EB-2017-0022
EB-2017-0223

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

AND IN THE MATTER OF two Notices of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Active Energy Inc. (Retailer Licence No. ER-2012-0045).

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Indexed as:

ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)

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.

[2006] 1 S.C.R. 140

[2006] 1 R.C.S. 140

[2006] S.C.J. No. 4

[2006] A.C.S. no 4

2006 SCC 4

File No.: 30247.

Supreme Court of Canada

Heard: May 11, 2005;
Judgment: February 9, 2006.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

(149 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

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 [page141] of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers -- Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale -- 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).

Summary:

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of [page142] review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [paras. 21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [para. 7] [para. 41] [para. 43] [para. 46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, [page143] the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price -- nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic

benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [paras. 54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [para. 39] [paras. 77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded [page144] that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [paras. 82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting) : The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's discretion is not unlimited and must be exercised in good faith for its intended purpose. Here, in allocating one third of the net gain to ATCO and two thirds to the rate base, the Board explained that it was proper to balance the interests of both shareholders and ratepayers. In the Board's view to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs, but on the other hand to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business. Although it was open

to the Board to allow ATCO's application for the entire profit, the solution it adopted in this case is well within the range of reasonable options. The "public interest" is largely and inherently a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, Alberta's grant of authority to its Board is more generous than most. The Court should not substitute its own view of what is "necessary in the public interest". The Board's decision made in the exercise of its jurisdiction was within the range of established regulatory opinion, whether the proper standard of review in that regard is patent unreasonableness or simple reasonableness. [paras. 91-92] [paras. 98-99] [para. 110] [para. 113] [para. 122] [para. 148]

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ATCO's submission that an allocation of profit to the customers would amount to a confiscation of the corporation's property overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the ratepayers carry the costs and the regulator sets the return on investment, not the marketplace. The Board's response cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what is regarded in comparable jurisdictions as an appropriate regulatory allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. Similarly, ATCO's argument that the Board engaged in impermissible retroactive rate making should not be accepted. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective not retroactive. Fixing the going-forward rate of return, as well as general supervision of "all gas utilities, and the owners of them", were matters squarely within the Board's statutory mandate. ATCO also submits in its cross-appeal that the Court of Appeal erred in drawing a distinction between gains on sale of land whose original cost is not depreciated and depreciated property, such as buildings. A review of regulatory practice shows that many, but not all, regulators reject the relevance of this distinction. The point is not that the regulator must reject any such distinction but, rather, that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. Finally, ATCO's contention that it alone is burdened with the risk on land that declines in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its original investment, even if the market value at the time is substantially less than its original investment. Further, it seems such losses are taken into account in the ongoing rate-setting process. [para. 93] [paras. 123-147]

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By Bastarache J.

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Citizenship and Immigration), [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, aff'd [1977] 2 S.C.R. 822; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL); *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 ; *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945); *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, March 23, 1987; *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349 [page147]; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167.

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (Wittmann J.A. and LoVecchio J. (*ad hoc*)) (2004), 24 