Commission aux seules questions de «droit ou de compétence». Le présent pourvoi implique l'analyse de l'intention du législateur relativement au pouvoir de la Commission de tenir compte des manques à gagner ou des dépenses excédentaires engagées avant la présentation d'une demande de nouveaux tarifs en vertu de la Loi. La décision de la Commission au sujet du «manque à gagner prévu pour 1975, l'année témoin», comporte la détermination de questions dont la Commission prend connaissance pour fixer les tarifs en vertu de la Loi. C'est là une question de droit susceptible d'appel en vertu de l'art. 62. Une décision relative à une requête qui, comme je l'ai dit, oblige la Commission à interpréter les art. 28 et 31 de *The Gas Utilities Act*, soulève une question de droit pouvant mettre en cause la compétence de la Commission.

Cependant, les circonstances de la présente affaire ne permettent pas au tribunal qui examine l'ordonnance de la Commission d'établir si cette dernière a excédé ou non sa compétence. Le libellé et le contenu de l'ordonnance de la Commission sont en effet d'une portée si limitée et d'une telle brièveté qu'il est impossible d'établir si les tarifs ont été fixés pour la période commençant le 1er octobre 1975. Cet argument de la Compagnie ne peut donc être retenu.

J'en viens maintenant à la deuxième question en litige; elle porte sur l'application de l'art. 8 de *The Administrative Procedures Act* de l'Alberta, précitée, aux présentes procédures. Cette disposition oblige certains tribunaux administratifs à communiquer aux parties une décision écrite, exposant les conclusions de fait et les motifs sur lesquels elle est fondée. Cet article prévoit:

> [TRADUCTION] Lorsque, dans l'exercice de pouvoirs conférés par la loi, un organisme porte atteinte aux droits d'une partie, il doit communiquer à chaque partie un exposé écrit de sa décision et y préciser
>
> *a*) les conclusions de fait sur lesquelles sa décision est fondée, et

(*b*) the reasons for the decision.

The "reasons" handed down by the Board consist of the following:

INTERIM ORDER

UPON THE APPLICATION of Northwestern Utilities Limited, (hereinafter referred to as "N.U.L.") to the Public Utilities Board for an Order or Orders approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers;

AND UPON READING the application of N.U.L. dated the 20th day of August, 1975 and the Affidavit of Dorothea E. Blackwood concerning service by mail and by newspaper publication of a Notice of the matter as directed by the Board and written evidence of witnesses of N.U.L. and other material filed in support of the application;

AND UPON HEARING an application made by N.U.L. on September 25, 1975, for an Interim Order approving changes in existing rates, tolls or charges for gas supplied and services rendered by N.U.L. to its customers pending final determination of the matter;

AND UPON HEARING the application, testimony and submission of witnesses and counsel for N.U.L.;

AND THE BOARD having considered the argument of counsel for Interveners that the application for interim refundable rates by N.U.L. should be rejected, in whole or in part, on the grounds that the increased interim refundable rates are for the purpose of recovering "past losses" which they claim have been incurred by N.U.L. since January 1, 1975;

AND THE BOARD considering that the forecast revenue deficiency in the 1975 future test year requested by N.U.L. cannot be properly characterized as "past losses".

AND THE BOARD considering that delay in granting an interim increase in rates may adversely affect N.U.L.'s financial integrity and customer service;

AND N.U.L. having undertaken to refund to its customers such amounts as the Board may direct if any of the said interim rates are changed after further hearing.

IT IS ORDERED as follows: . . . .

The law reports are replete with cases affirming the desirability if not the legal obligation at common law of giving reasons for decisions (*vide Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of Ameri-*

b) les motifs de sa décision.

Voici les «motifs» exposés par la Commission:

[TRADUCTION] ORDONNANCE PROVISOIRE

THE PUBLIC UTILITIES BOARD, SUR REQUÊTE de Northwestern Utilities Limited (ci-après appelée «NUL») en vue d'obtenir une ordonnance ou des ordonnances approuvant les modifications aux tarifs, taxes ou droits actuellement perçus par NUL pour le gaz fourni et les services rendus à ses clients;

ET APRÈS LECTURE de la requête de NUL en date du 20 août 1975, de l'affidavit de Dorothea E. Blackwood relatif à la signification par courrier et la publication dans un journal d'un avis de requête, conformément aux directives de la Commission, et de la preuve écrite des témoins de NUL et autres documents produits à l'appui de la requête;

ET APRÈS AUDITION d'une requête présentée par NUL le 25 septembre 1975 en vue d'obtenir une ordonnance provisoire approuvant les modifications aux tarifs, taxes ou droits actuellement perçus par NUL pour le gaz fourni et les services rendus à ses clients, en attendant une décision définitive;

ET APRÈS AUDITION de la requête, des témoins et des avocats de NUL;

ET CONSIDÉRANT l'argumentation des avocats des intervenants en faveur du rejet, en totalité ou en partie, de la requête de NUL pour l'obtention de tarifs provisoires remboursables, au motif que l'augmentation provisoire et remboursable des tarifs vise à recouvrer des «pertes passées» subies par NUL depuis le 1er janvier 1975;

ET CONSIDÉRANT que le manque à gagner prévu par NUL pour 1975, l'année témoin, ne constitue pas véritablement des «pertes passées»;

ET CONSIDÉRANT qu'un retard à accorder une augmentation provisoire des tarifs pourrait nuire à la stabilité financière de NUL et aux services fournis aux clients;

ET CONSIDÉRANT l'engagement de NUL de rembourser à ses clients les montants prescrits par la Commission si, après audition, cette dernière décidait de modifier lesdits tarifs provisoires;

STATUE que . . .

Les recueils judiciaires regorgent de jugements affirmant qu'il est souhaitable sinon obligatoire en *common law*, de rendre des décisions motivées (voir *Gill Lumber Chipman (1973) Ltd. v. United Brotherhood of Carpenters and Joiners of Ameri-*

ca Local 2142[7], *per* Hughes C.J.N.B. at p. 47; *MacDonald v. The Queen*[8], *per* Laskin C.J.C. at p. 262). This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and if taken, the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed. This is not to say, however, that absent a requirement by statute or regulation a disposition by an administrative tribunal would be reviewable solely by reason of a failure to disclose its reasons for such disposition.

ca Local 2142[7], le juge en chef Hughes du Nouveau-Brunswick, à la p. 47; *MacDonald c. La Reine*[8], le juge en chef Laskin du Canada, à la p. 262). Cette obligation est salutaire: elle réduit considérablement les risques de décisions arbitraires, raffermit la confiance du public dans le jugement et l'équité des tribunaux administratifs et permet aux parties aux procédures d'évaluer la possibilité d'un appel et, le cas échéant, au tribunal siégeant en révision ou en appel d'accorder une audition complète, qui serait peut-être inaccessible si les motifs de la décision n'étaient pas révélés. Toutefois, cela ne signifie pas que la décision d'un tribunal administratif est susceptible de révision pour l'unique raison qu'elle n'est pas motivée, en l'absence d'obligation légale ou réglementaire en ce sens.

The Board in its decision allowing the interim rate increase which is challenged by the City failed to meet the requirements of s. 8 of *The Administrative Procedures Act*. It is not enough to assert, or more accurately, to recite, the fact that evidence and arguments led by the parties have been considered. That much is expected in any event. If those recitals are eliminated from the 'reasons' of the Board all that is left is the conclusion of the Board "that the forecast revenue deficiency in the 1975 future test year requested by the Company cannot be properly characterized as "past losses" ". The failure of the Board to perform its function under s. 8 included most seriously a failure to set out "the findings of fact upon which it based its decision" so that the parties and a reviewing tribunal are unable to determine whether or not, in discharging its functions, the Board has remained within or has transgressed the boundaries of its jurisdiction established by its parent statute. The obligation imposed under s. 8 of the Act is not met by the bald assertion that, as Keith J. succinctly put it in *Re Canada Metal Co. Ltd. et al. and MacFarlane*[9], at p. 587, when dealing with a similar statutory requirement, "my reasons are that I think so".

La décision de la Commission accordant l'augmentation provisoire de tarifs contestée par la Ville n'est pas conforme aux exigences de l'art. 8 de *The Administrative Procedures Act*. Il ne suffit pas d'affirmer ou, plus précisément, d'énoncer que la preuve et les moyens soumis par les parties ont été considérés. Cela va de soi. Si l'on soustrait ces attendus des «motifs» rendus par la Commission, il ne reste que la conclusion selon laquelle «le manque à gagner prévu par NUL pour 1975, l'année témoin, ne constitue pas véritablement des «pertes passées»». L'inobservation de l'art. 8 par la Commission comporte l'omission très grave d'exposer «les conclusions de fait sur lesquelles sa décision est fondée», de sorte qu'il est impossible pour les parties et pour le tribunal siégeant en révision de déterminer si, dans l'exercice de ses fonctions, la Commission a respecté ou excédé les limites de sa compétence qu'établit sa loi organique. L'exigence prévue à l'art. 8 de la Loi n'est pas respectée si l'on se contente de dire, comme le mentionne le juge Keith dans *Re Canada Metal Co. Ltd. et al. and MacFarlane*[9], à la p. 587, à propos d'un cas semblable, [TRADUCTION] «mes motifs sont que telle est ma conclusion».

[7] (1973), 7 N.B.R. (2d) 41 (N.B.S.C.A.D.).
[8] (1976), 29 C.C.C. (2d) 257.
[9] (1973), 1 O.R. (2d) 577.

[7] (1973), 7 N.B.R. (2d) 41 (N.B.S.C.A.D.)
[8] (1976), 29 C.C.C. (2d) 257.
[9] (1973), 1 O.R. (2d) 577.

The appellants are not assisted by the decision of the Appellate Division of the Supreme Court of Alberta in *Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.*[10], affirmed by this Court at [1977] 2 S.C.R. 822 to the effect that under s. 8 of *The Administrative Procedures Act* the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal. Nor can the Board rely on the peculiar nature of the order in this case, being an interim order with the amounts payable thereunder perhaps being refundable at some later date, to deny the obligation to give reasons. Brevity in this era of prolixity is commendable and might well be rewarded by a different result herein but for the fact that the order of the Board reveals only conclusions without any hint of the reasoning process which led thereto. For example, none of the factors which the Board took into account, in reaching its conclusion that the amounts contested were not "past losses" are revealed so that a reviewing tribunal cannot with any assurance determine that the statutory mandates bearing upon the Board's process have been heeded.

The Appellate Division of the Supreme Court of Alberta, after coming to the same result, vacated the Board's order and referred the matter to the Board for further consideration and determination pursuant to s. 64 of *The Public Utilities Board Act*. In doing so, it is evident from the reasons for judgment of the said Court that the Court properly viewed its appellate jurisdiction under s. 64 of *The Public Utilities Board Act* as a limited one. It is not for a court to usurp the statutory responsibilities entrusted to the Board, except in so far as judicial review is expressly allowed under the Act. It is, of course, otherwise where the administrative tribunal oversteps its statutory authority or fails to perform its functions as directed by the statute. Questions as to how and when operating expenses are to be measured and recovered through pre-

[10] (1976), 2 A.R. 453.

Les appelantes ne trouvent aucun appui dans l'arrêt de la Division d'appel de la Cour suprême de l'Alberta *Dome Petroleum Ltd. v. Public Utilities Board (Alberta) and Canadian Superior Oil Ltd.*[10], confirmé par cette Cour à [1977] 2 R.C.S. 822, où il fut jugé que pour être conformes à l'art. 8 de *The Administrative Procedures Act*, les motifs doivent être appropriés, pertinents et intelligibles, et doivent permettre à la partie concernée d'évaluer les possibilités d'appel. La Commission ne peut pas invoquer non plus le caractère particulier de l'ordonnance en question, savoir une ordonnance provisoire dont les dispositions prévoient la possibilité d'un remboursement des montants perçus sous son autorité, pour se soustraire à son obligation de rendre une décision motivée. A une époque où le style est souvent verbeux, la brièveté est un atout et elle aurait pu donner lieu à un résultat différent en l'espèce si ce n'était que l'ordonnance de la Commission ne comporte que des conclusions et est muette quant au raisonnement suivi pour y arriver. Par exemple, la Commission ne révèle aucun des facteurs pris en considération pour parvenir à la conclusion que le montant contesté ne constitue pas des «pertes passées», de sorte que le tribunal siégeant en révision ne peut établir avec certitude si la Commission a observé les exigences légales dans l'élaboration de sa décision.

Parvenue à la même conclusion, la Division d'appel de la Cour suprême de l'Alberta a annulé la décision de la Commission et lui a renvoyé le dossier pour qu'elle l'examine à nouveau et rende une décision conformément à l'art. 64 de *The Public Utilities Board Act*. Il est évident, à la lecture des motifs de jugement de ladite cour, qu'elle a à juste titre considéré que sa compétence en appel aux termes de l'art. 64 de cette loi était limitée. Une cour ne doit pas s'approprier les responsabilités administratives conférées à la Commission, sauf dans la mesure où l'examen judiciaire est expressément prévu par la Loi. Bien sûr, il en va autrement lorsque le tribunal administratif excède ses pouvoirs ou n'exerce pas ses fonctions conformément à la Loi. Sous réserve des limites imposées par la Loi, il appartient à la Commission

[10] (1976), 2 A.R. 453.

scribed rates are, subject to the limits imposed by the Act itself, for the Board to decide, and the procedures for such decisions if made within the confines of the statute are administrative matters which are better left to the Board to determine (*vide City of Edmonton v. Northwestern Utilities Limited, supra, per* Locke J. at p. 406).

As for the participation of The Public Utilities Board in these proceedings, it was pointed out to the Court that s. 65 of *The Public Utilities Board Act* entitles the Board "to be heard ... upon the argument of any appeal". Under s. 66 of the Act the Board is shielded from any liability in respect of costs by reason or in respect of an appeal.

Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party. That this is so is made evident by s. 63(2) of *The Public Utilities Board Act* which reads as follows:

> The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

Under s. 63(2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the

de déterminer comment calculer les dépenses d'exploitation et leur recouvrement par l'imposition de tarifs appropriés et la procédure suivie pour parvenir à cette décision, si cette dernière est rendue dans le cadre de la Loi, constitue une question administrative dont la Commission est le meilleur juge (voir *Ville d'Edmonton c. Northwestern Utilities Limited*, précité, le juge Locke, à la p. 406).

En ce qui concerne la participation de The Public Utilities Board aux présentes procédures, on a cité à la Cour l'art. 65 de *The Public Utilities Board Act* selon lequel la Commission a le droit [TRADUCTION] «d'être entendue ... et de faire valoir ses arguments sur tout appel». L'article 66 de la Loi dégage la Commission de toute responsabilité quant aux dépens de l'appel.

Il est évident que l'art. 65 confère à la Commission le droit de participer à l'appel de ses décisions, mais en l'absence d'indication précise de l'intention du législateur, ce droit est limité. La Commission a un *locus standi* et son droit de participer aux procédures d'appel s'apparente à celui d'un *amicus curiae* et non à celui d'une partie. Cela ressort clairement du par. 63(2) de *The Public Utilities Board Act* que voici:

> [TRADUCTION] La partie qui interjette appel doit, dans les dix jours de l'inscription de l'appel, donner aux parties touchées par l'appel ou à leurs procureurs respectifs devant la Commission, et au secrétaire de la Commission, un avis écrit de l'inscription de l'appel pour audition et la cour d'appel doit entendre l'appel dans les plus brefs délais.

Le paragraphe 63(2) fait une distinction entre les «parties» qui interjettent appel de la décision de la Commission ou qui étaient représentées devant la Commission, et la Commission elle-même. La Commission a un rôle limité devant la Cour et elle ne peut pas être considérée comme une partie, au sens plein du terme, dans les procédures d'appel de ses propres décisions. J'estime cette restriction tout à fait justifiée. Le législateur l'a sans aucun doute consciemment imposée dans le but d'éviter de mettre un fardeau injuste sur les épaules d'un appelant qui, par la nature des choses, devra éventuellement retourner devant la Commission et se

universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. (*Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al.*[11]; *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al.*[12]) Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*[13], at pp. 589, 590:

[11] [1961] S.C.R. 72.
[12] [1947] S.C.R. 336.
[13] (1958), 18 D.L.R. (2d) 588.

soumettre de nouveau à ses procédures de détermination des tarifs. Cette restriction offre également une protection contre les défaillances humaines qui entrent en jeu lorsque des personnes ou des organismes se retrouvent ainsi en situation de conflit.

Aux fins de ce pourvoi, l'analyse de la décision de la Commission doit se fonder sur deux considérations concernant l'une et l'autre la légalité d'un acte administratif. L'une des deux appelantes est la Commission elle-même; son avocat a présenté une argumentation détaillée et approfondie à l'appui de la décision de la Commission en faveur de la Compagnie. Une participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures concernant des intérêts et des questions semblables ou impliquant les mêmes parties. La Commission a tout le loisir de s'expliquer dans ses motifs de jugement et elle a enfreint de façon inacceptable la réserve dont elle aurait dû faire preuve lorsqu'elle a participé aux procédures comme partie à part entière, en opposition directe à une partie au litige dont elle avait eu à connaître en première instance.

Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. (Voir les arrêts *The Labour Relations Board of the Province of New Brunswick c. Eastern Bakeries Limited et autres*[11]; *The Labour Relations Board of Saskatchewan c. Dominion Fire Brick and Clay Products Limited et autres*[12].) Lorsque la loi donne à un tribunal administratif le droit de comparaître et de plaider, ce dernier aurait tout avantage à suivre les principes énoncés par le juge Aylesworth dans l'arrêt *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board*[13], aux pp. 589 et 590:

[11] [1961] R.C.S. 72.
[12] [1947] R.C.S. 336.
[13] (1958), 18 D.L.R. (2d) 588.

Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (*Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529*[14].)

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. In *Canada Labour Relations Board v. Transair Ltd. et al.*[15], Spence J. speaking on this point, stated at pp. 746-7:

It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of *certiorari* and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has

[14] [1977] 2 S.C.R. 112.
[15] [1977] 1 S.C.R. 722.

[TRADUCTION] Il ne fait aucun doute qu'en appel d'une décision du Conseil, celui-ci peut se faire représenter par un avocat qui plaidera sa cause devant le tribunal d'appel. Nous estimons toutefois approprié que la plaidoirie traite non du fond de l'affaire entre les parties qui ont comparu devant le Conseil, mais plutôt de la compétence ou du défaut de compétence de ce dernier. Si l'avocat du Conseil mène sa plaidoirie de la sorte, l'impartialité du Conseil sera d'autant mieux mise en valeur et sa dignité et son autorité en seront d'autant mieux garanties. En même temps, le tribunal d'appel bénéficiera de toutes les observations que l'avocat du Conseil jugera utiles de présenter sur la question de compétence.

Lorsque la loi constitutive ou organique ne dit rien du rôle ni du statut du tribunal dans les procédures d'appel ou d'examen judiciaire, cette Cour a limité ledit rôle à la seule question de la compétence pour rendre l'ordonnance contestée. (Voir *Central Broadcasting Company Ltd. c. Le Conseil canadien des relations du travail et la Fraternité internationale des ouvriers en électricité, Section locale nº 529*[14].)

Au sens où j'ai employé ce mot ici, la «compétence» n'inclut pas la transgression du pouvoir d'un tribunal par l'inobservation des règles de justice naturelle. Dans un tel cas, lorsqu'une partie aux procédures devant ce tribunal est également partie aux procédures de révision, c'est le tribunal lui-même qui fait l'objet de l'examen. Accorder au tribunal administratif la possibilité de défendre sa conduite et en fait de se justifier donnerait lieu à un spectacle auquel nos traditions judiciaires ne nous ont pas habitués. Dans l'arrêt *Re Conseil canadien des relations du travail c. Transair Ltd. et autres*[15], le juge Spence a écrit à ce sujet (pp. 746-7):

Il est exact qu'on a souvent utilisé la conclusion selon laquelle un tribunal administratif a manqué aux principes de justice naturelle pour décider qu'il a renoncé à l'exercice de sa compétence et par conséquent qu'il se trouvait dans l'impossibilité de statuer, comme il prétendait le faire. Cependant, j'estime que c'est là simplement une façon de permettre à la Cour d'avoir recours au *certiorari* et non une question qui touche à la compétence que le tribunal prétend avoir. Il est évident qu'il n'appartient pas au Conseil qui voit sa façon d'exercer

[14] [1977] 2 R.C.S. 112.
[15] [1977] 1 R.C.S. 722.

acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review.

There are other issues subordinate to the two principal submissions which I have discussed above but which are inappropriate for comment at this stage by reason of the disposition which I propose in respect to this appeal. I would dismiss the appeal with costs to the respondent The City of Edmonton as against the appellant Northwestern Utilities Limited. In the result, therefore, the matter would revert to the Board for a continuation of the processing of the application by the Company of August 20, 1975, involving, as discussed above, the ascertainment by any means appropriate to the provisions of the statute, the expenses estimated to be incurred in the future and to be therefore properly recoverable by the application of the rates to be established by the Board; and in the event that s. 31 be invoked for the ascertainment of only those expenses which had been incurred after the application of August 20, 1975. Any further analysis of the factual background and subordinate issues would, in view of this disposition, be inappropriate.

Appeal dismissed with costs.

Solicitors for the appellant, The Public Utilities Board for the Province of Alberta: Major, Caron & Co., Calgary.

Solicitors for the appellant, Northwestern Utilities Ltd.: Milner & Steer, Edmonton.

Solicitor for the respondent, The City of Edmonton: M. H. Patterson, Calgary.

ses fonctions contestée, de plaider en appel, à titre d'intéressé, sur la question de savoir s'il a ou non agi conformément aux principes de justice naturelle; c'est là un point dont doivent débattre en appel les parties et non le tribunal dont les actions sont soumises à examen.

Il existe des questions sous-jacentes à ces deux points principaux mais, étant donné ma conclusion dans ce pourvoi, il est inutile d'en discuter ici. Je suis d'avis de rejeter le pourvoi, avec dépens en faveur de la ville d'Edmonton et à l'encontre de l'appelante Northwestern Utilities Limited. Je suis donc d'avis de renvoyer le dossier devant la Commission afin qu'elle poursuive l'étude de la requête présentée par la Compagnie le 20 août 1975 et qu'elle évalue, conformément à la Loi, les dépenses à venir et en ordonne le recouvrement par les tarifs qu'elle fixera; et, dans l'éventualité où l'on invoquerait l'art. 31, afin qu'elle évalue les seules dépenses engagées après la requête du 20 août 1975. Etant donné ma conclusion, une analyse plus poussée des faits et des autres questions sous-jacentes n'est pas pertinente.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante, The Public Utilities Board de la Province de l'Alberta: Major, Caron & Co., Calgary.

Procureurs de l'appelante: Northwestern Utilities Ltd.: Milner & Steer, Edmonton.

Procureur de l'intimée, La ville d'Edmonton: M. H. Patterson, Calgary.

TAB 2

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided

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1 (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Re Chemainus Team Development Training Trust* (2004), 2004 CarswellBC 2853, [2004] B.C.J. No. 2519 (B.C. S.C.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); and *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.).

4 The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III C.

5 See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where

TAB 3

CITATION: L'Abbee v. Denis, 2008 ONCA 328
DATE: 20080429
DOCKET: C47369

COURT OF APPEAL FOR ONTARIO

CRONK, ARMSTRONG and LaFORME JJ.A.

BETWEEN:

HELENE L'ABBEE, ANDRE LALONDE, PAUL MERCIER, DENIS FAUBERT, LINDA ARSENAULT, DIANE BELANGER-BRISSON, PIERRETTE GOUIN, PASCAL LALIBERTE, MIKE MURPHY and THE ASSOCIATION OF EMPLOYEES OF THE UNIVERSITY OF OTTAWA

Respondents (Applicants)

and

JEAN CARL DENIS

Appellant (Respondent)

Jean Carl Denis, in person

R. Mitchell Rowe, for the respondent

Heard and released orally: April 23, 2008

On appeal from the order of Justice A. Roy of the Superior Court of Justice dated June 6, 2007.

ENDORSEMENT

[1] The appellant, Jean Carl Denis, appeals on several grounds from the order of the application judge dated June 6, 2007 reopening an agreement between the parties dated June 21, 2005, referring those of the appellant's accounts that were submitted to the respondents after June 2005 to assessment, and awarding the respondents their costs of the application on a full indemnity basis, in the total amount of $12,000.

[2] We see no error in the application judge's decision to refer the appellant's accounts rendered after June 2005 to assessment under s. 25 of the *Solicitors Act*, R.S.O. 1990, c. S.15. We are satisfied that the written document relied on by the appellant as creating an express trust arrangement did not give rise to a valid trust.

[3] As the application judge observed, the document in question is "very confusing and uncertain". It speaks variously of a trust, a "trust partnership" and a "joint venture trust partnership agreement". This language does not assist in ascertaining the intent of the parties with any degree of certainty.

[4] While the appellant is described in the document as both a "settlor" and a "trustee", he did not sign the document (although he appears to have affixed his notarial seal and notarial signature to the document) and, more importantly, no property appears to have been settled on the alleged trust by the appellant or any other person. The appellant did not contribute property to the alleged trust, in respect of which he no longer had an interest, to be held for the benefit of named beneficiaries.

[5] Thus, neither certainty of intention to create a trust, nor certainty of subject matter were established. Consequently, the document did not effectively constitute a trust. To this extent, we agree with the application judge that "whatever [the] intent or purpose [of the document]", it is not accomplished..."

[6] It is also significant that, on the record before the application judge, the respondents neither received independent legal advice concerning the "declaration of trust" drafted by the appellant, nor were they advised by him of their right to do so.

[7] In essence, the appellant maintains that, for the most part, the services rendered by him to the respondents were in the nature of management consulting and/or industrial relations services, rather than legal services. However, contrary to this submission, the appellant's own written explanation of his accounts as provided to the respondents expressly refers to the provision of legal services.

[8] In all these special circumstances, it was open to the application judge to refer certain of the appellant's accounts for assessment under the *Solicitors Act* in order that those of the appellant's accounts that concerned services of a legal nature might be assessed.

[9] The appeal, therefore, is dismissed. The respondents are entitled to their costs of this appeal, fixed in the total amount of $7,500, inclusive of disbursements and GST.

"E.A. Cronk J.A."
"Robert P. Armstrong J.A."
"H.S. LaForme J.A."

TAB 4

SUPREME COURT OF CANADA

CITATION: Galambos *v.* Perez, 2009 SCC 48, [2009] 3 S.C.R. 247

DATE: 20091023
DOCKET: 32586

BETWEEN:

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company
Appellants
and
Estela Perez
Respondent

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

REASONS FOR JUDGMENT: (paras. 1 to 88)

Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company *Appellants*

v.

Estela Perez *Respondent*

Indexed as: Galambos *v.* Perez

Neutral citation: 2009 SCC 48.

File No.: 32586.

2009: April 15; 2009: October 23.

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

Torts — Negligence — Fiduciary duty — Bookkeeper making unsolicited and voluntary cash advances to employer law firm which was experiencing financial difficulties — Law firm acting

on bookkeeper's behalf in preparing two wills and in handling two mortgage transactions while she was working for it — Law firm going bankrupt and bookkeeper finding herself unsecured creditor — Whether duty of care under negligence principles or per se fiduciary obligations arose within solicitor-client relationship — Whether ad hoc fiduciary duties arose from power dependency relationship existing between bookkeeper and lawyer — Whether in such relationships, fiduciary duties may arise simply on basis of reasonable expectations of weaker party and without any mutual understanding of both parties that one must act in interests of the other — Whether fiduciary duties may arise although fiduciary has no discretionary power to affect other party's legal or important practical interests.

P made voluntary sizeable advances of cash — some $200,000 in total — to her employer, a law firm founded by G, often without informing G beforehand. Although P was hired as the firm's part-time bookkeeper she effectively became the office manager, overseeing the firm's income, expenses and accounting and had unlimited signing authority on the firm's non-trust bank accounts. Initially, to resolve a cash flow problem, P obtained a personal loan and deposited $40,000 into the firm's bank account. G did not ask her to advance this money and he did not even know about the advance until several days later. G instructed P to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000. As the firm's financial situation deteriorated, P made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The firm, during the time she worked for it, handled the preparation and execution of new wills for P and her husband as well as two mortgage transactions. The firm did not expect to be and was not paid for these services. When the firm was placed in receivership and G went bankrupt, P found herself an unsecured creditor. She

recovered nothing. P then sued G and the defunct firm for negligence, breach of contract and breach of fiduciary duty.

The trial judge dismissed P's claims, finding that her rights were those of a creditor and nothing more. The Court of Appeal set aside that decision and granted P judgment for $200,000. The court concluded that P was entitled to equity's protection because there were *ad hoc* fiduciary duties owed to her by G and his law firm in relation to the cash advances, which they had breached. It held that: there was a power-dependency relationship between P and G; it is not necessary that there be any mutual understanding that G had relinquished his self-interest in favour of P's for the duty to arise; P was vulnerable; and, the evidence overwhelmingly supported the conclusion that G took advantage of her trust.

Held: The appeal should be allowed and the trial judgment should be restored except that, if the parties cannot agree, the question as to whether P is entitled to a judgment in debt against the law firm and, if so, whether there is any impact on the costs ordered at trial or on appeal to the Court of Appeal flowing from that judgment, should be remanded to the Court of Appeal.

The Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. Absent an error of law or a palpable and overriding error of fact, of which there is none, the trial judge's findings of fact and conclusion that a fiduciary duty did not exist must be upheld on appeal. In this case, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. [3] [49] [53]

In holding that the relationship between P and G and his firm gave rise to an *ad hoc* fiduciary duty, the Court of Appeal erred in three respects. First, the conclusion that G was in a position of power and influence relative to P is directly at odds with the clear findings of fact at trial. The trial judge found that P was not vulnerable in terms of her relationship with G, that she probably had more knowledge of the state of G's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans and that G had no discretion over her interests that he was able to exercise unilaterally or otherwise. The trial judge specifically rejected P's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that P was unable to refuse requests when there were in fact none. [48] [51-55] [57]

Second, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows that there are not, and should not be, special rules for recognition of fiduciary duties in the case of power-dependency relationships. Here, the Court of Appeal erred when it held that, in the case of a power-dependency relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other provided there is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests. The Court of Appeal found P to have such a reasonable expectation. While a mutual understanding may not always be necessary — a point that need not be decided here — it is fundamental to all *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or

implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. The Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking, express or implied, on the part of G that he would act in relation to the loans only in P's interests, and based its conclusion that a fiduciary duty existed on P's expectations alone. [63-64] [66] [74-75] [77] [80]

The third error arises by implication because the Court of Appeal appears to have accepted the proposition that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests. The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations by the beneficiary's entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty. The findings of the trial judge that the evidence did not establish that P relinquished her decision-making power with respect to the

loans to G, and that G had no discretionary power over P's interests that he was able to exercise unilaterally or otherwise, with which the Court of Appeal did not disagree, are fatal to P's claim that there was an *ad hoc* fiduciary duty on G's part to act solely in her interests in relation to these cash advances. [50] [84-86]

Moreover, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that G and the law firm did not breach their duty of care arising from the solicitor-client relationship between them and P. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give P advice about those advances or to insist that she obtain independent legal advice about them. [33]

With respect to P's contractual claims against the law firm, out of an abundance of caution and if the parties cannot agree, the question of whether a judgment in debt in P's favour against the firm should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal should be remanded to the Court of Appeal. [46]

Cases Cited

Referred to: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *MacDonald Estate v. Martin*,

[1990] 3 S.C.R. 1235; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 44 B.C.L.R. 188; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191, aff'd (1996), 25 B.C.L.R. (3d) 220; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Frame v. Smith*, [1987] 2 S.C.R. 99.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

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Weinrib, Ernest J. "The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Levine and Thackray JJ.A.), 2008 BCCA 91, 78 B.C.L.R. (4th) 268, 253 B.C.A.C. 149, 425 W.A.C. 149, 291 D.L.R. (4th) 537, [2008] 7 W.W.R. 39, 55 C.C.L.T. (3d) 243, [2008] B.C.J. No. 309 (QL), 2008 CarswellBC 339, setting aside a decision of Rice J., 2006 BCSC 899, [2006] B.C.J. No. 1396 (QL), 2006 CarswellBC 1523. Appeal allowed.

George K. Macintosh, Q.C., and *Tim Dickson*, for the appellants.

Robert D. Holmes and *John W. Bilawich*, for the respondent.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] This appeal arises out of the developing jurisprudence about fiduciary obligations. The facts are unusual, if not unique. At the centre of the case are sizeable advances of cash — some $200,000 in total — made by Ms. Perez to her employer, the appellant law firm founded by Mr. Galambos. Ms. Perez made these advances voluntarily, much on her initiative and often without informing Mr. Galambos beforehand. When the firm was placed in receivership and Mr. Galambos went bankrupt, she found herself an unsecured creditor. She recovered nothing. With the necessary leave of the court (under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3), she

sued Mr. Galambos and the defunct firm for negligence, breach of contract and breach of fiduciary duty, no doubt in the hope that, as the trial judge observed, success in these claims might allow her to recover from the appellants' professional liability insurance.

[2] Ms. Perez's claims failed at trial where the judge found that her rights were those of a creditor and nothing more (2006 BCSC 899, [2006] B.C.J. No. 1396 (QL)). The Court of Appeal, however, set aside that decision (2008 BCCA 91, 78 B.C.L.R. (4th) 268). It concluded that Ms. Perez was entitled to equity's protection because there were fiduciary duties owed to her by the appellants which they had breached. The appellants now appeal to this Court. Although there are several issues, the main question is whether the Court of Appeal was correct to find the appellants owed and breached fiduciary duties to Ms. Perez.

[3] In my respectful view, the Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. The trial judge was right to dismiss Ms. Perez's claims and the Court of Appeal erred in law by reversing that decision.

II. Issues

[4] The focus of the appeal is the appellants' contention that the Court of Appeal wrongly found that they were Ms. Perez's fiduciaries in relation to the cash advances which she made. Ms. Perez, in responding to the appeal, not only defends the Court of Appeal's decision, but also renews other arguments which she advanced unsuccessfully at trial. She submits that the appellants acted throughout as her lawyers and in the course of doing so, breached fiduciary duties inherent to the

solicitor-client relationship, acted negligently and in breach of contract. She also raises arguments based on her employment contract and her claim in debt against the firm.

[5] I find it more convenient to address Ms. Perez's submissions on these points first and then turn to what I view as the heart of the appeal, the appellants' challenge to the Court of Appeal's decision. A brief overview of the facts, claims and proceedings will set the stage.

III. Overview of Facts, Claims and Proceedings

A. *Facts*

[6] Ms. Perez was hired in May 2001 as the firm's part-time bookkeeper. She did excellent work and in October 2001 she started to work full-time, effectively becoming the office manager. As part of her duties, she oversaw all of the firm's income, expenses and accounting and had unlimited signing authority on the firm's bank accounts, except trust accounts.

[7] In January 2002 the firm experienced a cash flow problem. To resolve it, Ms. Perez obtained a personal loan and deposited $40,000 into the firm's account. The trial judge found that Mr. Galambos did not ask her to advance this money and that he did not even know about the advance until several days later (para. 61). It is common ground that Mr. Galambos instructed Ms. Perez to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000.

[8] During and after 2002, the firm's financial situation deteriorated. Ms. Perez made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The trial judge found that Ms. Perez made several of the advances without informing Mr. Galambos beforehand and that she extended the loans voluntarily, much on her own initiative and without undue influence by Mr. Galambos (paras. 62-63). The trial judge described what happened this way:

> As the [financial] decline continued, Mrs. Perez began to deposit more monies of her own into the general account of the firm. On February 12 and 21, 2003, she deposited cheques for $10,000 and $22,000. She testified that she would observe that the funds were needed and inform Mr. Galambos. According to her, he would simply ask her to "do something". She would then, without necessarily telling him first, deposit more funds of her own into the firm's account.
>
> In addition to these deposits, Mrs. Perez frequently paid for the firm's supplies with her own credit card and then reimbursed herself for those expenses. She even used her card to make certain personal purchases for Mr. Galambos, such as two suits when she accompanied him once to Harry Rosen's and a down payment when she accompanied him once to sign a lease for a Mercedes. Mr. Galambos was aware that this was her practice. He said she volunteered to use her personal credit card in this way so that she could pick up frequent flyer points as a perquisite.
>
> All the while, throughout 2003 and early 2004, the decline in the firm's fortunes continued, and clearly so. The DOJ work, which had made up most of the firm's revenue, continued to drop. The firm laid off staff. The bank overdraft was constantly at its limit and beyond. The plaintiff kept advancing money, asserting several times in her testimony that she did so in reliance on Mr. Galambos's promises that the firm's fortunes would improve and that he would pay her back. According to Mrs. Perez, he told her that there were one or two files soon to be completed with high contingency fees and that he was on the verge of obtaining lucrative new legal work. He even took her to meet the new client. By March 2004, the firm owed Mrs. Perez approximately $200,000. [paras. 17-19]

[9] During the time she worked for the firm, it handled the preparation and execution of new wills for Ms. Perez and her husband as well as two mortgage transactions, with respect to at least

one of which the firm also acted for the lender. The firm did not expect to be and was not paid for these services.

B. *Claims*

[10] Ms. Perez claimed that there was an ongoing solicitor-client relationship between her and Mr. Galambos's firm because free legal services were part of her employment contract. She submitted that Mr. Galambos and the firm breached an implied term of the retainer and their fiduciary duties to her by failing to provide her with the legal advice she required in connection with her loans to the firm and by acting for her while in a conflict of interest. She also asserted that Mr. Galambos and the firm were fiduciaries even apart from the solicitor-client relationship and that they had breached their obligations to her. She made other claims in contract and negligence.

C. *Proceedings*

[11] At trial, all of Ms. Perez's claims were dismissed. The trial judge, Rice J., found that there were no fiduciary duties in relation to the cash advances. He rejected Ms. Perez's contention that there was any ongoing, general solicitor-client relationship; he found, contrary to her position, that free legal services were not a term of her employment. He concluded that the retainers for the wills and mortgages were each distinct and limited to the services requested and that the loans were outside the ambit of the limited solicitor-client relationship which existed between the parties (paras. 24-40). He also found that there was no fiduciary relationship apart from these retainers since Ms. Perez was not vulnerable and had not relinquished any decision-making power to Mr. Galambos

(paras. 41-46). As for Ms. Perez's negligence claim, the trial judge concluded that Mr. Galambos had not been negligent in his conduct of his business, that he owed no special duty to Ms. Perez in that regard in any case, that she did not rely on Mr. Galambos's expressions of hope that things would turn around and that it would have been unreasonable for her to do so, given her detailed knowledge of the firm's finances. Finally, the judge firmly rejected Ms. Perez's allegations of coercion and undue influence by Mr. Galambos (paras. 54-55).

[12] Writing for the Court of Appeal, Rowles J.A. agreed with the trial judge that it was not a term of Ms. Perez's employment that the firm would provide free legal services on all matters or act as her lawyer generally. Also in apparent agreement with the trial judge, the court doubted that the limited solicitor-client relationships that did exist between Ms. Perez and the firm provided a basis for finding any breach of the *per se* fiduciary obligations arising from the relationship of solicitor and client. However, the court concluded that Mr. Galambos had breached an *ad hoc* fiduciary duty which arose in all of the circumstances, even though Ms. Perez did not specifically submit before the Court of Appeal that there was a duty arising that way. The court held that there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos; it is not necessary for the duty to arise that there be any mutual understanding that Mr. Galambos had relinquished his self-interest in favour of hers; Ms. Perez was vulnerable; and the evidence "overwhelmingly" supported the conclusion that Mr. Galambos took advantage of her trust (paras. 16 and 50-56). The Court of Appeal therefore allowed the appeal and granted Ms. Perez judgment for $200,000.

IV. Analysis

A. *Respondent's Issues*

[13] Ms. Perez submits that the appellants acted throughout as her lawyers and that, in doing so, they acted negligently, in breach of contract and in breach of a fiduciary duty flowing from that solicitor-client relationship. She also makes brief submissions with respect to her contract of employment and her claim in debt against the now-defunct firm.

[14] Except in one aspect, I am not persuaded that these points have merit. I will first address the submissions arising from the solicitor-client relationship and then turn to the other claims.

1. Claims Arising From the Solicitor-Client Relationship

a. *Negligence*

[15] At trial, Ms. Perez submitted that the appellants had a duty of care towards her under negligence principles, both within the solicitor-client relationship and apart from that relationship. In this Court, her submissions about negligence are limited to breaches of duty within the solicitor-client relationship.

[16] In June of 2002, a Galambos & Co. lawyer handled the preparation and execution of new wills for Ms. Perez and her husband. The firm also handled mortgage transactions in January and September of 2003.

[17] The foundation of Ms. Perez's negligence submission is that there was a general and ongoing solicitor-client relationship between the appellants and herself. She maintains that this relationship existed throughout her employment and covered all necessary legal work during that time including, of course, the period during which she advanced funds to the firm. Ms. Perez submits that the appellants breached the duty of care which was inherent in this solicitor-client relationship, saying that they were negligent by placing themselves in a position of conflict of interest with her, failing to advise her in connection with the cash advances and failing to require or suggest that she seek independent legal advice before making the cash advances to the firm.

[18] In the particular and admittedly unusual facts of this case, these submissions cannot be accepted. Given the strong findings of fact by the trial judge, the particular nature of the appellants' retainers and the nature of the advances themselves, I see no reviewable error in Rice J.'s rejection of these claims.

[19] The trial judge made three especially important factual findings which in my view cannot be disturbed on appeal.

[20] The first is that, contrary to Ms. Perez's contentions, there was no ongoing, general solicitor-client relationship. While Ms. Perez claimed that she had been promised free legal work as a condition of her employment, the judge concluded that this was not a term of her employment and that the firm had not undertaken to be her lawyer generally or to provide her with any specific legal service (para. 27). This was a finding of fact made by the judge after consideration of conflicting evidence and no basis has been made out for setting it aside. It follows that an important

factual element of Ms. Perez's claims does not exist.

[21] The judge's second finding related to the legal work undertaken by the firm on Ms. Perez's behalf. He found that each retainer was limited to the specific services requested and was unrelated to the advances she made to the firm. While the judge did make a factual mistake in his discussion of this issue as I shall describe, I see no proper basis to interfere with his conclusions about the nature of the retainers.

[22] With respect to the wills, the trial judge noted that Ms. Perez herself acknowledged that this legal work had nothing to do with the previous or subsequent advances of funds that she made to the firm (para. 29).

[23] With respect to the mortgages, the judge found that these retainers were unrelated to the cash advances and were limited to the particular services requested. He put it this way, at paras. 36-37:

> On the whole, the evidence indicates that Mrs. Perez retained Galambos & Company for three specific legal purposes: to obtain a new will and to complete two mortgage transactions. Aside from those, Mrs. Perez's only relationship with the firm was as an employee and a creditor. There was, at the time these services were performed, no commitment of the firm to provide Mrs. Perez with any legal service in the future. There is no evidence that Mrs. Perez consulted anyone in the firm for legal advice on any matter outside the confines of the three specific transactions. In particular, there is no evidence that she ever asked Mr. Galambos or another lawyer at the firm to advise her about the loans or about her financial circumstances generally. On the contrary, she made some advances on her own initiative without telling Mr. Galambos beforehand.
>
> In the circumstances, I find that each retainer was separate, distinct, and limited to the specific services Mrs. Perez requested. [Emphasis added.]

[24] The judge's third finding was that Ms. Perez did not ask for or receive advice about the advances, that she did not rely on anything Mr. Galambos told her when she decided to make the advances and that, even if she had so relied, that reliance would have been unreasonable in the particular circumstances of the case (paras. 47-53).

[25] In light of these findings, Ms. Perez's submissions about negligence cannot succeed. The solicitor-client relationship between Ms. Perez and the appellants was very limited and there is no plausible suggestion that the firm's preparation of the wills and the mortgages breached the standard of care owed to her. As the trial judge put it, "Mrs. Perez has no complaint relating to any of the legal services or advice that the firm provided. Those transactions did not leave her disadvantaged in any way" (para. 40).

[26] Was there a breach of any duty owed in relation to the cash advances? Ms. Perez argues that it is illogical to say that the subject matters of the legal services were distinct from the loans because drawing up a will involves knowing the state of a client's assets and liabilities and that "the relation of the two mortgage transactions to the loans is obvious" (Factum, at para. 66). She submits that the proceeds were used to provide the advances. However, the trial judge found as a fact that the mortgages had nothing to do with her advances to the firm and rejected as inconclusive the only piece of evidence which could have supported the theory that Mr. Galambos helped her obtain one of the loans by attesting to her employment status (paras. 29 and 56-61). Ms. Perez has pointed to no proper basis for appellate interference with these findings.

[27] That said, Ms. Perez correctly submits that the judge was wrong to find that there was

no solicitor-client relationship between her and the firm at the time of any of her cash advances. The record discloses that Ms. Perez did make some advances to the firm while there were open files for some of the matters in which the firm acted for her. During these periods, Ms. Perez advanced Galambos & Co. amounts which are difficult to calculate precisely from the record, but which were at least in the tens of thousands of dollars. The judge erred, therefore, in saying, at para. 37, that she was not a client at any of the times when she made loans to the firm. However, this factual mistake does not in my view invalidate the judge's critical finding that the retainers were distinct, limited and had no bearing on these advances.

[28] I would not wish to be thought as saying that the firm complied with all of the applicable rules of professional conduct. The fact that these advances were made outside the confines of this particular solicitor-client relationship does not circumvent the nearly absolute professional standard not to borrow from clients. As provided in rule 4 of Chapter 7 of the Law Society of British Columbia *Professional Conduct Handbook* (1993): "Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client."

[29] However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public

policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence: see, e.g., *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 44 B.C.L.R. 188 (S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.

[30] The second point relates to the concerns underlying the rules of conduct in relation to borrowing from clients. The rule is a specific application of the general rules about conflict of interest. There is concern that a lawyer's legal skill and training, coupled with the relationship of trust that arises between a solicitor and a client, creates the possibility of overreaching by the lawyer. A further concern is that the lawyer is in a position to arrange the form of the transaction and may therefore further his or her own interests instead of those of the client: see *Restatement (Third) of the Law Governing Lawyers* § 126 cmt. b (2000). However, given the trial judge's factual findings in this unusual case, the concerns giving rise to the rule are not in play here.

[31] A situation of conflict of interest occurs when there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person": *Restatement (Third) of the Law Governing Lawyers* § 121, cited with approval in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 31. On this point, Rice J. effectively found that there was no risk that the firm's representation of Ms. Perez in connection with the wills or mortgages could be

affected by the firm's interest in receiving the cash advances from her. Similarly, the trial judge found no reliance and therefore certainly no overreaching and no effort on the part of the lawyers to structure the advances to their advantage. As the trial judge found, at para. 62: ". . . although it is truly strange, [Ms. Perez] appears to have extended the loans voluntarily and much on her own initiative." He concluded that there was "no evidence of undue influence, or unconscionability" (para. 63).

[32] I cannot fault the judge for reaching this conclusion on the admittedly unusual facts which confronted him. These were routine legal services, wholly unrelated, as the judge found, to the advances and they were provided without fee to an employee. The cash advances were unusual and far removed from the sorts of loans from clients envisaged by the professional conduct rule. The advances were not requested by the firm or Mr. Galambos, they were sometimes made without Ms. Perez advising the firm that they had been. Ms. Perez, the bookkeeper and employee of the firm, did not obey her employer's instructions to repay the advances even when the firm's finances would have permitted it and she did not provide an accounting to the firm of what it owed to her. This situation is as about as far removed as one can imagine from the typical case of a lawyer improperly borrowing money from a client. In short, there was no conflict between the firm's duties to her in connection with the wills and mortgages and the advances, and the firm did not in any way trade upon its position as her lawyer to obtain them.

[33] I conclude that, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that the appellants did not breach their duty of care arising from the solicitor-client relationship between them and Ms. Perez. There was no actual

conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give Ms. Perez advice about those advances or to insist that she obtain independent legal advice about them.

b. *Contract for Legal Services*

[34] The claim that the solicitor-client contract was breached is essentially a differently labelled repetition of the claim in negligence, and this contractual claim falls with it.

c. *Per se Fiduciary Duty*

[35] Ms. Perez submits that the appellants breached the fiduciary obligations owed by lawyers to clients. In my view, this contention fails for much the same reason as Ms. Perez's claims in negligence.

[36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-client relationship is an example. It is important to remember, however, that not every legal claim

arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.

[37] A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647. This point is important here because not all lawyers' duties towards their clients are fiduciary in nature. Sopinka and McLachlin JJ. (as the latter then was) underlined this in dissent (but not on this point) in *Hodgkinson*, at pp. 463-64, noting that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client relationship do not attract a fiduciary obligation. Binnie J. made the same point in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 34: "Not every breach of the contract of retainer is a breach of a fiduciary duty." The point was also put nicely by Rupert M. Jackson and John L. Powell, *Jackson & Powell on Professional Liability* (6th ed. 2007), at para. 2-130, when they said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty.

[38] The launching pad for Ms. Perez's submissions based on the solicitor-client relationship is that there was a general solicitor-client relationship between her and the firm for all necessary legal work during the time that she advanced funds to the firm. As noted earlier, the judge made a finding against her on this point: he found, on conflicting evidence, that it was not a term of Ms. Perez's employment that the firm would provide her with all necessary legal services and that the cash advances were not within the terms of any of the specific and limited retainers which the firm undertook on her behalf. The Court of Appeal agreed. It concluded that whatever fiduciary obligations arose from the limited solicitor-client relationship, they did not extend to the cash

advances. As the Court of Appeal put it:

> While a solicitor-client relationship existed between the parties at certain times and for certain purposes, I question whether that aspect of their relationship, standing alone, would provide a foundation for imposing fiduciary obligations in this case. Unlike the situation in *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), (a case which both parties rely on as authority for the extent of the duties of lawyers to their clients where there is a conflict of interest), it appears to me that the nature of the relationship between Mr. Galambos and Ms. Perez and the trust and confidence that formed between them cannot be fully encompassed or explained by their interactions as solicitor and client. I agree with the trial judge that although it was reasonable for [Ms. Perez] to expect the firm to offer its services for certain discrete transactions, it was not implicit as a term of her employment that the firm would provide free legal services on all matters or act as her lawyer generally. Even if this were the case, I question whether that alone would constitute a sufficient basis on which to impose fiduciary obligations. As the trial judge noted, it is common practice for law firms to act for their employees on discrete, simple matters. Generally speaking, acting on such discrete matters would not alone found a fiduciary relationship giving rise to fiduciary obligations in all dealings with all such employees. [para. 48]

[39] I am not persuaded that there is any basis to interfere with the trial judge's conclusion, endorsed by the Court of Appeal, that the retainers were unrelated to the cash advances and that no obligation arose on the part of Mr. Galambos and his firm to act solely in Ms. Perez's interest in relation to the advances. I conclude that the judge did not err in finding that there had been no breach of the *per se* fiduciary obligations that arose from the solicitor-client relationship.

d. *Conclusion on Solicitor-Client Issues*

[40] In my view, the trial judge did not err by dismissing Ms. Perez's claims in negligence, contract and breach of fiduciary duty arising from the solicitor-client relationship between her and the firm.

2. Other Contractual Claims

[41] Two paragraphs of Ms. Perez's factum are devoted to two other contractual claims: the first relating to an alleged breach of employment contract and the second to an alleged breach of a "covenant to repay" the advances. I will address each in turn.

a. *Employment Contract*

[42] While Ms. Perez's submissions on this point are not easy to follow, the point appears to be that the firm breached an implied obligation under Ms. Perez's employment contract not to undermine the trust and confidence of the employment relationship. The question of whether there was an obligation of trust and confidence arising in the particular circumstances of the parties' relationship will be addressed in the next section of my reasons. I do not discern in Ms. Perez's submissions any other independent alleged breach of the employment contract.

b. *Covenant to Repay*

[43] Ms. Perez submits that she is entitled to, but did not receive, a judgment in debt against the appellant law corporation. While Mr. Galambos is personally shielded from any action in debt under the *Bankruptcy and Insolvency Act*, she submits that a judgment in debt should issue against the firm, which, so far as may be ascertained from the record in this Court, has not obtained the same protection.

[44] The fact of the debt is not disputed and it appears that the Amended Statement of Claim includes language which may be broad enough to include this claim (Appellants' Record, p. 80, at para. 12). While the law corporation, we are told, is defunct and without assets, Ms. Perez's counsel mentioned during oral argument that a judgment against the firm might have some impact on the question of costs.

[45] This issue is mentioned in neither of the judgments below; the trial judge's order dismissed all claims and awarded scale 3 costs to April 24, 2006 and double scale 3 costs thereafter, and the Court of Appeal set aside this order, gave Ms. Perez judgment for $200,000, prejudgment interest and costs of the trial and the appeal. It was, therefore, not necessary for it to consider the debt claim or the trial judge's costs award.

[46] There is at least some basis to think, therefore, that Ms. Perez may be entitled to the judgment she seeks against the firm for debt and that such a judgment might have some practical value to her. However, the question has not been addressed below and the record and arguments in this Court are too sparse to allow me to resolve the matter confidently. As there appears to be no dispute about the existence of the debt to the corporation, it may well be that the parties can sort out for themselves what, if any, costs consequences should flow from it. However, if they cannot, I would, out of an abundance of caution, remand, pursuant to s. 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to the British Columbia Court of Appeal the questions of whether a judgment in debt in Ms. Perez's favour should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal now that her appeal in all other respects has been dismissed in this

Court.

3. Summary of Conclusions With Respect to the Respondent's Issues

[47] I conclude that Ms. Perez's claims fail with respect to alleged breaches within the solicitor-client relationship and her contract of employment. Subject to any agreement among the parties, I would remand to the Court of Appeal the questions of whether she ought to have judgment in debt against the Michael Z. Galambos Law Corporation and, if so, whether that judgment has any impact on the disposition of costs in the courts below.

B. *Appellants' Issues*

[48] The appellants' issues address the holding of the Court of Appeal. As noted, it held, reversing the trial judge, that the particular circumstances of the relationship between Ms. Perez and Mr. Galambos and his firm gave rise to what may be called an *ad hoc* fiduciary duty. This means that apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship: see, e.g., *Lac Minerals*, at p. 648; *Hodgkinson*, at p. 409. The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances: *Lac Minerals*, at p. 648.

[49] This is an important point in relation to the standard of appellate review. Absent an error of law or a palpable and overriding error of fact, the trial judge's conclusion that a fiduciary

duty did not exist must be upheld on appeal: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *Hodgkinson*, at pp. 425-26. As La Forest J. put it in *Hodgkinson*, at p. 426, this principle of non-intervention on appeal "is not merely cautionary; it is a rule of law. Failing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge."

[50] The core of the Court of Appeal's reasoning consists of three points, two of which are expressly set out and the third of which is implied. The explicit points are, first, that a "power-dependency" relationship existed between Ms. Perez and Mr. Galambos and second, that in such relationships, fiduciary duties may arise simply on the basis of the reasonable expectations of the weaker party and without any mutual understanding of both parties that one must act in the interests of the other. The third point arises by implication because the court appears to have accepted the proposition, without expressly stating it, that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests.

[51] The appellants challenge each of these points. For reasons which I will develop, I agree that the Court of Appeal erred in these three respects.

1. Was There a Power-Dependency Relationship?

[52] The Court of Appeal found that the parties' relationship in this case was similar in nature to the "power-dependency" relationship found in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. By the term "power-dependency" relationship, I understand the Court of Appeal to have meant that Mr.

Galambos had gained a position of overriding power or influence over Ms. Perez: see *Hodgkinson*, at p. 411; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191 (B.C.S.C.), aff'd (1996), 25 B.C.L.R. (3d) 220 (C.A.). As the Court of Appeal put it, at para. 50: "As [Ms. Perez's] employer, [Mr. Galambos] was in a position of power and influence relative to [Ms. Perez]. It is clear from the circumstances that [Ms. Perez] looked up to Mr. Galambos and expected that he would look out for her best interests as a result of the nature of their relationship."

[53] This conclusion is directly at odds with the clear findings of fact at trial. In effect, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. This, respectfully, was not the court's function on appeal and it erred in law by doing so.

[54] The trial judge found that Ms. Perez was not vulnerable in terms of her relationship with Mr. Galambos, that she had not relinquished her decision-making power with respect to the loans to Mr. Galambos and that he had no discretion over her interests that he was able to exercise unilaterally or otherwise (paras. 45-46). He found (at paras. 45-46, 54 and 63) that:

- Ms. Perez was well educated and well experienced in dealing with successful, busy lawyers;

- she was as knowledgeable and probably more knowledgeable than Mr. Galambos about most aspects of the firm's financial affairs;

- she was not, as a result of their relative position or her respect for Mr. Galambos, vulnerable to him;

- the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos;

- Mr. Galambos had no discretion over her interests that he was able to exercise unilaterally or otherwise;

- aside from the limited retainers for routine legal services, their relationship was one of friendship between employer and employee which gave rise to a creditor-debtor relationship;

- there was never any suggestion that Ms. Perez's employment evaluations or prospects would be affected in any way by the loans or by any refusal to make them;

- there was no evidence that Mr. Galambos made any efforts to impose his will on Ms. Perez or to convince her to act against her wishes, to appeal to her sympathy or to cultivate hero-worship or subservience on her part.

[55] The trial judge specifically rejected Ms. Perez's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no

evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that Ms. Perez was unable to refuse requests when there were in fact none. Moreover, the trial judge was not persuaded on the balance of probabilities that Mr. Galambos's instructions to "do something" when advised of cash flow problems were, or could reasonably have been understood by Ms. Perez as pressure on her to loan her personal funds, a course she frequently took without any solicitation or, in some instances, any knowledge on Mr. Galambos's part (para. 54).

[56] The trial judge's findings do not support the existence of the parallel that the Court of Appeal found between this case and power-dependency cases such as *Norberg* and *Mustaji*. *Norberg* involved an aging physician extorting sex for drugs from a young woman addicted to prescription drugs. *Mustaji* involved a claim by a nanny brought to Canada under the Foreign Domestic Movement Program. There were findings of fact that the defendants had taken over her affairs concerning her immigration and employment in Canada, that they had the opportunity to exercise power or discretion over her, were capable of using that power or discretion without her knowledge or consent so as to affect her legal and practical interests and that she was especially vulnerable to that exercise of discretion and control: see reasons of Vickers J., at para. 27, and reasons of the Court of Appeal, at para. 12. The trial judge in the present case found nothing of this sort.

[57] The trial judge addressed Ms. Perez's argument that she advanced funds relying on and trusting Mr. Galambos's assurances that the firm's finances would turn around and that there were some major files coming to him. As noted earlier, the trial judge found as facts that she did not rely on these alleged statements, that she knew that the financial circumstances of the firm were not improving, that the influx of new legal work was speculative and that the potential for large amounts

of contingency fees was exaggerated. As the judge put it, "both Mr. Galambos and [Ms.] Perez shared a hope for better times to come and blinded themselves to the true situation" (para. 53). Moreover, the judge also found that even if Ms. Perez had in fact relied on Mr. Galambos's general statements to the effect that things would turn around, her reliance was not reasonable. As the judge put it, "[a] reasonable person in [Ms. Perez's] position would not have relied on [these statements], given especially her personal knowledge of the state of Mr. Galambos's financial affairs. She probably had more knowledge than he" (para. 52).

[58] The Court of Appeal, however, found that the judge's finding of fact that Ms. Perez was not vulnerable to Mr. Galambos was unreasonable. The court based its reversal of the trial judge on this point on the facts that Mr. Galambos had superior legal knowledge and experience, that he understood when professional advice was needed with respect to his financial affairs, that Ms. Perez looked up to and trusted him, that there was a power imbalance in their relationship and that Ms. Perez's conduct could not be explained on the basis of simple friendship (paras. 50 and 64-65).

[59] Respectfully, the reasons of the Court of Appeal disclose no basis for appellate intervention. The most that may be said is that the considerations identified by the Court of Appeal could plausibly sustain more than one conclusion about Ms. Perez's vulnerability. The Court of Appeal identified no finding of fact relevant to the judge's conclusion on this point that was both clearly wrong and determinative of the result. Rather, the Court of Appeal simply drew different inferences from the evidence than the ones drawn by the trial judge. This was not a proper basis for appellate reversal of his findings. The Court of Appeal ought not to have interfered with the judge's finding that Ms. Perez was not vulnerable to Mr. Galambos.

[60] The Court of Appeal also found that the judge erred by concluding that any reliance by Ms. Perez on Mr. Galambos's statements that things would turn around was unreasonable. The court reasoned that Mr. Galambos was in the best position to assess the prospects of the firm and that Ms. Perez had no means of knowing whether the flow of work from the Department of Justice would again increase. On this basis, the court found the judge's conclusion to be "plainly wrong" (para. 61) and this error was part of the justification for appellate intervention. However, there are two difficulties with the Court of Appeal's approach to this issue.

[61] First, the trial judge found as a fact that Ms. Perez did not rely on these statements (para. 53) and the Court of Appeal did not directly take issue with this finding. This makes hypothetical and irrelevant the question of whether such reliance, had it occurred, would have been reasonable; any error by the judge on this hypothetical question provides no basis for interfering with his decision. Second, even if an error on this point were pertinent to the result, the reasons of the Court of Appeal disclose no clear and determinative error in the judge's holding to the effect that any reliance would have been unreasonable. Once again, the Court of Appeal in my respectful view substituted its reading of the record for the trial judge's findings. This was not its role.

[62] In summary, the trial judge's findings of fact should not have been disturbed on appeal and those findings do not support the Court of Appeal's conclusion that there was a "power-dependency" relationship between Ms. Perez and Mr. Galambos.

2. Mutual Understanding or Undertaking by the Fiduciary

[63] The Court of Appeal held that, in the case of a "power-dependency" relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other. Respectfully, I do not agree.

[64] Relying on *Hodgkinson*, the trial judge held that in order to find an *ad hoc* fiduciary duty, there must be a mutual understanding between the fiduciary and the beneficiary that the fiduciary party has relinquished his or her own self-interest and agreed to act solely on behalf of the beneficiary (para. 43). The judge concluded that there was no such mutual understanding here (para. 46). The Court of Appeal, on the other hand, held that as the relationship between Mr. Galambos and Ms. Perez was one of "power-dependency", there need not be a mutual understanding that one party has relinquished his or her own self-interest and undertaken to act in the interests of the other (para. 43). According to the Court of Appeal, what is required in the case of power-dependency relationships is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests (para. 43). It found Ms. Perez to have such a reasonable expectation (paras. 60-65).

[65] The appellants challenge this conclusion, submitting that one party's reasonable expectation is not sufficient and that there must be a mutual understanding that the fiduciary has undertaken to act only in the interests of the other party. Ms. Perez seeks to uphold the Court of Appeal's decision, arguing that equity is inherently flexible and that a reasonable expectation is enough in a power-dependency relationship.

[66] In my view, while a mutual understanding may not always be necessary (a point we need

not decide here), it is fundamental to *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. In other words, while it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship. To explain why I have reached this conclusion, I need to go back to some basic principles of fiduciary law.

a. *Some Basic Principles*

[67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: "[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed" (emphasis added). This brief sentence makes two important points which help sharpen the focus on the role of fiduciary law.

[68] The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of

conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

[69] The second is that a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. This was put succinctly by McLachlin J. in *Norberg*, at p. 273, when she said that "fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests". See also *Hodgkinson*, *per* La Forest J., at pp. 404-7.

[70] Underpinning all of this is the focus of fiduciary law on relationships. As Dickson J. (as he then was) put it in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384: "It is the nature of the relationship . . . that gives rise to the fiduciary duty. . . ." The underlying purpose of fiduciary law may be seen as protecting and reinforcing "the integrity of social institutions and enterprises", recognizing that "not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules": *Hodgkinson*, at p. 422 (*per* La Forest J.). The particular relationships on which fiduciary law focusses are those in which one party is given a discretionary power to affect the legal or vital practical interests of the other: see, e.g., *Frame v. Smith*, [1987] 2 S.C.R. 99, *per* Wilson J., at pp. 136-37; *Norberg*, *per* McLachlin J., at p. 272; Weinrib, at p. 4, quoted with approval in *Guerin*, at p. 384.

[71] I return to the Court of Appeal's holding that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party. I respectfully disagree with this approach, for two reasons: "power-dependency" relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

b. *Power-Dependency Relationships as a Special Category*

[72] As noted by the Court of Appeal, La Forest J. used the term "power-dependency" relationships in *Norberg* and in *Hodgkinson*. In the latter case he wrote, at p. 411:

> I employed this notion, developed in an article by Professor [Phyllis] Coleman ["Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 *Alb. L. Rev.* 95], to capture the dynamic of abuse in *Norberg v. Wynrib*, *supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. [Emphasis added.]

[73] It is clear from these comments that La Forest J. was describing certain relationships which may also be fiduciary, but was not creating a separate category of *ad hoc* fiduciary relationships. In other words, this concept borrowed from academic writing may

be useful to describe certain relationships, but it has not been and should not be used as a tool for categorization. Fiduciary relationships, he explained, are "simply a species of a broader family of relationships that may be termed 'power-dependency' relationships" (p. 411). The law's approach to the situation of vulnerable people "gives rise to a variety of often overlapping duties" and "the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship" (pp. 412-13).

[74] In short, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows, in my view, that there are not and should not be special rules for recognition of fiduciary duties in the case of "power-dependency" relationships. I am therefore of the view that the Court of Appeal erred in this respect.

c. *Mutual Understanding and Undertaking by the Fiduciary*

[75] The appellants fault the Court of Appeal for holding that fiduciary duties may arise only on the basis of the reasonable expectations of one party. The appellants say that there must be a mutual understanding that the fiduciary will act only in the interests of the other party. While I agree with the appellants that the Court of Appeal erred by basing a fiduciary obligation on Ms. Perez's reasonable expectation, it is not necessary in order to resolve this appeal to go so far as to say that a mutual understanding is necessary in all cases. It is

sufficient to say here that what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.

[76] I note that in *Hodgkinson*, this Court considered competing bases for the imposition of *ad hoc* fiduciary duties, opposing to a certain extent mutual understanding and reasonable expectations of the alleged beneficiary. While the seven judges sitting on the case were not fully unanimous in this respect, they all agreed that *ad hoc* fiduciary obligations may be imposed when there is a mutual understanding to this effect, and, following the example of Dickson J. in *Guerin*, at p. 384, left the door open to such an obligation arising from a unilateral undertaking by the fiduciary (see on this point Professor Lionel Smith's insightful comment on *Hodgkinson*, "Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson* v. *Simms*" (1995), 74 *Can. Bar Rev.* 714). Thus, what is required in all cases of *ad hoc* fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party. To repeat what was said by McLachlin J. in *Norberg*, "fiduciary relationships . . . are always dependent on the fiduciary's undertaking to act in the beneficiary's interests" (p. 273). As Dickson J. put it in *Guerin*, fiduciary duties may arise where "by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another" (p. 384).

[77] The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc*

fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[78] Commentators support this view. In his seminal work, *Fiduciary Obligations* (1977), Professor P. D. Finn writes at para. 15:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter. [Emphasis added.]

To the same effect, Professor Smith writes in his comment on *Hodgkinson*, at p. 717 (echoing Dickson J.'s comments in *Guerin*, at p. 384, and Austin W. Scott, "The Fiduciary Principle" (1949), 37 *Cal. L. Rev.* 539, at p. 540):

> The fiduciary must *relinquish* self-interest; that is an act which the fiduciary does, not an act which is done to the fiduciary. This was put slightly differently by Austin Scott, who said that "a fiduciary is a person who *undertakes* to act in the interest of another person." [Emphasis in original.]

[79] This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

[80] In my respectful view, the Court of Appeal's analysis went wrong on this point. It found a fiduciary duty without finding an undertaking, express or implied, on the part of Mr. Galambos that he would act in relation to the loans only in Ms. Perez's interests. The court's reasoning is premised on the fact that there was no such undertaking; otherwise, there would have been no need to base the conclusion that a fiduciary duty existed on Ms. Perez's expectations alone.

[81] It is clear from the evidence that there was no explicit undertaking that Mr. Galambos was to act in Ms. Perez's best interest in relation to the cash advances; she does not even allege as much. Moreover, it would be inconsistent with the judge's findings to conclude that any such undertaking should be implied on the facts of this case. The trial judge found that Mr. Galambos never explicitly requested a loan and that his requests that Ms. Perez "do something" to solve the cashflow problem referred to contacting the bank to extend the firm's line of credit, which had been done several times in the past (paras. 54-55). Having never requested the advances, it is difficult to see how there was any implied undertaking to act only in Ms. Perez's interests with respect to them. The judge also found that if Ms. Perez formed any expectation that Mr. Galambos was to act as her fiduciary, it was unreasonable. Rice J. found that if there was a disparity in knowledge of the firm's finances, it was Ms. Perez who was more knowledgeable (para. 52). In such circumstances, any reasonable person would have understood that he or she assumed the position of a precarious unsecured creditor, not that of a protected beneficiary.

[82] In summary, my view is that the Court of Appeal erred in holding that in the case of power-dependency relationships, a fiduciary duty may arise absent some undertaking on the part of the fiduciary to act in the interests of the other party. The Court of Appeal did not suggest that there was any such undertaking here and in any event, it would be inconsistent with the judge's factual findings to conclude that any such undertaking should be implied.

3. Transfer of Discretionary Power

[83] It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387) and, while making no comment on whether it was broad enough to embrace all fiduciary obligations, he endorsed Professor Weinrib's description of a fiduciary relationship as one in which "the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him" (p. 384). The influential guidelines set out by Wilson J. in *Frame*, at p. 136, for identifying new categories of fiduciary relationships included that the fiduciary have scope for the exercise of some discretion or power, the exercise of which affects the beneficiary's legal or practical interests. In *Norberg*, McLachlin J. noted that a fiduciary must be entrusted with such power in order to perform his or her functions (p. 275).

[84] The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from

power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., *Lac Minerals* and *Hodgkinson*. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.

[85] As noted, the trial judge held that the evidence did not establish that Ms. Perez relinquished her decision-making power with respect to the loans to Mr. Galambos or that there was any discretion over her interests that he was able to exercise unilaterally or otherwise (para. 46). The Court of Appeal did not disagree with these conclusions and no basis for doing so has been suggested.

[86] In my respectful view, the finding of the trial judge that Mr. Galambos had no discretionary power over Ms. Perez's interests that he was able to exercise unilaterally or otherwise is fatal to her claim that there was an *ad hoc* fiduciary duty on Mr. Galambos's part to act solely in her interests in relation to these cash advances.

4. Conclusion With Respect to Appellants' Issues

[87] I conclude that the Court of Appeal erred in finding that Mr. Galambos and his

firm had an *ad hoc* fiduciary obligation towards Ms. Perez with respect to the cash advances.

V. Disposition

[88] I would allow the appeal and restore the trial judgment, except that, if the parties are not able to agree about whether Ms. Perez is entitled to a judgment in debt against the law corporation and the costs consequences if any flowing from it, I would remand to the Court of Appeal the question of whether Ms. Perez is entitled to a judgment in debt against the Michael Z. Galambos Law Corporation and, if so, whether that judgment should have any impact on the question of costs in the courts below. Subject to any adjustment resulting from an agreement between the parties or from the remand, the appellants are entitled to their costs throughout if demanded.

Appeal allowed with costs.

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondent: Holmes & King, Vancouver.

TAB 5

Ontario

ServiceOntario
e-Laws

Français

Charities Accounting Act

R.S.O. 1990, CHAPTER C.10

Consolidation Period: From June 1, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 44.

Notice of donation to be given to Public Guardian and Trustee

1. (1) Where, under the terms of a will or other instrument in writing, real or personal property or any right or interest in it or proceeds from it are given to or vested in a person as executor or trustee for a religious, educational, charitable or public purpose, or are to be applied by the person for any such purpose, the person shall give written notice to,

(a) the person, if any, designated in the will or other instrument as the beneficiary or as the person to receive the gift from the executor or trustee; and

(b) the Public Guardian and Trustee, in the case of an instrument other than a will. 2000, c. 26, Sched. A, s. 2 (1).

Charitable corporations, etc., brought within Act

(2) Any corporation incorporated for a religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act, its instrument of incorporation shall be deemed to be an instrument in writing within the meaning of this Act, and any real or personal property acquired by it shall be deemed to be property within the meaning of this Act. R.S.O. 1990, c. C.10, s. 1 (2).

Time for giving notice

(3) The notice shall be given, in the case of an instrument other than a will, within one month after it has been executed, and, in the case of a will, within the same period after the death of the testator. R.S.O. 1990, c. C.10, s. 1 (3).

Where notice not necessary

(4) No notice is necessary where the trust was completely executed before the 31st day of March, 1914, but the remaining sections of this Act nevertheless apply to every such trust. R.S.O. 1990, c. C.10, s. 1 (4).

Contents of notice

(5) The notice shall state the nature of the property coming into the possession or under the control of the executor or trustee. 1997, c. 23, s. 3 (2).

Copy of instrument

(6) The notice shall be accompanied by a copy of the will or other instrument; in the case of a notice under clause (1) (b), the Public Guardian and Trustee may require a notarial copy. 2000, c. 26, Sched. A, s. 2 (2).

1.1 Repealed: 2009, c. 33, Sched. 2, s. 11 (1).

Executor or trustee to provide information

2. An executor or trustee to whom section 1 applies shall, if requested by the Public Guardian and Trustee, provide to the Public Guardian and Trustee particulars in writing respecting,

(a) the name and address of each executor or trustee of the estate or trust;

(b) the condition, disposition or other such particulars as requested of the property devised, bequeathed or given or which is in any way held by the executor or trustee; and

(c) any other matter relating to the administration or management of the estate or trust or any other property held by the executor or trustee, as requested. 2009, c. 33, Sched. 2, s. 11 (2).

Auditing accounts as to charitable legacies or grants

3. Whenever required so to do by the Public Guardian and Trustee, an executor or trustee shall submit the accounts of dealings with the property coming into the hands or under the control of the executor or trustee under the terms of the bequest or gift, to be passed and examined and audited by a judge of the Superior Court of Justice. R.S.O. 1990, c. C.10, s. 3; 1999, c. 12, Sched. B, s. 1 (1); 2000, c. 26, Sched. A, s. 2 (4).

Application to court where executor or trustee in default

4. If any such executor or trustee,

(a) refuses or neglects to comply with section 1, 2 or 3, or with any of the regulations made under this Act;

(b) is found to have misapplied or misappropriated any property or fund coming into the executor's or trustee's hands;

(c) has made any improper or unauthorized investment of any money forming part of the proceeds of any such property or fund; or

(d) is not applying any property, fund or money in the manner directed by the will or instrument,

a judge of the Superior Court of Justice upon the application of the Public Guardian and Trustee, may make an order,

(e) directing the executor or trustee to do forthwith or within the time stated in the order anything that the executor or trustee has refused or neglected to do in compliance with section 1, 2 or 3, or with the regulations made under this Act;

(f) requiring the executor or trustee to pay into court any funds in the executor's or trustee's hands and to assign and transfer to the Accountant of the Superior Court of Justice, or to a new trustee appointed under clause (g), any property or securities in the hands or under the control of the executor or trustee;

(g) removing such executor or trustee and appointing some other person to act in the executor's or trustee's stead;

(h) directing the issue of an attachment against the executor or trustee to the amount of any property or funds as to which the executor or trustee is in default;

(i) fixing the costs of the application and directing how and by whom they shall be payable;

(j) giving such directions as to the future investment, disposition and application of any such property, funds or money as the judge considers just and best calculated to carry out the intentions of the testator or donor;

(k) imposing a penalty by way of fine or imprisonment not exceeding twelve months upon the executor or trustee for any such default or misconduct or for disobedience to any order made under this section;

(l) appointing an executor or trustee in place of an executor or trustee who has died, or has ceased to act, or has been removed, or has gone out of Ontario, even if the will or other instrument creating the trust confers the power to make such an appointment upon another executor or trustee or upon any other person. R.S.O. 1990, c. C.10, s. 4; 1999, c. 12, Sched. B, s. 1 (1, 2); 2000, c. 26, Sched. A, s. 2 (4).

Information, documents respecting entities

4.1 (1) If an executor or trustee to whom section 1 applies holds a substantial interest in an entity within the meaning of subsection (3), the Public Guardian and Trustee may inquire into the management or operation of the entity and into its relationship to the executor or trustee, and the entity or any director, officer, manager or trustee of the entity shall, if requested by the Public Guardian and Trustee, provide to the Public Guardian and Trustee such information or documents respecting the entity as the Public Guardian and Trustee specifies. 2009, c. 33, Sched. 2, s. 11 (3).

Same

(2) Without limiting the generality of subsection (1), the Public Guardian and Trustee may make a request under that subsection for,

(a) business records of the entity;

(b) information respecting the assets and liabilities of the entity;

(c) accounts of income and expenses for the entity;

(d) financial statements of the entity, including any statements made by an auditor with respect to the financial statements; and

(e) the particulars of any fees, salary or other remuneration paid to any person by the entity. 2009, c. 33, Sched. 2, s. 11 (3).

Substantial interest

(3) An executor or trustee holds a substantial interest in an entity if the following criteria are met:

1. In the case of an entity that is a corporation with share capital, the executor or trustee beneficially owns, controls or has direction over one of the following:

   i. Shares of any class or series of voting shares of the corporation carrying more

than 20 per cent of the voting rights attached to all of the outstanding voting shares of the corporation.

ii. Shares of the corporation representing more than 20 per cent of the shareholders' equity of the corporation.

2. In the case of an entity that is a corporation without share capital, the executor or trustee beneficially owns, controls or has direction over membership in a class of membership of the corporation carrying more than 20 per cent of the voting rights attached to all of the outstanding voting membership interests of the corporation.

3. In the case of an entity that is a partnership, the executor or trustee beneficially owns, controls or has direction over a right to one of the following:

i. At least 20 per cent of the profits of the partnership.

ii. At least 20 per cent of the assets of the partnership on its dissolution.

4. In the case of an entity that is a trust, the executor or trustee beneficially holds an interest in the trust.

5. In the case of any other entity, the aggregate of any ownership interests into which the entity is divided, however designated, that are beneficially owned or controlled by the executor or trustee, or over which the executor or trustee exercises direction, exceeds 20 per cent of all the ownership interests into which the entity is divided. 2009, c. 33, Sched. 2, s. 11 (3).

Same

(4) For the purposes of subsection (3), the ownership, control or direction over a thing by the executor or trustee may be,

(a) direct or indirect; or

(b) alone or through one or more persons, entities or both. 2009, c. 33, Sched. 2, s. 11 (3).

Application to court

(5) On application by the Public Guardian and Trustee, a judge of the Superior Court of Justice may,

(a) make any order that the judge considers necessary or proper to compel the provision of information or documents required to be provided to the Public Guardian and Trustee under subsection (1);

(b) fix the costs of the application and direct how and by whom they shall be payable;

(c) make any order relating to the management, operation, ownership or control of the entity that is in the best interest of the purpose for which the estate or trust is held, including an order,

(i) determining who owns, controls or has direction over the entity,

(ii) determining who controls the election of the directors of the entity,

(iii) ensuring that the ownership, control or direction of the entity is in the best interest of the purpose for which the estate or trust is held, including, if appropriate, requiring the executor or trustee to sell all or some of his or her interest in the entity,

(iv) ensuring the proper operation and management of the entity and its assets,

(v) protecting or preserving the assets or financial stability of the entity and the assets held by the executor or trustee relating to the entity,

(vi) selling some or all of the assets of the entity, or

(vii) distributing some or all of the profits of the entity. 2009, c. 33, Sched. 2, s. 11 (3).

Notice

(6) An application under subsection (5) shall be on notice to the entity, to the executor or trustee and to any other person that a judge directs. 2009, c. 33, Sched. 2, s. 11 (3).

No obstruction

(7) No person shall obstruct, hinder or interfere with an inquiry conducted under subsection (1), or withhold, conceal or destroy information or documents required to be provided to the Public Guardian and Trustee under that subsection. 2009, c. 33, Sched. 2, s. 11 (3).

Offence and penalty

(8) Every person who contravenes subsection (7) is guilty of an offence and on conviction is liable to a fine not exceeding $25,000. 2009, c. 33, Sched. 2, s. 11 (3).

Regulations

5. (1) The Attorney General, on the advice of the Public Guardian and Trustee, may make regulations,

(a) prescribing forms of notices and returns to be made under this Act;

(b) respecting the practice and procedure upon passing the accounts of an executor or trustee under this Act and the tariff of fees and costs to be applicable thereto;

(c) requiring returns to be made by any such executor or trustee to any ministry of the Government and the form of such returns;

(d) regulating the practice and procedure upon applications under section 4. R.S.O. 1990, c. C.10, s. 5 (1); 1996, c. 25, s. 2 (1).

Practice

(2) Except as otherwise provided by the regulations, the practice and procedure of the Superior Court of Justice apply to proceedings under this Act. R.S.O. 1990, c. C.10, s. 5 (2); 1999, c. 12, Sched. B, s. 1 (3).

(3) Repealed: 1997, c. 23, s. 3 (3).

Notice of action to set aside will to be served on Public Guardian and Trustee

(4) Where an action or other proceeding is brought to set aside, vary or construe a will or other instrument described in subsection 1 (1), written notice thereof shall be served upon the Public Guardian and Trustee, and if no one appears as representing the religious, educational, charitable or public institution, or if there is no named beneficiary, or a discretion is given to the executor or trustee as to a choice of beneficiaries, the Public Guardian and Trustee may intervene in the action or other proceeding and has the right to object or consent and to be heard upon any argument as a party to the action or other proceeding. R.S.O. 1990, c. C.10, s. 5 (4); 2000, c. 26, Sched. A, s. 2 (4); 2009, c. 33, Sched. 2, s. 11 (4).

Regulations

5.1 (1) The Attorney General, on the advice of the Public Guardian and Trustee, may make regulations,

(a) providing that acts or omissions that would otherwise require the approval of the Superior Court of Justice in the exercise of its inherent jurisdiction in charitable matters shall be treated, for all purposes, as though they had been so approved;

(b) requiring the making and keeping of records relating to charitable property and respecting the making, keeping, transfer and disposal of such records. 1999, c. 12, Sched. B, s. 1 (4).

Limitation

(2) Regulations under clause (1) (a) may be made only in relation to,

(a) the giving of benefits from charitable property to,

(i) executors and trustees referred to in subsection 1 (1),

(ii) corporations deemed by subsection 1 (2) to be trustees within the meaning of this Act,

(iii) directors of corporations described in subclause (ii) or of persons described in subclause (i) who are corporations, or

(iv) persons who, because of their relationship or connection to a person, corporation or director described in subclause (i), (ii) or (iii), cannot be given such benefits without court approval; and

(b) the administration and management of charitable property that is held for restricted or special purposes. 1999, c. 12, Sched. B, s. 1 (4); 2000, c. 26, Sched. A, s. 2 (3).

Governing instrument

(3) Regulations made under clause (1) (a) do not apply to an act or omission that conflicts with the will or instrument referred to in subsection 1 (1) or with the instrument deemed by subsection 1 (2) to be an instrument in writing under this Act. 1999, c. 12, Sched. B, s. 1 (4).

General or particular

(4) Regulations made under this section may be general or particular in their application and, without limiting the generality of the foregoing, may be subject to the conditions set out in the regulations. 1999, c. 12, Sched. B, s. 1 (4).

Definition

(5) In this section,

"charitable property" means property that is within the inherent jurisdiction of the court in charitable matters. 1999, c. 12, Sched. B, s. 1 (4).

Collection of funds from the public, right of complaint

6. (1) Any person may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of. R.S.O. 1990, c. C.10, s. 6 (1).

Form of complaint

(2) Every such complaint shall be in writing and delivered by the complainant to a judge

of the Superior Court of Justice. R.S.O. 1990, c. C.10, s. 6 (2); 1999, c. 12, Sched. B, s. 1 (5).

Order for investigation

(3) Wherever the judge is of opinion that the public interest can be served by an investigation of the matter complained of, he or she may make an order directing the Public Guardian and Trustee to make such investigation as the Public Guardian and Trustee considers proper in the circumstances. R.S.O. 1990, c. C.10, s. 6 (3); 2000, c. 26, Sched. A, s. 2 (4).

Application of *Public Inquiries Act, 2009*

(4) Section 33 of the *Public Inquiries Act, 2009* applies to an investigation directed under subsection (3). 2009, c. 33, Sched. 6, s. 44 (1).

Cost of investigation

(5) The cost of any such investigation, when approved by the Attorney General, forms part of the expenses of the administration of justice in Ontario. R.S.O. 1990, c. C.10, s. 6 (5).

Report of investigation

(6) As soon as the Public Guardian and Trustee has completed the investigation, he or she shall report in writing thereon to the Attorney General and to the judge who ordered the investigation. R.S.O. 1990, c. C.10, s. 6 (6); 2000, c. 26, Sched. A, s. 2 (4).

Order for audit

(7) Upon receipt of the report, the judge may order a passing of the accounts in question, in which case section 23 of the *Trustee Act* applies, and the judge may make such order as to the costs of the Public Guardian and Trustee thereon as he or she considers proper. R.S.O. 1990, c. C.10, s. 6 (7); 2000, c. 26, Sched. A, s. 2 (4).

Where section not to apply

(8) Nothing in this section applies to any religious or fraternal organization or to any person who solicited or procured any funds of any religious or fraternal organization. R.S.O. 1990, c. C.10, s. 6 (8).

Definition

7. In sections 8, 9 and 10,

"charitable purpose" means,

(a) the relief of poverty,

(b) education,

(c) the advancement of religion, and

(d) any purpose beneficial to the community, not falling under clause (a), (b) or (c). R.S.O. 1990, c. C.10, s. 7; 2009, c. 33, Sched. 2, s. 11 (5).

Limitation on use of property

8. A person who holds an interest in real or personal property for a charitable purpose shall use the property for the charitable purpose. 2009, c. 33, Sched. 2, s. 11 (6).

Authority for certain public bodies to receive property for charitable purposes

9. (1) Subject to section 8, a municipal corporation or local board thereof, a university or a public hospital may receive, hold and enjoy real or personal property devised, bequeathed or granted to it for a charitable purpose, upon the terms expressed in the devise, bequest or grant.

R.S.O. 1990, c. C.10, s. 9 (1).

Agreement re administration

(2) A municipal corporation or local board thereof, university or public hospital holding property under subsection (1) may enter into an agreement with the person devising, bequeathing or granting the property for the holding, management, administration or disposition of the property. R.S.O. 1990, c. C.10, s. 9 (2).

Application of section

(3) This section applies even if the devise, bequest or grant was made before it was authorized by this section. R.S.O. 1990, c. C.10, s. 9 (3).

Definition

(4) In this section,

"local board" includes a school board and a conservation authority. 2002, c. 17, Sched. F, Table.

Application for order re carrying out trust

10. (1) Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. R.S.O. 1990, c. C.10, s. 10 (1); 1999, c. 12, Sched. B, s. 1 (5).

Notice to Public Guardian and Trustee

(2) An application under subsection (1) shall be upon notice to the Public Guardian and Trustee who may appear and be represented by counsel at the hearing. R.S.O. 1990, c. C.10, s. 10 (2); 2000, c. 26, Sched. A, s. 2 (4).

Investigation by Public Guardian and Trustee

(3) Where the court is of the opinion that the public interest can be served by an investigation of the matter alleged in the application, the court may make an order directing the Public Guardian and Trustee to make such investigation as the Public Guardian and Trustee considers proper in the circumstances and report in writing thereon to the court and the Attorney General. R.S.O. 1990, c. C.10, s. 10 (3); 2000, c. 26, Sched. A, s. 2 (4).

Application of *Public Inquiries Act, 2009*

(4) Section 33 of the *Public Inquiries Act, 2009* applies to an investigation directed under subsection (3). 2009, c. 33, Sched. 6, s. 44 (2).

Application of *Trustee Act*

10.1 Sections 27 to 31 of the *Trustee Act* apply to,

(a) an executor or trustee referred to in subsection 1 (1);

(b) a corporation that is deemed to be a trustee under subsection 1 (2); and

(c) a person referred to in section 8 who is not a person referred to in clause (a) or (b). 2009, c. 33, Sched. 2, s. 11 (7).

Application of Act

11. This Act applies despite any provision in any will or other instrument excluding its application or giving to an executor or trustee any discretion as to the application of property, funds or the proceeds thereof to religious, educational, charitable or public purposes. R.S.O.

1990, c. C.10, s. 11.

Other rights and remedies not affected

12. This Act does not apply to or affect or in any way interfere with any right or remedy that any person may have under any other Act or in equity or at common law or otherwise. R.S.O. 1990, c. C.10, s. 12.

Consent orders and judgments in charitable matters

13. (1) A draft order or judgment that could have been made by the Superior Court of Justice under this Act, under any other Act dealing with charitable matters, or in the exercise of its inherent jurisdiction in charitable matters, shall be deemed to be an order or judgment of that court if the following persons give a written consent to its terms:

1. The Public Guardian and Trustee.
2. Every other person who would have been required to be served in a proceeding to obtain the order or judgment. 1997, c. 23, s. 3 (4); 1999, c. 12, Sched. B, s. 1 (5).

PGT's seal

(2) In the case of the Public Guardian and Trustee, the consent shall be sealed. 1997, c. 23, s. 3 (4).

Effective date

(3) The terms of the draft order or judgment take effect when it is filed with the Superior Court of Justice. 1997, c. 23, s. 3 (4); 1999, c. 12, Sched. B, s. 1 (5).

Charitable Gifts Act

Definition

14. (1) In this section,

"interest in a business" means an interest in a business within the meaning of the *Charitable Gifts Act*, as it read immediately before its repeal. 2009, c. 33, Sched. 2, s. 11 (8).

Obligation to dispose of business interest extinguished

(2) Despite clause 51 (1) (b) of the *Legislation Act, 2006*, the repeal of the *Charitable Gifts Act* extinguishes all obligations under the *Charitable Gifts Act* to dispose of any interest in a business that are still in existence at the time of the repeal. 2009, c. 33, Sched. 2, s. 11 (8).

Same

(3) Subsection (2) applies in respect of obligations that came into existence under the *Charitable Gifts Act* at any time before its repeal. 2009, c. 33, Sched. 2, s. 11 (8).

Right to application extinguished

(4) Despite subclause 51 (1) (d) (i) and subsection 51 (2) of the *Legislation Act, 2006*, the repeal of the *Charitable Gifts Act* extinguishes all rights to bring an application under that Act in relation to the obligations to which subsection (2) applies. 2009, c. 33, Sched. 2, s. 11 (8).

Non-application

(5) Subsection (4) does not apply in respect of an application relating to an order made under subsection 3 (3) of the *Charitable Gifts Act*, as it read immediately before its repeal. 2009, c. 33, Sched. 2, s. 11 (8).

Français

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TAB 6

2011 CarswellOnt 12086, 2011 ONSC 5684, 209 A.C.W.S. (3d) 475, 75 E.T.R. (3d) 161, 94 B.L.R. (4th) 246

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation

Victoria Order of Nurses for Canada and Victorian Order of Nurses for Canada — Ontario Branch, Applicants and Greater Hamilton Wellness Foundation, Respondent

Ontario Superior Court of Justice

Robert N. Beaudoin J.

Heard: May 12-14; August 2-4, 2011
Judgment: September 27, 2011[FN*]
Docket: Ottawa 09-46843

Proceedings: additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731 (Ont. S.C.J.)

Counsel: David Sherriff-Scott, Peter C.P. Thompson, Q.C., for Applicants

Henry G. Blumberg, Ronald S. Segal, Scott Chambers, for Respondent

Dana De Sante, for Public Guardian and Trustee

Subject: Estates and Trusts; Civil Practice and Procedure; Corporate and Commercial

Estates and trusts --- Charities — General principles — Charitable purposes — Purposes beneficial to community

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC

programs — VH was source of Foundation's initial funding.

Estates and trusts --- Trusts — Purpose trust — Charitable purpose

Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — VH was exclusive beneficiary under Foundation's corporate object based on proper interpretation of objects in Letters Patent — VO was VH's successor — Original object clause required Foundation to make distributions of property to VH or its successor for charitable or educational purposes related to patient and health care — Object clause did not authorize Foundation to distribute its funds to any entity so long as their purposes were consistent with purposes of VC — Objects clause included name of VC specifically — Solicitation material represented that donations were to be used for VC programs — VH was source of Foundation's initial funding.

Estates and trusts --- Charities — Administration of charities

Fiduciary duty and trust obligations of directors — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — It did not become impossible or impracticable for Foundation to carry out its original object, so it could not significantly amend its objects — Original Letters Patent did not provide for any exercise of discretion with respect to funding of VH.

Estates and trusts --- Charities — Miscellaneous issues

Remedy for breach of duty — Charity VC's regional provider, VH, created respondent Foundation as parallel fundraiser to meet VH's needs and services, with respect to education and nursing needs — Charity underwent restructuring whereby provincial corporations, including VH, were dissolved and regional corporations were incorporated, including applicant VO — Activities such as strategic plans, advocacy, fundraising and community development were expected to be assumed by Foundation — As part of restructuring, VH was to transfer all of its assets to VO — Foundation decided to broaden its objects to provide funds to organizations other than VO, as long as it related to patient and health care — VC and VO brought application for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation — Application granted — VO was beneficially entitled to all funds held by Foundation — Foundation breached its fiduciary duty and trust obligations to VH and VO — Remedy for breach required clean break between Foundation and VO — Foundation was ordered to transfer all of its as-

sets to another entity in trust — Assets were transferred to VO in trust to be used in accordance with Foundation's original objects — VO was legal successor to VH, and had not acted inappropriately — Adding another party at this time would cause further delay and add administrative costs.

Estates and trusts --- Charities — Practice and procedure — Miscellaneous issues

Standing — Charities.

Civil practice and procedure --- Parties — Standing

Charities.

Estates and trusts --- Gifts — Types of gifts — Inter vivos gift — Conditional gifts

Breach of conditions precedent and subsequent.

Estates and trusts --- Trusts — Resulting trust — Creation — Miscellaneous issues

No proof of gift.

Cases considered by *Robert N. Beaudoin J.*:

Adolph Lumber Co. v. Meadow Creek Lumber Co. (1919), 58 S.C.R. 306, 45 D.L.R. 579, [1919] 1 W.W.R. 823, 1919 CarswellBC 24 (S.C.C.) — referred to

Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre (2002), 22 B.L.R. (3d) 182, 2002 CarswellOnt 517, 44 E.T.R. (2d) 155 (Ont. S.C.J.) — considered

Christian Brothers of Ireland in Canada, Re (2000), 17 C.B.R. (4th) 168, 33 E.T.R. (2d) 32, 6 B.L.R. (3d) 151, 47 O.R. (3d) 674, 2000 CarswellOnt 1143, 132 O.A.C. 271, 184 D.L.R. (4th) 445 (Ont. C.A.) — considered

Hoefle v. Bongard & Co. (1945), [1945] 2 D.L.R. 609, 1945 CarswellOnt 98, [1945] S.C.R. 360 (S.C.C.) — referred to

Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997), [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896, [1997] UKHL 28 (U.K. H.L.) — considered

Johnson v. Crocker (1954), 1954 CarswellOnt 195, [1954] O.W.N. 352, [1954] 2 D.L.R. 70 (Ont. C.A.) — referred to

Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 1998 CarswellOnt 4170, 41 B.L.R. (2d) 42, 114 O.A.C. 357 (Ont. C.A.) — followed

Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario) (2001), 39 E.T.R. (2d) 96, 2001 CarswellOnt 1971 (Ont. S.C.J.) — followed

Ontario (Public Trustee) v. Toronto Humane Society (1987), 1987 CarswellOnt 649, 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, 27 E.T.R. 40 (Ont. H.C.) — considered

Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society (2010), 100 O.R. (3d) 340,

2010 ONSC 608, 2010 CarswellOnt 384 (Ont. S.C.J.) — referred to

Pecore v. Pecore (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.) — considered

Rowland v. Vancouver College Ltd. (2000), 78 B.C.L.R. (3d) 87, [2000] 8 W.W.R. 85, 34 E.T.R. (2d) 60, 2000 BCSC 1221, 2000 CarswellBC 1667 (B.C. S.C.) — considered

Rowland v. Vancouver College Ltd. (2001), [2001] 11 W.W.R. 416, 205 D.L.R. (4th) 193, 94 B.C.L.R. (3d) 249, 2001 BCCA 527, 2001 CarswellBC 2243, 41 E.T.R. (2d) 77, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation))* 159 B.C.A.C. 177, (sub nom. *Rowland v. Christian Brothers of Ireland in Canada (Liquidation))* 259 W.A.C. 177 (B.C. C.A.) — referred to

Schilthuis v. Arnold (1996), 95 O.A.C. 196, 1996 CarswellOnt 4230 (Ont. C.A.) — referred to

Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home (2003), 68 O.R. (3d) 777, 2003 CarswellOnt 6169 (Ont. S.C.J.) — considered

Women's Christian Assn. of London v. McCormick Estate (1989), 34 E.T.R. 216, 1989 CarswellOnt 533 (Ont. H.C.) — referred to

Statutes considered:

Charities Accounting Act, R.S.O. 1990, c. C.10

Generally — referred to

s. 1(2) — considered

s. 4 — considered

s. 6 — considered

s. 6(1) — considered

s. 10 — considered

s. 10(1) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.01(5) — considered

Words and phrases considered:

Victorian Order of Nurses for Canada

The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support worker services.

Victorian Order of Nurses for Canada — Ontario Branch

Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations . . . . VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario . . .

The Victorian Order of Nurses Hamilton-Wentworth Branch

[The Victorian Order of Nurses Hamilton-Wentworth Branch] was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch".

Greater-Hamilton Wellness Foundation

The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON [Victorian Order of Nurses] trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Foundation.

Victorian Order of Nurses Hamilton-Wentworth Foundation

The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. . . . The Foundation itself has never been a health care services provider.

Charities Accounting Act

The *CA Act* [the *Charities Accounting Act*, R.S.O. 1990, c. C.10] is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

APPLICATION by charities for order requiring Foundation's assets to be transferred to trustee to be held in trust and distributed to benefit programs in accordance with objects of Foundation.

***Robert N. Beaudoin J.*:**

Relief Sought in this Application

1 The applicants seek an order requiring that the Foundation assets be transferred to the applicant VON Ontario to be held in trust and distributed in an orderly way to benefit programs and services provided by VON Ontario at its Hamilton site in accordance with the original objects of the Foundation. The applicants had initially sought an order winding up the Foundation but did not pursue that relief in their final argument.

The Parties

VON Canada

2 The Victorian Order of Nurses for Canada ("VON" or "VON Canada") is a national non-profit, registered charity since 1899. VON currently delivers programs and services, through six nominee regional corporations, at 52 sites across Canada. Its activities include the operation of adult day centers, home visiting programs, meals on wheels, educational health services, and services to women at shelters and children at risk. It also provides in-home nursing, personal support, therapy and palliative care services. VON operates flu clinics, blood pressure testing clinics, primary healthcare clinics, respite care programs, and provides school health services. It delivers private nursing and personal support worker services.

VON Ontario

3 Victorian Order of Nurses for Canada — Ontario Branch ("VON Ontario") is one of VON Canada's six nominee regional corporations as described in greater detail below. VON Ontario is responsible for delivering VON programs and services at 21 sites in Ontario, including Hamilton.

4 In the Hamilton area, VON programs and services are delivered by about 57 full-time and 85 part-time workers supported by about 885 volunteers. The resources located in Hamilton are supported by additional VON centralized resources located elsewhere. The VON Ontario operating division providing programs and services at the Hamilton site after 2003 is hereinafter referred to as "VON Hamilton".

VON Hamilton Branch

5 VON Hamilton's predecessor was The Victorian Order of Nurses Hamilton-Wentworth Branch. The Branch was incorporated in January of 1969 as an amalgamation of two Hamilton area VON Branches. The Branch provided VON programs and services in the Hamilton area prior to the transfer of its operations to VON Ontario in 2003 and is hereinafter referred to as "VON Hamilton Branch" or "the Branch". VON Canada was a member of the Hamilton Branch.

Greater-Hamilton Wellness Foundation

6 The Greater-Hamilton Wellness Foundation ("GHWF") was formed in December 2009, shortly after its rights to operate under the auspices of VON trademarks and banners were terminated by VON Canada. The GHWF operates as a general fundraiser in the Hamilton area since December 2009. It was previously known as the VON Hamilton Foundation.

VON Hamilton Foundation

7 The Victorian Order of Nurses Hamilton-Wentworth Foundation was founded on December 8, 1981. Its name was subsequently changed to Victorian Order of Nurses Hamilton Foundation. Its Letters Patent, describe the Foundation's corporate objects as follows:

3. (a) To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

The dissolution clause provides:

6. (d) Upon the dissolution of the Corporation and after the payment of all debts and liabilities, its remaining property shall be distributed or disposed of to any Victorian Order of Nurses' purposes in Ontario or to other organizations which carry on their work solely in the Province of Ontario for charitable and educational purposes related to patient and health care.

Finally, the Letters Patent specify:

6. (f) No person shall be elected as a director unless his or her election has the prior approval (expressed as a resolution) of the Board of Management of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor.

The Foundation itself has never been a health care services provider.

Relationship between the Foundation and the Branch

8 It is evident on the record before me that the Foundation was created as a parallel fundraiser by and for the Hamilton Branch. That the Foundation existed to meet the expectations of the Branch was recognized at its inaugural meeting of Directors held on May 12, 1988 where, in his opening remarks, the then Vice-President asks "that the directors consider the question of what the VON wants and expects from the Foundation." Initially, the Foundation did not raise funds and its September 27, 1988 Minutes state: "All agreed that the role of this Foundation will be to receive funds and hold them as capital and disburse the income from that capita as needed by the Branch."

9 At a June 28, 1996 meeting, the Board of Directors agreed that the Foundation would assume a more active role in the fundraising area. This is corroborated by the financial summary prepared by counsel for the respondent which discloses no fundraising revenue for the Foundation until 1997.

10 By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

11 The Foundation's June 21, 2001 By-law described its function as follows:

The corporation is mandated to raising, investing and managing funds which will be used to support the programs of the Local Branch.

12 According to its financial statements, the Foundation was dormant until it commenced operations in 1989. For approximately 20 years and until December 15, 2009, the Foundation exclusively conducted its fundraising communica-

tions with the public on the basis that it raised money for VON programs and services and it funded only VON programs and services.

The Public Guardian and Trustee

13 The Public Guardian and Trustee ("PGT") appears in this proceeding to safeguard the public's interest, and to afford advice and assistance to the court. At common law, the Attorney General acted on behalf of the Crown in representing the objects of a charity, a role now assumed by the PGT as more recently re-stated in *Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home* (2003), 68 O.R. (3d) 777 (Ont. S.C.J.) at paras. 5-6:

> [5] ... Whether or not the Attorney General might still have, in some circumstances, a residual role to play, the powers and responsibilities traditionally attached to that office are now, for most, if not all, practical purposes exercised in matters of charity by the Public Guardian and Trustee pursuant to the provisions of the Public Guardian and Trustee Act, R.S.O. 1990, c. P.51 and the *Charities Accounting Act*, R.S.O. 1990, C.10.
>
> [6] Traditionally, the role of the Attorney General was limited to making inquiries with respect to particular charities, instituting legal proceedings where this was considered to be warranted, and aiding and assisting the court in their determination...

14 The PGT's duties under the *Charities Accounting Act* are engaged when a proceeding may involve a potential misapplication of charitable funds or breach of fiduciary duties. The PGT supports the position of the applicants in this proceeding.

Events Leading to the Application

Preliminary comments on the affidavits filed in support of this application

15 Diane McLeod ("Ms. McLeod") has set out the events leading to this application in her affidavit of January 8, 2009 and her reply affidavit of April 19, 2010. Ms. McLeod is currently the Executive vice-president of VON Canada. She has spent her entire working career with VON, first in her capacity as a nurse and later in positions of management including executive level positions. She has direct knowledge of the matters to which she deposes and where her evidence is based on information and belief she has carefully set out the source of that information.

16 The respondent relies on the affidavit of Kate Bursey ("Ms. Bursey"), currently the Chair of the Foundation. She has been in that position since June of 2007. She was previously a director of the Foundation since 2004. Her direct knowledge of the events is limited to that period of time. Ms. Bursey's affidavit is problematic. First, it offends r. 39.01(5) of the *Rules of Civil Procedure* and the Rules of Evidence generally in that much of the evidence she offers on contentious matters is pure hearsay. Her affidavit is also replete with insinuation, argument and opinion. Counsel for the Foundation countered the court's concerns by arguing that the parties agreed that this would be a "paper trial". That may be so, but I am unaware of any agreement that the parties would ignore the Rules of Evidence.

17 Ms. Bursey's affidavit reveals a tendency to make inflammatory statements that are not supported by any evidence other than her own self-serving analysis such as this statement at para. 29: "In total, the applicant, through VON — Ontario Branch, effected the removal of more than $1,000,000.00 from local Hamilton control as part of its implementation of the applicant's Centralization Strategy." She relies on e-mail communications between others to support an allegation that "there is a money grab at play." At para. 24, she claims: "Since 2002, the applicant has systematically removed from local Hamilton control more than $1,000,000.00 of funds ...".

18 These events took place at a time when she was not herself a director of the Foundation. At para. 23 she refers to the Asset Transfer Agreement ("ATA") entered into in 2003 wherein she alleges that the applicant "orchestrated the transfer of all current assets of the local VON corporation to its nominee." The Foundation was not a party to that agreement. She has no direct knowledge of it and she does not offer any source for that comment other than her own opinion.

19 In support of her views, she consistently refers to e-mail communications between Sandra Edrupt ("Ms. Edrupt"), a former Chair of the Foundation, and VON and between other third parties and she offers these communications for the truth of their contents. Ms. Edrupt, who was involved in many of these events, did not provide an affidavit. Without being qualified to do so, Ms. Bursey proceeds to offer her own *expert* opinion on VON Canada's solvency.

20 More troubling are Ms. Bursey's assertions that are completely contradicted by the Foundation's own documents. At para. 101 of her affidavit she claims that VON Canada would not approve a Bylaw approved by the Foundation's directors on October 31, 2006. The Foundation's own Minutes of November 28, 2006 indicate the very opposite:

> C. Young clarified that the Bylaws were accepted by VON Canada. All Bylaws need to be redone in the spring to meet VON Canada's new guidelines. It is expected that the ByLaws of the Branch Foundation Board will fully meet these guidelines.

21 Perhaps the most troubling allegations contained in Ms. Bursey's affidavit are those that focus on her allegations that VON Canada wanted the Foundation to amend its objects clause in its Letters Patent so as to remove the Directors' exercise of discretion and requiring them to abandon their fiduciary responsibilities to their donors. This point was emphasized by the Foundation's counsel in argument. This is how Ms. Bursey described the proposed new objects for the Foundation at para. 21 of her affidavit:

> To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, **to** the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada.
>
> [Emphasis added.]

22 In fact, the proposed new objects clauses in question were much broader in scope than what is suggested by either Ms. Bursey or by the Foundation's counsel in his *factum*. There are nine paragraphs in total and they read as follows:

> **SECTION 15 — ESSENTIAL OBJECTS OF THE COMMUNITY CORPORATION**
>
> 15.1 . . .
>
> (1) To receive and maintain a fund or funds and to apply all or part of the principal and income therefore, from time to time, to the Victorian Order of Nurses for Canada and/or the VON Canada Foundation, which are registered charities under the *Income Tax Act*, Canada;
>
> (2) To fund research and needs assessments for the purposes of identifying unmet health care and social support needs in the Local Community and **select and fund** the Charitable Programs to be delivered in the Local Community by VON Canada to meet these needs; [emphasis added]
>
> (3) To fund health and support services to be provided by VON Canada to persons with debilitating diseases, illnesses and other health conditions for the purpose of preventing disease and promoting good health;

(4) To carry out Local Community capacity development activities and to build partnerships in the Local Community;

(5) To advance the development of new health care and social program initiatives to be provided by VON Canada in the Local Community;

(6) To promote awareness and educate the public for the purposes of:

(a) encouraging changes and/or new developments in delivery of health and social services in the Local Community; and

(b) developing meaningful responses to health and social issues and unmet or emerging needs to be provided by VON Canada in the Local Community;

(7) To solicit and receive donations, bequests, legacies and grants and to enter into agreements, contracts and undertakings incidental thereto;

(8) To prudently invest the funds of the Community Corporation; and

(9) To ensure that, upon dissolution of the Community Corporation and after payment of all debts and liabilities, its remaining property is distributed or disposed of to Victorian Order of Nurses for Canada or the VON Canada Foundation, to be used in the Local Community.

23 As can be seen, the language of the proposed objects refers to the Foundation's authority to "select and fund" charitable programs once it entered into a new Association Agreement with VON Canada. There are no fewer than seven references to the local community. Later in this decision I will refer to the discretionary authority that was allegedly being removed from the Foundation's directors.

24 In her reply affidavit, Ms. McLeod identifies the inaccuracies in Ms. Bursey's affidavit under 15 separate topic headings. Given my own concerns about the misrepresentations in Ms. Bursey's affidavit, I accept the version of events as set out by Ms. McLeod. In any event, the background facts as I have set them out herein are not materially in dispute.

Restructuring of Von

Background

25 Historically, VON delivered its services through a decentralized structure which included local Branches, which were separately incorporated, non-profit corporations that were also registered charities. These Branches provided operational services to their communities. In turn, they reported to provincial VON corporate entities. The provincial organizations acted as a liaison between individual Branch corporate entities and VON at the national level. VON nationally administered overall operations and established policy and direction for the organization.

26 VON's decentralized structure caused it to begin losing business and activity opportunities throughout the late 1980s and 1990s as private sector health care providers began to play an increased role in community health services traditionally served by VON. Accordingly, in the late 1990s and following, VON developed a strategy to maintain its position in the health care and charitable services area.

27 This strategy was called the "National Vision Achievement Strategy" ("NVAS") and its eventual implementation

had a significant impact on local corporate Branch structures. All provincial VON corporations were dissolved and VON incorporated a series of "regional VON corporations" which had Boards of Directors mirroring that of VON. In Ontario this resulted in the creation of the Victorian Order of Nurses — Ontario Branch. Regional VON corporations assumed all of the operational contracts, responsibilities and duties as well as assets, liabilities and employees of each individual Branch corporation. All Branch operational activity was assumed by VON regional corporations. The former Branch ceased all activity except for: (a) strategic plan development for local communities; (b) advocacy activities; (c) fundraising; and (d) community development activities. In Hamilton, it was expected that these activities were to be assumed by the Foundation.

28 Resources were restructured and rationalized to provide centralized payroll, financial reporting and auditing functions. Other resources and functions including human resources, namely, recruitment, hiring, termination, benefits, management and labour relations, were also centralized. Every VON site was charged a percentage amount of its revenues for services it receives from centralized VON resources located elsewhere.

29 These restructuring initiatives involved extensive communication and consensus building with the local Branches. The Foundation Directors were kept informed of VON Canada's consultations with the Hamilton Branch which commenced in the latter half of 2000. Hamilton Foundation and Branch staff occupied the same office space and information was shared informally as well.

The Hamilton Branch Transfers its Assets and Liabilities to VON Ontario — Asset Transfer Agreement dated February 14, 2003

30 As part of the NVAS, the transfer of assets to VON Ontario needed to be sufficient to cover the liabilities it was assuming by acquiring responsibility for the provision of VON services in the Hamilton area. The Hamilton Branch executed an initial Asset Transfer Agreement dated February 14, 2003. The Foundation was made aware of this.

31 This is where Ms. Bursey complains about the "restructuring costs" which she infers was a "money grab" even though the Foundation is not a party to the ATA and she herself was not involved in the transaction. These facts do not deter her from offering her own opinion as to the nature of the transaction and to my knowledge Ms. Bursey is not qualified as an accountant. Article 2.02(4) of the Agreement discloses how the amount of $613,226 of restructuring cost was calculated. The Agreement specified that the accrued expense was to cover the one-time cost of implementing the arrangements, including without limitations, "severance cost, infrastructure, setup cost, initial training and installation cost of new systems, the cost of software licenses required to consolidate operations and unexpected contingencies." A system-wide accounting of expenditures was subsequently provided. It is clear from a review of that document that any transfer of Branch funds to VON Ontario was to discharge an agreed upon liability and not a money grab as alleged.

Lands and Building

32 The lands and building at 400 Victoria Avenue, Hamilton, were not included within the ambit of the ATA of 2003. The Branch's "residual assets", including the land and building, were to be dealt with later. The building at 400 Victoria Avenue houses the Adult Day Care ("ADC") Centre which is a key program provided by VON Hamilton. The ADC provides daily and overnight respite services, including social services and entertainment programs for the families of those who are caring for persons suffering from cognitive impairments. The transfer documents reveal that the Branch had acquired the 400 Victoria Avenue property in 1986 for $850,000 long before the Foundation began raising money. The Foundation was not involved in the initial acquisition of the property.

The Memo of Intent

33 Internal friction developed between Branch and Foundation staff as a result of the transfer of the Branch operations to VON Ontario. The issues were resolved following a meeting on September 11, 2003, that concluded with a written Memo of Intent between VON Canada and the Foundation. The Memo of Intent reads as follows:

STRICTLY CONFIDENTIAL
FINAL VERSION
MEMO OF INTENT
between
VON [CANADA] AND VON HAMILTON FOUNDATION
RE: NATIONAL VISION ACHIEVEMENT STRATEGY

Present at the meeting:

Sandra Edrupt, Chair
Cathy Young, Vice-Chair
Maggie Carr, Past President
Ralph Hayman
Bob Simpson
Lois O'Sullivan
Keith Augustine
Adam Capelli
Lois Murray
Dennis Lugowy
Joe White
Ron Farrell, CEO VON Canada
Lynn Bessey, Chair Elect VON Canada
Jim McCaw, Treasurer VON Canada

1) The Hamilton Board retain the name VON Hamilton Foundation. All directors resign immediately from the legacy Hamilton Branch Board in order that VON Canada Executive can assume responsibility for dissolving the Branch corporation. The branch's only asset (the adult day centre on Victoria Street) is to be gifted to the Hamilton Foundation Board. Details for this arrangement have to be finalized but the intent is that VON Canada will continue operating the day centre as in the past and that VON Hamilton Foundation will not charge VON Canada for the use of the building.

2) The VON Hamilton Foundation not be an employer. The Foundation's OPSEU staff be transferred to the VON Canada bargaining unit. It is understood that the Foundation is in the process of assessing their fundraising support staff requirements and that one or both of the support staff may not be required.

The contract with the Foundation's Executive Director be converted to a term appointment with VON Canada. Assuming a successful transfer VON Canada agrees to appoint the current Foundation Director as the dedicated senior fundraising resource for VON Hamilton Foundation for the length of the term appointment (subject to satisfactory performance management reviews for which the Foundation Board provides input).

3) The VON Hamilton Foundation to create new bylaws, to be approved by VON Canada, which clarify its role as a public foundation to undertake strategic planning, community development, public relations, advocacy, and fundraising. Proceeds from the Hamilton Foundation's fundraising initiatives be used at the discretion of the Hamilton Foundation Board, and be intended to support programs in the Hamilton community, as delivered by VON Canada's Hamilton Branch.

4) The Hamilton Foundation agrees to the provision of support services — staff, equipment, space, financial services — by VON Canada. The Foundation will retain an independent auditor for at least the current year. The use of an independent auditor will be reviewed by the Foundation Board at that time. Service level agreements will be promptly developed to include mechanisms for determining fair market value, performance expectations and conditions for termination of service.

With respect to financial services VON Canada agrees to have the VP of Finance oversee bringing the Hamilton Foundations financial information up to date as quickly as possible in order to mitigate any director liability, and to ensure timely and accurate information in the future.

With respect to fundraising the service agreement must include provision for one full time senior person dedicated to fundraising in Hamilton. This person is to be a member of senior management in the Hamilton Branch operation with appropriate title and office location and office space. The Foundation Board is to provide input to the job description, appointment, performance expectations and performance evaluation of the senior fundraiser.

5) When VON Canada Foundation has a formal proposal for pooling investment funds the Hamilton Foundation will consider it at that time.

A timetable for action needs to be developed in order to implement this agreement as quickly as possible.

September 11, 2003

34 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact new bylaws, to be approved by VON Canada, to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

35 While the respondent's counsel now argues that the Memo of Intent is of no effect because it is unsigned, the Foundation's then President, Ms. Edrupt, was present at the meeting and in her e-mail of February 25, 2005 to VON Canada, she specifically acknowledges that there was an agreement. Moreover, the evidence shows that the parties acted in accordance with the Memo of Intent.

Implementation of Memo of Intent

36 Following the Memo of Intent, the then Directors of the Branch Board resigned and VON Canada representatives were established as Branch Directors so that VON Canada could proceed to wind up the residual assets of the Branch. On October 30, 2003, VON Canada representatives were named as Directors of the Branch Board.

37 An October 4, 2004 e-mail from VON Canada prompted Ms. Edrupt to question VON Canada's plans with respect to the residual assets of the Branch and, in particular, the lands and building at 400 Victoria Avenue. That e-mail exchange led to a meeting on November 1, 2004, between the Foundation Directors and the Chief Executive Officer of

VON Canada. It was confirmed that the lands and building would be gifted to the Foundation once it had enacted bylaws that complied with the requirements of the September 11, 2003 Memo of Intent. Ms. Edrupt later reported to the Foundation Directors on January 11, 2005 that "the deed to the VON Adult Daycare Centre property would be released once the Branch Foundation Board has established bylaws based on the template for the National Vision Achievement Strategy for Branches."[FN1]

38 The Minutes of the Meetings of the Foundation Directors between January 2005 and October 2006 further reflect the steps taken by the Foundation to comply with the Bylaw Enactment condition precedent to the gift of the 400 Victoria Avenue property to it. The Foundation and VON Ontario entered into a Purchased Services Agreement on March 4, 2005. VON and the Foundation entered into a Trademark License Agreement on April 1, 2006.

ByLaw Enactment

39 To comply with the by-law enactment condition of the gift, on October 31, 2006, the Foundation enacted and ratified ByLaw No. 1. This recognized the commitments made in the September 11, 2003 Memo of Intent to allocate funds to VON Hamilton and to include VON Canada as a Foundation Board member. The bylaw was executed by the Chair and the Vice-Chair of the Board who, at that time, was Ms. Bursey. The bylaw states that it was:

> Unanimously Confirmed, Ratified and Approved by the Directors of the Corporation at a General Meeting assembled for that purpose this 31st day of October, 2006.

40 The Minutes of the Foundation's Meeting of October 31, 2006 further comment on the bylaws at item 5.4:

> J. North reported that K. Bursey and C. Young met briefly with Esther Shainblum, Director of Corporate Support & General Counsel VON Canada at the VON Canada AGM. There was discussion regarding the Hamilton Foundation ByLaws and the transfer of the ADC building to the Foundation.
>
> In this Board's view, VON Canada has accepted the ByLaws as prepared as they were returned to Hamilton without statement and they are consistent with the new template for Branch Foundation Board Bylaws.

41 The Minutes reveal that there was a motion by Ms. Bursey, that the bylaws as presented be unanimously confirmed and approved. That motion was carried. At the next meeting, on November 28, 2006, Board member Cathy Young clarified that the bylaws were accepted by VON Canada.

42 The Foundation then acted in accordance with the intent of the bylaw provisions by treating VON Hamilton as one of its members and providing it with notice of all Foundation meetings. According to VON Hamilton, its reliance on these circumstances, as further evidence of the Foundation's commitment to the September 11, 2003 Memo of Intent, led to the transfer of the 400 Victoria Avenue property to the Foundation on June 4, 2007.

Further Bylaw Re-Alignment and Association Agreement

43 In the summer of 2007, VON Canada notified all Branches and the Foundation that they would be required to sign "Association Agreements" to clarify their roles under the NVAS including the agreed upon roles of the delivery of strategic planning and community development advocacy and fundraising. In its November 28, 2006 Minutes, the Foundation previously recognized that the October 31, 2006 bylaws would need to be revised in the spring of 2007 to meet VON Canada's new guidelines. While the Foundation's initial response to the proposed Association Agreement was positive, as time passed, its resistance to the proposed Association Agreement hardened.

The Subsequent Chain of Events

Ms. Bursey's Conflict with VON Canada

44 In June 2008, VON held a National Board Meeting to set deadlines for the execution of Association Agreements and to discuss the need for the Foundation to sign such an Agreement. At VON's June 2008 Board Meeting, Ms. Bursey, who was then both the Chair of the Foundation's Board and a member of the National Board of VON, opposed the idea that the Foundation would be required to sign an Association Agreement.

45 The Foundation then attempted to re-invigorate the defunct Hamilton Branch and to re-populate its Board of Directors with members of the Board of Directors of the Foundation. The objective of this action was to have this new entity carry out the roles of advocacy, community development and strategic planning which the Foundation was to carry out in the Association Agreement. This action was inconsistent with the NVAS which was designed to discourage the proliferation of VON entities as well as the agreement between VON — Ontario and the Foundation.

Termination of the Purchased Services Agreement

46 In July 2008, the Foundation insisted that VON Ontario fire an employee who was on maternity leave. This employee had provided all her services to the Foundation under the Purchased Services Agreement. When this matter was not resolved to the satisfaction of the Foundation, it arbitrarily and abruptly terminated the Purchased Services Agreement on August 11, 2008 and refused to enter into the dispute resolution procedures set out therein. The Foundation then withheld payment to VON Ontario of hundreds of thousands of dollars in fees that were owed pursuant to the Purchased Services Agreement. These were not paid in full until there was threat of litigation.

Foundation's Departure from 414 Victoria Avenue

47 The Foundation had shared space with VON Ontario at 414 Victoria since the Foundation began its operations in the late 1980s. It continued to occupy this space pursuant to the Purchased Services Agreement. Within two days of its termination of the Purchased Services Agreement, the Foundation moved out of the 414 Victoria Avenue premises after hours without notice. Files relating to confidential and donor information were removed. Ms. Bursey acknowledged that the Foundation had the files and claimed that these belonged to the Foundation.

Ms. Bursey's Further Conflict with VON Canada

48 At the September 2008 Meeting of VON Canada's Board of Directors, Ms. Bursey refused to recognize the conflict of interest in which she found herself and now strenuously objected to the requirement for the Foundation to sign an Association Agreement. The VON Canada Directors found her to be in conflict of interest and rejected her submissions on the issue. Shortly thereafter, on or about November 21, 2008, Ms. Bursey submitted her resignation as a Director of VON Canada.

Foundation Demands Lease from VON Ontario

49 Within days of the rejection of Ms. Bursey's September 2008 submission to VON Canada's Board of Directors, VON Hamilton received a demand from the Foundation that it pay annual rent in the amount of $86,000.00 subject to annual increases for its occupation of the 400 Victoria Avenue premises. The Foundation advised that no off-setting funding would be provided. Branch staff were no longer invited to Foundation meetings.

Foundation Decides to Broaden its Objects

50 The Minutes of the Meeting of Foundation Directors held on October 28, 2008 record that Ms. Bursey stated that the Foundation was free to change its Letters Patent at its discretion, as long as they did not contravene Canada Revenue Agency guidelines. At the November 25, 2008 meeting, a motion was passed to change the Letters Patent to enable the Foundation to disburse to other organizations. In particular, the Foundation was exploring how it could assist the McMaster University Gerontology Program. Minutes of the Meeting of Foundation Directors on November 25, 2008 read as follows:

> The current Letters Patent state that **all funds must flow back to VON in Ontario** for charitable or educational purposes (patient and health care). They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.
>
> [Emphasis added.]

Foundation Changes its Approach to Funding

51 VON Ontario attempted to work with the Foundation during this time. At the meeting of Foundation Directors on January 27, 2009, Ms. Bursey expressed a need for the Foundation to carefully outline what kind of information it requires to consider VON Hamilton's funding requests. Shortly thereafter, the Foundation imposed for the first time more stringent requirements for requests for funding from VON Hamilton. In January of 2009, VON Hamilton submitted its funding request in the amount of $202,700. The Foundation refused $69,723 of that funding request. The Foundation maintains that it was simply using appropriate procedures to review funding requests as part of their fiduciary responsibilities to its donors.

52 In argument, the Foundation's counsel suggests that not all of VON Hamilton's requests related to charitable programs. This argument makes no sense. Counsel could not adequately explain the distinction as to which of a registered charity's programs were charitable and which were not. For example, he could not explain why monies used to express appreciation to the many volunteers who deliver the VON's charitable programs such as "Meals on Wheels" was not a charitable purpose. More importantly, Ms. Bursey makes no mention of this lack of charitable purpose in her affidavit as a justification for the rejecting the funding requests.

53 These new requirements were completely at odds with the Foundation's own Charitable Giving Policy and Procedural Guidelines established in May 1999. Under those Guidelines, all that the former Branch had to do was submit a budget or a memo and the Foundation would transfer the requested funds. There never was an exercise of a discretion that Ms. Bursey and her counsel now claim was so critical. The original objects clause only permitted an exercise of discretion when the Foundation chose to fund VON programs outside of Hamilton — elsewhere in the Province. There was no exercise of discretion when it came to funding VON Hamilton Branch's requests.

The Commencement of these Proceedings

54 The developments led to unsuccessful negotiations between the parties through their solicitors. In May 2009, VON served notice that it would terminate the Trademark License Agreement pursuant to which the Foundation was entitled to use VON's name and trademarks unless there was some resolution of outstanding issues. By letter dated October 15, 2009, the Foundation's counsel repudiated the commitments the Foundation had made in the September 11, 2003 Memo of Intent and subsequently. Counsel asserted that VON was not a member of the Foundation and was not entitled to have a Director on the Foundation's Board of Directors. At this time, the applicants' solicitors learned that the Foundation had filed an application for Supplementary Letters Patent to change its corporate objects. They also learned of the Foundation's plan to donate funds for McMaster University.

55 The Foundation's Supplementary Letters Patent now allowed the Foundation to use its monies to fund any "other charitable organizations in Ontario registered under the *Income Tax Act* (Canada)." In early October 2009, the applicants' solicitors notified the Foundation, its Directors, and the Public Guardian and Trustee of their concerns with the actions taken by the Foundation and of the plan to commence legal proceedings.

56 The application was issued in November 2009. VON terminated the Trademark License Agreement with the Foundation effective December 15, 2009. On or about December 21, 2009, the Foundation changed its name to GHWF. The Foundation ceased to operate as a VON-specific fundraiser in December 2009 and since that date it has purported to operate as a general fundraiser in the Hamilton area.

Events Susbsequent to the Initiation of the Application

57 On January 28, 2010, I issued a Consent Order containing, *inter alia*, injunctive relief and asset preservation provisions that prohibited the Foundation from continuing to act on the basis that it is a VON entity. That order enjoined the Foundation from dispersing or transferring any assets or monies that it had raised or received prior to December 15, 2009, to any non-VON entities as follows:

> 16. THIS COURT FURTHER ORDERS that the Foundation will be bound by an interim injunction, pending the disposition of the Application, restraining it from disbursing or in any way transferring any money (other than for the purpose of overhead and administrative costs) or assets raised or received by it prior to December 15, 2009 to any non-VON entity. For greater certainty, the Foundation will be restrained, in this regard, from disbursing or transferring any assets or monies (other than for the purpose of overhead and administrative costs) raised or received by it prior to December 15, 2009 to any registered charity, qualified donee or other person or organization other than VON Ontario Branch, the Applicant herein or any other VON entity.

58 The Order established a schedule for the provision by the Foundation and its solicitors of certain specific information, the delivery by the Foundation of its responding materials, and the delivery by VON Canada of reply evidence. The Order called for a mediation to be held and for cross-examinations to be conducted in the event the matter could not be settled.

59 Initially, VON Canada was the sole applicant and the respondent was described as VON Central Ontario Foundation. On consent of the parties, the title of the proceedings was amended to add the Victoria Order of Nurses for Canada — Ontario Branch and the respondent's current name was substituted.

60 The Foundation has refused to deliver to the applicants the list of donors it compiled during its 20 years of activity as a VON-specific fundraiser.

61 The funding requests made by VON Hamilton to the Foundation in 2010 and 2011 were also subjected to the new approval process resulting in further denials of VON Hamilton's requests.

62 The Foundation continues to use a "break open ticket" funding mechanism that is licensed by the Ontario Alcohol and Gaming Commission. This funding mechanism was used to raise funds prior to December 15, 2009, to support VON Hamilton. A "break open ticket" is a device made of cardboard that has perforated cover window tabs which have symbols revealed by tearing open the cover tab. The winning combination of symbols is specified on the back of the ticket. "Break open tickets" are also known as "Nevada tickets" or "pull tabs". The Ontario Alcohol and Gaming Commission issues a license to an eligible charity or religious organization in circumstances where the licensed charitable organization has a provincial mandate. The license that the Foundation continues to use was granted to support VON Hamilton. The

funds the Foundation currently holds that are attributable to this funding mechanism total slightly in excess of $18,000. There appears to have been little activity in that account for some time.

63 Throughout 2010, although it avoided a specific use of VON's trademarks, the Foundation continued to represent itself as being associated with the programs and services that it has funded since 1981, being the very programs and services provided by VON Hamilton.

64 On or about October 25, 2010, a representative of the applicants asked the Foundation to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria Avenue, Hamilton, to increase the capacity of the Overnight Respite ("ONR") program from four to six beds. The Foundation's consent was necessary since title was registered in its name. Officials from the Hamilton-Niagara-Haldimand-Norfolk Local Health Integration Network ("LHIN") have been urging VON Hamilton to increase the ONR bed capacity since the beginning of 2010. Initially, the Foundation refused to execute the minor zoning variance request and demanded the execution of a lease by VON Hamilton. This was resolved on a without prejudice basis during the course of the hearing of this application.

Relief Sought

65 As the successor to the VON Hamilton Branch, VON Ontario claims it is beneficially entitled to all of the funds the Foundation currently held as of December 15, 2009. Moreover, VON Ontario claims it is beneficially entitled to the lands and building at 400 Victoria Avenue because all of the money used to acquire the lands and premises either belonged to the Branch or was raised by the Foundation for the purposes of benefiting the Branch. The entitlement of VON Ontario to the lands and building is further claimed on the principles of resulting trust and conditional gift.

The Issues

Issue 1: *Do the applicants have standing to seek the relief in this application?*

Issue 2: *Is VON Hamilton beneficially entitled to the Foundation's assets including real property accumulated to December 15, 2009, and the income attributable thereto?*

Issue 3: *Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?*

Issue 1: Do the applicants have standing to seek the relief in this application?

66 Section 6(1) of the *Charities Accounting Act*, R.S.O. 1990, c. C.10 ("*CA Act*") states that:

> **Any person** may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of.
>
> [Emphasis added.]

67 Section 10(1) of the *CA Act* enlarges the court's supervisory powers by providing that:

> Where any two or more persons allege a breach of trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the

law.

[Emphasis added.]

68 As noted, prior to the amendment to these pleadings, there was a single applicant. The requisite number of persons was in place prior to the hearing of this application and there is no issue as to standing.

Issue 2: Is VON Hamilton beneficially entitled to the Foundation's assets including real property held at December 15, 2009, and income attributable thereto?

69 With respect to this issue, VON Ontario's position at law may be summarized as follows:

(a) As the successor to the VON Hamilton Branch, VON Ontario has been and is the beneficial owner of all of the money and property historically held and raised (including all accruals thereon), by the Foundation;

(b) VON Ontario position as beneficial owner arises because:

- VON's predecessor created the Foundation through Letters Patent which endowed it with specific corporate objects. Under those objects, VON Hamilton Branch was to be the exclusive beneficiary of all of the Foundation's fundraising activities;

- the conduct of both VON Hamilton Branch and the Foundation, including the Foundation's representations to the public, during the Foundation's active, corporate life, demonstrated that VON Hamilton Branch and later VON Ontario were intended to be exclusively, beneficially entitled to all of the assets raised by the Foundation;

- both VON Hamilton Branch and the Foundation shared a mutual assumption that VON Hamilton Branch was beneficially entitled to all of the money raised by the Foundation;

- the *Charities Accounting Act* of Ontario deems the Foundation to be a trustee and its Directors to be fiduciaries of and in relation to the assets held beneficially for VON Hamilton Branch and its successor. VON Ontario is entitled to enforce those obligations under the *Charities Accounting Act*;

- the Foundation holds all or some of its assets in trust, at law for VON Ontario;

- the Foundation holds all or some of its assets beneficially for VON Ontario pursuant to special charitable purposes trusts;

- the Foundation is the constructive trustee of its assets for the benefit of VON Ontario;

- the assets of the Foundation, and in particular the real property owned by it, are held on a resulting trust in favour of VON Ontario;

- the Foundation's real property was, moreover, conditionally gifted to it by VON Hamilton Branch. The conditions of that gift failed with the result that the property must revert to VON Hamilton.

70 While the applicants claimed beneficial "ownership" of the Foundation's assets in their initial application, they are in fact seeking beneficial or equitable "entitlement". Their use of the word "ownership" in their original application may have initially confused the respondent's understanding of the equitable claims in issue but by the time of the hearing

of this application, the nature of these claims was very clear. Regardless of whether the equitable interest of the Applicants' stems from what might be characterized as a trust, constructive trust, resulting trust, near trust, fiduciary relationship, and/or something else, the end result is the same. While the applicants assert various bases in support of their claims that are amply supported by the evidence and the applicable law, I have concluded the applicant VON Ontario's claims to an equitable entitlement to the Foundation's assets can be resolved solely on the basis of the interpretation of the Foundation's original objects.

71 I propose to review the law with respect to charitable corporations including the jurisdiction of this Court to deal with this application and then to focus on the interpretation of the Foundation's objects as of December 15, 2009. Finally I will deal with the transfer of the property at 400 Victoria. Although I have come to the conclusion that the Foundation held all of its assets, including its real property, beneficially for VON Ontario, I will also address the alternate basis for the applicants' claim to 400 Victoria since this was the focus of much argument on the application. Finally, I will decide if the directors of the Foundations are in breach of their fiduciary responsibilities and, if so, the appropriate remedy

Charitable Corporations

72 Two relatively recent decisions, one in Ontario and the other in British Columbia; namely, *Christian Brothers of Ireland in Canada, Re* (2000), 47 O.R. (3d) 674 (Ont. C.A.) and *Rowland v. Vancouver College Ltd.*, [2000] 8 W.W.R. 85 (B.C. S.C.) affirmed (2001), 205 D.L.R. (4th) 193 (B.C. C.A.) affirm the principle that a charitable corporation holds its corporate assets beneficially to be used only and strictly in accordance with its charitable objects. In this context, a charity's directors have fiduciary obligations to ensure that a charitable corporation's assets are applied in accordance with its corporate objects

73 In *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)* (2001), 39 E.T.R. (2d) 96 (Ont. S.C.J.) Haley, J. observed that charitable corporations owe fiduciary duties to the beneficiaries of its charitable objects and further "that a charitable corporation owes a fiduciary duty to the public in general which supports the privileges extended to charitable corporations and to the public in particular which turns over its money to the charitable corporation for the charitable purposes it wishes to support."[FN2]

74 It has also been held that a breach of trust occurs when a charitable corporation applies its property to purposes that are beyond the scope of its objects. This principle applies regardless of whether those other purposes to which property has been diverted to are charitable or non-charitable.[FN3]

75 As noted by the PGT, courts have recognized that there are substantive differences between a corporation and a trust. The existence of bylaws, statutory corporate remedies, members, and corporate governance requirements, are but some of the factors which distinguish an incorporated charity from a trust. A charitable corporation nonetheless may be in a position analogous to a trustee in relation to its corporate assets when the corporate machinery is insufficient to protect the charitable assets. The court has exercised supervisory inherent equitable jurisdiction over incorporated charities to restrain directors from receiving remuneration either in their capacity as a director or for professional services, unless court approval is first obtained. Similarly, the court has intervened in the administration of incorporated charities to direct and oversee the election of directors, require an accounting, appoint an interim receiver or to direct a *cy pres* scheme in respect of surplus assets of a defunct incorporated charity that has been directed to be wound up.

76 As Justice Anderson said in *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 60 O.R. (2d) 236 (Ont. H.C.) at p. 243:

> ... is a charitable corporation a trust and, second, are its directors trustees?

... In Ontario, the question cannot be examined without some regard for the Charities Accounting Act. ... It is not in dispute that the Society is subject to the provisions of this Act. It is clear, therefore, that for certain purposes the Society is a trustee and its property is trust property...

77 In his article, The Charitable Corporation: A "Bastard" Legal Form Revisited", The Philanthropist (2000) Vol. 17, No. 1, p. 17 at p.29, Maurice Cullity comments on the *PGT v. THS* decision:

It is suggested that the decision in the *Toronto Humane Society* case was landmark in the development of the law of charity in this jurisdiction in the following respects:

(1) It recognized that the internal affairs and the regulation of the finances of incorporated charities are not governed exclusively by corporate law and the provisions of Part III of the *Corporations Act.* Advice and directions under the *Trustee Act*, generally and with respect to compensation, can be given and the inherent jurisdiction of the court in matters of charity is applicable;

(2) The jurisdiction may justify intervention both in the internal affairs of an incorporated charity with respect to its governance and election of its directors, and with respect to the expenditures of its fund on non-charitable or borderline purposes;

(3) However, generally, the affairs of an incorporated charity may be left to its members and the intervention of the court will be limited to cases where corporate law is inadequate to protect the interests of charity; and

(4) Statutory provisions applicable to trustees may be applied to incorporated charities and their governing bodies.

Charities Accounting Act

78 As noted, charities are considered to have trust obligations and their directors to be fiduciaries with respect to the management of their assets. These obligations are enforceable through the court's inherent jurisdiction and, in addition, in Ontario, under the *CA Act.*

79 The *CA Act* is Ontario's statutory instrument for the supervision of charitable corporations. It provides a mechanism for the courts to control the behaviour of charities, including how they solicit, handle and disburse donations. The statute gives the power to the courts to ensure that a charity complies with its objects, the directions of donors, the interests of beneficiaries and the public at large.

80 Subsection 1(2) of the *CA Act* contains a "deeming" provision which provides that a charity "shall be deemed to be a trustee" and that "any real and personal property acquired by it" is deemed to be held as trust "property" within the meaning of this *Act.*

81 Section 4 of the *CA Act* allows for an application to the court where executor or trustee in default:

4. If any such executor or trustee,

(a) refuses or neglects to comply with section 1, 2 or 3, or with any of the regulations made under this Act;

(b) is found to have misapplied or misappropriated any property or fund coming into the executor's or trustee's hands;

(c) has made any improper or unauthorized investment of any money forming part of the proceeds of any such property or fund; or

(d) is not applying any property, fund or money in the manner directed by the will or instrument,

a judge of the Superior Court of Justice upon the application of the Public Guardian and Trustee, may make an order,

(e) directing the executor or trustee to do forthwith or within the time stated in the order anything that the executor or trustee has refused or neglected to do in compliance with section 1, 2 or 3, or with the regulations made under this Act;

(f) requiring the executor or trustee to pay into court any funds in the executor's or trustee's hands and to assign and transfer to the Accountant of the Superior Court of Justice, or to a new trustee appointed under clause (g), any property or securities in the hands or under the control of the executor or trustee;

(g) removing such executor or trustee and appointing some other person to act in the executor's or trustee's stead;

(h) directing the issue of an attachment against the executor or trustee to the amount of any property or funds as to which the executor or trustee is in default;

(i) fixing the costs of the application and directing how and by whom they shall be payable;

(j) giving such directions as to the future investment, disposition and application of any such property, funds or money as the judge considers just and best calculated to carry out the intentions of the testator or donor;

(k) imposing a penalty by way of fine or imprisonment not exceeding twelve months upon the executor or trustee for any such default or misconduct or for disobedience to any order made under this section;

(l) appointing an executor or trustee in place of an executor or trustee who has died, or has ceased to act, or has been removed, or has gone out of Ontario, even if the will or other instrument creating the trust confers the power to make such an appointment upon another executor or trustee or upon any other person. R.S.O. 1990, c. C.10, s. 4; 1999, c. 12, Sched. B, s. 1 (1, 2); 2000, c. 26, Sched. A, s. 2 (4).

82 Section 6 of the *CA Act* gives the court the authority to ensure that charitable donations are disbursed in a way which is consistent with any restriction or special purpose imposed by a donor. As well, s. 6 of the *CA Act* gives authority to the courts to ensure that donations are dealt with in a manner which is consistent with how a charity has represented to the public that donations will be used.

83 Section 10. (1) provides:

10. (1) Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. R.S.O. 1990, c. C.10, s. 10 (1); 1999, c. 12, Sched. B, s. 1 (5).

84 The breadth of the power identified under both s. 10 of the *CA Act* and the court's own, broad, inherent jurisdiction to regulate charities was further described in this way:

> [39] ... the relief requested by these two applicants, who allege a breach of trust by the THS of its charitable purpose, must be considered by the court within its broad, historic jurisdiction to supervise the activities of a charitable corporation to ensure that they accord with its charitable purpose and to intervene if the charity is not administered in accordance with its purpose or if charitable funds are misapplied.[FN4]

85 I accept the applicants' submissions that both the court's broad, inherent jurisdiction and s. 10 of the *CA Act* allow this court to make any order that "is just" must include, without limitation, all of the powers described in s. 4 of the *CA Act*, such as the power to remove from a charity all or any of its property, the payment of such money or property into court, or into the hands of a new trustee, the removal of any trustee or director and the appointment of a substitute, the power to make orders as to how to deal with money and its disposal in order to best ensure that the intentions of donors and the purposes of the charity are respected.

86 In summary:

> (a) The *CAA* deems a charity to be a trustee and its directors to be fiduciaries for the implementation of a charity's objects and the management and disbursement of donations both in accordance with the directions of donors as well as the representations made by the charity to the public about how donations are sought and how they are to be used;
>
> (b) The *CAA* deems property received by a charity to be trust property;
>
> (c) The *CAA* provides a mechanism which allows anyone, including beneficiaries of a deemed trust under the *CAA*, or any other trust at law, to apply to the Superior Court of Justice to enforce the trust; and
>
> (d) The courts possesses an inherent jurisdiction to supervise charities as well the extremely broad powers conferred under the *CAA*, to make any order it considers to be just. This allows a court to wind up a charity, to remove from it all or any of its property, to remove and replace any of its officers or directors, to appoint substitute trustees and to provide any other appropriate relief.

Interpretation of Objects

87 Courts will apply well recognized rules of construction to assist in the interpretation of written documents. These rules are applicable to letters patent and are summarized in *Palmer's Company Law*[FN5] as follows:

> • The whole document must be read and considered.
>
> • The expressed intention is to have effect; we are not to speculate as to what the parties intended, but to ascertain it from the words used, for the expressed meaning is to be taken to indicate the intention.
>
> • The "golden rule" must be observed, namely, that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnance or inconsistency with the rest of the instrument, ...
>
> • Popular words are to be taken *prima facie* to be used in their popular sense, and technical words in their technical sense; but in each case the *prima facie* sense may be displayed or qualified by the context.
>
> • The words used must be read with reference to the subject-matter.
>
> • The *ejusdem generis* rule and the maxim *expressio unius est exclusio alterius* are also at times applicable.

88 As noted by the House of Lords in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*

(1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at p. 912, these rules of interpretation must now be read in light of the modern rules of construction. Under the modern approach, interpretation is the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the document was executed.

89 Modern principles of construction require the court to have regard for the background, the context of the document and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result. The Court of Appeal expressed agreement with this approach in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 at 363 (Ont. C.A.), holding that "the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance."

90 If there is any ambiguity in the Letters Patent, all of the surrounding circumstances, including the conduct of the parties themselves after the Foundation was incorporated, are admissible to derive the true meaning of the objects since "there is no better way of seeing what they intended, than seeing what they did under the agreement [objects] in dispute." [FN6]

VON Hamilton is the Exclusive Beneficiary under the Foundation's Corporate Objects

91 The Foundation's objects are repeated here:

> To receive and maintain a fund or funds and to apply from time to time all or part thereof and the income therefrom for such charitable or educational purposes related to patient and health care, of the Victorian Order of Nurses Hamilton-Dundas Branch or its successor or any other Branch of the Victorian Order of Nurses in Ontario, which, in the discretion of its Directors, needs assistance.

92 The applicants submit that the original object clause required the Foundation to make distributions of its corporate property to the Hamilton Branch or its successor, for its charitable or educational purposes related to patient and health care, or for any other VON Branch that the Foundation considered to be in need of assistance. The object clause did not authorize the Foundation to distribute its funds to any entity so long as their purposes were consistent with certain purposes of the VON. The PGT supports this interpretation of the object clause.

93 The Foundation submits that under its original objects, its corporate assets were beneficially held for particular *purposes* consistent with those of the VON, and that it was not obliged to make distributions to a VON entity as long as it applied its funds to those particular objects in the Hamilton area. The Foundation invites a comparison to the decision of Pitt J. in *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2002), 22 B.L.R. (3d) 182 (Ont. S.C.J.).

94 In that case, the directors of the then Bloorview Childrens Hospital had transferred its unrestricted funds ($10,000,000.00) to a foundation since they concluded that the good health of the hospital's balance sheet would be an impediment to their receipt of funds from the Ministry of Health. That foundation's objects were as follows:

> (1) Primarily, to apply the funds for the benefit of the patients of Bloorview Childrens Hospital, including capital expenditures;
>
> (2) Secondly,
>
> (i) to use the funds for the improvement of patient care or other charitable activities related to disabled

young persons carried on by hospitals or organizations or other persons, which are registered charities, elated to the health of disabled persons in Canada; and

(ii) to apply finds to the advancement of health care education including research related to disabled persons in Canada.

[Emphasis added.]

95 The main issue in that case was the ownership of the funds which the hospital now wanted to use in order to finance new construction. In reference to the objects clause, Justice Pitt noted that the focus was on the patients of the hospital and extended to disabled persons across Canada. The focus was not on the hospital. The object clauses in that case were much broader in scope than the narrow objects clause that is in issue here; one that makes specific reference to the charitable and educational programs of VON Hamilton-Wentworth. Moreover, that court did not have the mountain of evidence that has been put before me to establish how the parties themselves interpreted the charitable objects of the Foundation.

96 I agree with the position taken by the applicants and the PGT for the following reasons:

(a) The ordinary and grammatical meaning of the object clause. If the intention had been to authorize the Foundation to distribute its funds to any entity whose purposes were consistent with certain purposes of the VON, the object could have simply stated the particular VON objects, namely, for charitable or educational purposes related to patient and health care. There would have been no need to reference VON. Similarly, there would have been no need to authorize the Foundation to make distributions to other VON entities in need of assistance;

(b) The inclusion of "VON" in the original name of the Foundation;

(c) The voluminous representations in fundraising and solicitation material of the Foundation that donations shall be used for VON programs. A selection of these comprises an entire volume of documents. As recently as January 2008, Ms. Bursey as Chair of the Foundation published a giant "Thank You" in the *Hamilton Spectator* expressing the Foundation's appreciation for the community's support for VON programs. Many of the publicity items do not differentiate between the Foundation and the Branch; they simply refer to VON Hamilton. Where the Foundation is named in a fundraising announcement, there is usually a reference that proceeds from any fundraising will benefit only VON's charitable programs. The Foundation's letterhead uses the VON Canada trademark and lists the programs it funds; these are all VON programs and services;

(d) The Hamilton Branch was the source of the initial funding provided to the Foundation. The Foundation's own financial documents disclose an operating surplus in 1996 in excess of one million dollars. The Branch was the source of these funds as the Foundation had yet to commence its own fundraising;

(e) The dissolution clause of the Foundation states that it may dispose of its assets to VON purposes or to other organizations which carry on charitable or educational purposes related to patient and health care. This clearly states the Foundation's assets may be distributed to a non-VON entity. If the Foundation's object clause was intended to be as broad, then the same or similar wording could have been used in the object clause;

(f) By 1999, the Branch and Foundation had developed a Statement of Operating Principles described in the 2000 revision of the Branch's Bylaw as follows:

> As outlined in the Statement of Operating Principles adopted between the Branch and the Foundation, the Foundation exists to provide resources to the corporation to assist it in meeting its mission, vision and obligations to the community as established by the Branch Board of Directors. Provision for representation on each other's Board also shall be made in the By-laws of both the corporation and the Foundation to facilitate this partnership and to enhance communication.

(g) When the Foundation amended its Letters Patent, its corporate Minutes of November 25, 2008 constitute an admission that the applicants' interpretation is correct:

> The current letters patent state that all funds must flow back to VON in Ontario for charitable or educational purposes (patient and health care).They need to be changed to reflect the ability to disburse to other organizations as long as it is related to patient and health care.

(h) Historically, the Foundation only provided funding to VON entities; until the events leading to this application, the Foundation has never funded or considered funding any other organization;

(i) The Letters Patent of the Foundation granted the Hamilton Branch or its successor, a veto power over whom may be elected as a director of the Foundation. (While there may be a question about the legal validity of this provision, it nonetheless indicates that the intention of parties at the time of incorporation was to enable the Hamilton Branch to control the Foundation's Board);

(j) The financial statements of the Foundation and the Annual Information Returns of the Foundation filed with the Canada Revenue Agency and in Minutes the Foundation Directors disclose:

(a) Its Financial Statements from 1989 to 2000 said:

> The Victorian Order of Nurses, Hamilton-Wentworth Foundation was incorporated on December 8, 1981 to receive and maintain funds for charitable or educational purposes related to patient and health care of the Victorian Order of Nurses, Hamilton-Wentworth Branch.

(b) In 2003 the Foundation added the additional following text to its Financial Statements:

> During the year, the Victorian Order of Nurses Hamilton-Wentworth Branch transferred its operations to Victorian Order of Nurses Canada Ontario Branch — Hamilton ("the Branch").
>
> **This statement acknowledged VON Hamilton as the successor to the Hamilton Branch. The Foundation's Financial Statements maintained the same statement until 2007.**
>
> [emphasis added.]

(c) In 2007 the Foundation's Financial Statement said:

> Victorian Order of Nurses Hamilton Foundation (the Foundation) was incorporated December 8, 1981 to receive and maintain funds for the charitable purposes of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(d) In 2008 the Foundation's Financial Statements declared:

> VON South Central Ontario Foundation (formerly Victorian Order of Nurses Hamilton Foundation), the

Foundation, was incorporated December 8, 1981 to receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the Victorian Order of Nurses Canada — Hamilton Site (the Hamilton Site), to be used solely in Hamilton.

(e) Tax returns of the Foundation for the years 2000 to 2003 declared:

The purpose of the foundation is to fundraise for specific programs of the Victorian Order of Nurses — Hamilton-Wentworth branch.

(f) From 2004 to 2006 the Foundation's Tax Returns declared:

Provides funds for specific programs of the Victorian Order of Nurses Hamilton branch.

(g) The Foundation's 2007 Tax Returns stated:

Provides funds for specific programs of the Victorian Order of Nurses Canada — Ontario to be used solely in Hamilton.

(h) In 2008 the Foundation's Tax Returns declared;

Provides funds for specific programs of the Victorian Order of Nurses Canada — Hamilton site.

(i) The Foundation's 2009 Tax Return stated:

Receive and maintain funds for the charitable and educational purposes related to patient and healthcare of the VON Ontario Ltd. — Hamilton or any other branch/site of the VON Ontario Ltd.

(j) VON Hamilton Branch began reporting in its Financial Statements that it "controlled" the assets of the Foundation from 1998 to 2002. The Minutes of the Foundations Annual General Meeting of June 17, 1998 refer to the "controlling relationship that exists between the Branch and the Foundation."

(k) The close relationship between the Foundation and the Hamilton Branch prior to the restructuring, in which the Branch and the Foundation shared office space at the same location. Representatives of the Branch were active participants in the meetings of Foundation Directors. The presentation of Branch budgets and Foundation funding decisions were traditionally made during the course of a single meeting of the Foundation's Directors.

97 I am satisfied that a proper interpretation of the Foundation's corporate objects in its Letters Patent made VON Hamilton Branch and its successor VON Ontario the exclusive beneficiary of the Foundation's fundraising activities. I am further satisfied that VON Ontario is the Branch's successor. Both the Foundation and VON Hamilton conducted themselves for nearly 20 years on the basis of shared assumptions of law and the fact that VON Hamilton was the exclusive beneficiary of the Foundation's fundraising activities.

Transfer of 400 Victoria

98 While VON Ontario relies on the Interpretation of the Objects clause as set out above to claim its beneficial entitlement to the premises at 400 Victoria, VON Ontario further submits that title to 400 Victoria should revert to it on the basis of the doctrines of Resulting Trust and of Conditional Gifts.

99 Historically, the Hamilton Branch owned two buildings situated side by sided at 400 and 414 Victoria in the City of Hamilton. 414 Victoria was sold in the late 1990s in exchange for 10 years of rent-free occupation. That building houses the management and administrative offices of VON Ontario. From the time the Foundation began its fundraising operations on behalf of the Hamilton Branch, it shared offices with the Branch at 414 Victoria. During the restructuring, the Foundation's continued use of the space was formalized through the Purchased Services Agreement.

100 The 400 Victoria Avenue building was acquired by the Branch in 1986. This was before the Foundation began its fundraising activities. It has always been used for the Adult Day Care Program. It is acknowledged that in excess of $750,000 of funds that were held by VON Ontario as deferred revenues were used to fund renovations to 400 Victoria Avenue. While Ms. Bursey claims that the Foundation pressured VON Ontario to release these funds, the possibility of using these funds for the renovation of the building had been an item of discussion of the Branch and the Foundation since late 2002.[FN7] In accordance with the Memo of Intent, the 400 Victoria Avenue Building was transferred to the Foundation on June 4, 2007 for the nominal consideration of $1.00. The affidavit of Land Transfer Tax describes the transaction as a "gift".

101 The applicants submit that 400 Victoria Avenue was to be gifted to the Foundation in accordance with the Memo of Intent on two conditions. The first, a condition precedent, was that the Foundation would enact a new Bylaw to be approved by VON Canada to clarify its role and to assure that the proceeds from its fundraising are used to support programs in the Hamilton community delivered by VON Hamilton. The second, a condition subsequent, was that VON Hamilton would continue to occupy the premises at 400 Victoria Avenue rent-free.

Conditional Gifts

102 Gifts of money or property, including land can be made subject to conditions. In this regard, there are two kinds of conditions: conditions precedent and conditions subsequent. The operation of these conditions and what they mean has been described as follows:

> A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but if a condition subsequent is void, the gift remains good.[FN8]

103 It has been held that if a condition precedent is not satisfied, the gift fails. It must then be returned to the party with original title. Similarly, where a condition subsequent is unsatisfied, a gift fails and the property reverts to the original owner.[FN9]

104 In this case, the Memorandum of Intent reveals that the transfer of VON Hamilton's real property was made subject to a condition precedent, that the Foundation amend its bylaws in a certain way and a condition subsequent, that it provide rent-free occupancy of the real property.

105 The Foundation breached both conditions. While the Foundation commenced the process of bylaw amendment by enacting ByLaw No. 1, it refused to further re-align its ByLaw to meet VON Canada's guidelines. The Foundation then demanded the VON Ontario pay rent for the ADC site. The real property must therefore revert to the Branch's successor, VON Hamilton.

Resulting Trust

106 Equity recognizes and reinforces the distinction between legal and beneficial ownership of property. The benefi-

cial owner of property has been described as "the real owner of property even if it is in someone else's name".[FN10]

107 A resulting trust arises when title to the property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. This is because "equity does not assume gifts."[FN11]

108 As discussed by the Supreme Court of Canada in *Pecore v. Pecore* at pp. 806 — 807:

> Whenever A transfers property gratuitously into the hands of B, a legal presumption of a resulting trust arises. This will allocate the legal burden of proof to the transferee to demonstrate that a gift was intended. This presumption, therefore, alters the general practice and places the onus on the transferee to rebut the presumption that a resulting trust was intended and has been established.
>
> The court went on to hold at pp. 813-814 that:
>
> Rebutting the presumption of a resulting trust requires the transferee to tender specific evidence establishing that a full, unrestricted gift was intended. That evidence must meet the civil standard of proof on a balance of probabilities in order to defeat the presumption.

109 The Foundation has failed to tender any admissible evidence on this issue. Ms. Bursey relies on another hearsay e-mail document between Janis North, a former Executive Director, to herself dated January 18, 2008 and a self-serving exchange between Ms. Edrupt and VON Canada to argue the intention of the parties. In short, the respondent's sole argument is that the transfer documents specify that the transfer of 400 Victoria was made on the basis of a gift and that no other evidence is admissible. This fails to fails to address the equitable arguments in issue.

110 As a result of the Foundation's agreement to amend its bylaws and provide VON Hamilton with rent-free occupancy, VON Hamilton transferred its real property to its sister Foundation for nominal consideration. The Foundation has failed to meet the legal burden of proof to establish that an outright gift was intended and, as such, it holds the real property pursuant to a resulting trust and must return it to the Branch's successor VON Hamilton.

Issue 3: Has the Foundation breached its fiduciary and/or trust obligations to VON Hamilton and, if so, what is the appropriate remedy?

111 The Foundation submits that following the restructuring of VON branches:

(i) Funds distributed by the Foundation to the VON Ontario were reportedly improperly accumulated;

(ii) A portion of funds paid by VON Ontario to VON Canada were reportedly diverted to fund restructuring costs of VON Canada;

(iii) The Foundation was unable to meet its disbursement *quota* in 2009, as required by provisions of the *Income Tax Act* (Canada) in force at that time;

(iv) VON Canada's request that the Foundation to amend its Letters Patent was incompatible with the Directors fiduciary responsibilities to its donors by removing its exercise of discretion over funds;

(v) The Foundation had concerns about VON Canada's solvency; and

(vi) The Foundation purportedly found it necessary to amend its object clause by Supplementary Letters Patent dated

May 1, 2009, to clarify that it was indeed authorized to make distributions to non-VON entities.

112 The PGT submits that it must have become impossible or impracticable for an incorporated charity to carry out the originally intended objects for it to amend its objects with a significant departure from their original intent. I accept that submission and I agree that no significance can be attached to the fact that its office administratively approved the Supplementary Letters Patent in error. That approval did not confer authority on the Foundation that it itself did not possess.

113 In this case, there is no convincing evidence that the Foundation's property was not being used by VON entities to benefit patients and health care in Hamilton or that the Foundation's funds were being used to pay VON Canada's restructuring cost, or that VON Canada is insolvent. While the Foundation purportedly may have been unable to meet its disbursement *quota* in 2009, it had the option of distributing its funds to other VON entities to meet its disbursement *quota*, or to ask for a waiver for that year from Canada Revenue Agency. In any event, the relevant part of the disbursement *quota* was repealed in March 2010 thereby making this issue moot.

114 The Foundation's concerns about the requested changes to its Letters Patent are without any merit. The original Letters Patent did not provide for any exercise of discretion with respect to funding the local Branch. The Foundation's own policies and guidelines do not provide for the exercise of any discretion. In the nearly 20 years of funding programs, Ms. Bursey cannot indentify a single instance of any such exercise of discretion. The Branch requested funds by submitting a memo or a budget and the Foundation transferred the funds. In contrast, the proposed objects clause would have given the Foundation the opportunity to select the charitable programs to be funded; thereby conferring even more discretion than it previously had.

115 The Foundations' concern about the threats to its fiduciary responsibilities is somewhat ironic. I am satisfied from a review of Ms. Bursey's affidavit and its references to "a money grab" and "orchestration of the removal of funds" that the Foundation held an unfounded belief that local funds were going to be absorbed into VON Canada's overhead and restructuring costs. As a result, the Foundation's Directors manufactured a breakdown of the relationship and resorted to the rarely sanctioned strategy of "self-help" in removing the Foundation's assets from VON. In doing so, they breached their fiduciary responsibilities to VON Hamilton and the Foundation's historic donors. Had the Foundation held genuine concerns about the impact of VON's reorganization on its charitable assets, it could have sought the assistance of the PGT and sought the remedies available under the *CA Act.*

116 There was no basis upon which the Foundation could apply its expanded objects to its corporate funds already on hand. In the result, corporate property held by the Foundation as of December 15, 2009 continues to be held beneficially for the Foundation's original objects together with all of the income therefrom.

117 I accept the submissions of the applicants that the following constitutes a long list of the Foundation's breaches of its fiduciary and trust obligations to VON Ontario:

(a) Its failure to adhere to the commitments made in the September 11, 2003 Memo of Intent;

(b) Its failure to abide with the bylaw enactment and rent-free conditions of the gift to it of the lands and building at 400 Victoria Avenue, Hamilton;

(c) Its arbitrary and abrupt termination of the Purchased Services Agreement, including a failure to pay significant sums of money owing thereunder for a lengthy period of time;

(d) Its sudden after hours departure from 414 Victoria Avenue, Hamilton, including the removal of files without notice;

(e) Its exclusion of VON Hamilton representatives from Foundation Board meetings;

(f) Its refusal to execute an Association Agreement reflecting the commitments it made in the September 11, 2003 Memo of Intent;

(g) Its unilateral broadening of its corporate objects to enable it to support charities other than VON Ontario with funds raised under the VON banner and trademarks;

(h) Its adoption of stringent funding criteria and the subsequent refusals to advance funds requested by VON Ontario;

(i) Its refusal to deliver the VON Hamilton donors list;

(j) Its continuing demands for a lease from VON Hamilton without the provision of off-setting funding;

(k) Its refusal to consent to a minor zoning variance pertaining to the ADC Centre at 400 Victoria unless VON Ontario signed a lease. This would have allowed VON to increase the capacity of the Overnight Respite program from four to six beds. The Foundation only agreed to this when the court suggested that it could do so on a without prejudice basis;

(l) The continued allegations of wrongdoing and misappropriation by Ms. Bursey in her affidavit material;

(m) The Foundation continues to use the "break open ticket" funding mechanism;

(n) Despite acknowledging in its Financial Statements that VON Ontario is the successor to the Branch and despite my order prohibiting the Foundation from continuing to act on the basis that it is a VON entity, the Foundation's solicitors wrote to the Executors of the Stanley Mills Memorial Fund claiming that the Foundation is the successor to the Branch.

The Appropriate Remedy

118 Relying on this Court's broad inherent equitable jurisdiction in charitable matters to make such transfers, I am of the view that a clean break must be accomplished by requiring the Foundation to transfer all of its assets as at December 15, 2009 to another entity in trust for its Hamilton site. In anticipation of such a ruling, the respondent allowed that it would not object to the transfer of the assets to a new appointee or fiduciary subject to judicial supervision. The applicants themselves suggested this possibility in supplemental submissions.

119 In final argument, both the applicants and the PGT submit that the assets should be transferred to VON Ontario in trust to be used in accordance with the Foundation's original objects. This does appear to be the most appropriate recourse. I have concluded that VON Ontario is the legal successor to the Branch. There is no evidence that VON Ontario has acted inappropriately at any time. Adding another party at this stage would cause further delay and add administrative costs which will further deplete the resources that can be made available to the community.

120 Relying on this court's broad inherent equitable jurisdiction in charitable matters I therefore order as follows:

(i) The Foundation will transfer to VON Ontario in trust for the Foundation's charitable objects all of its corporate

property as at December 15, 2009, including land and buildings and any accumulated interest and investment income thereon, less any funds that may have been transferred to VON funds in response to its funding requests and any amounts properly authorized to be deducted as administrative and overhead costs. I understand that the parties agree that the amount held by the Foundation as of December 15, 2009 was $1,470,670.60. It is also acknowledged by the applicants that the Foundation made two payments to VON Hamilton in the amount of $97,253.00 on March 31, 2010 and a second payment of $30, 281.00 on March 31, 2011. If the parties cannot agree on the allowable administrative and overhead costs, they are to make additional submissions in writing within 20 days of the release of this decision.

(ii) VON Ontario shall not dispose of any real property without court approval sought on notice to the PGT.

(iii) The Foundation will immediately transfer to VON Ontario its donors list as it existed as at December 15, 2009.

(iv) The Nevada license should be amended to show the holder is the Greater Hamilton Wellness Foundation and any reference to VON should be deleted. The Foundation shall account for any proceeds from their use of the "break open tickets" and transfer to VON Ontario all funds received until such time as the license has been amended;

(v) The current asset preservation order continues in effect until all documents necessary to give effect to the judgment have been executed. Any remaining funds should stay with the Foundation.

121 Unless there are any further submissions with regard to paragraph 120(i) above, the applicants are to make their written submissions as to costs within 20 days of the release of this decision, The Respondent is to make its submissions within a further period of 20 days and the applicants will have a further 10 days to deliver reply submissions if they so choose.

Application granted.

FN* Additional reasons at *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011), 2011 ONSC 6801, 2011 CarswellOnt 12731, 75 E.T.R. (3d) 207 (Ont. S.C.J.).

FN1 Minutes of Meetings of Foundation Directors January 11, 2005.

FN2 *at para 26*

FN3 *Weinberg et al v the Grey Bruce Humane Society et al.* (1999) (Ont. G.D.) unreported.

FN4 *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society* (2010), 100 O.R. (3d) 340 (Ont. S.C.J.) at para. 39.

FN5 C. Schmitthoff, *Palmer's Company Law*, vol. 1, 25th ed., (London: Sweet & Maxwell, 1995) at p. 2126, para. 2.607.

FN6 *Hoefle v. Bongard & Co.*, [1945] S.C.R. 360 (S.C.C.) at p. 377; *Johnson v. Crocker*, [1954] 2 D.L.R. 70 (Ont. C.A.); and *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 (S.C.C.) at p. 307.

FN7 Minutes of Foundation Directors meeting on September 18, 2002, Item 6.0.

FN8 *Halsbury's Laws of England, supra*, at para. 50, p. 33

FN9 *Women's Christian Assn. of London v. McCormick Estate* (1989), 34 E.T.R. 216 (Ont. H.C.); *Schilthuis v. Arnold* (1996), 95 O.A.C. 196 (Ont. C.A.) at p. 197

FN10 *Pecore v. Pecore*, [2007] 1 S.C.R. 795 (S.C.C.), at pp. 805-806. Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) pp 362-368.

FN11 *Waters' Law of Trusts in Canada, supra, at pp. 363.*

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TAB 7

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

INDEXED AS: ATCO GAS AND PIPELINES LTD. *v.* ALBERTA (ENERGY AND UTILITIES BOARD)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

RÉPERTORIÉ : ATCO GAS AND PIPELINES LTD. *c.* ALBERTA (ENERGY AND UTILITIES BOARD)

Référence neutre : 2006 CSC 4.

N° du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

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

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

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

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

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

LE JUGE BASTARACHE —

1. Introduction

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

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

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

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

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

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

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

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

Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

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

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

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

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

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

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

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

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

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

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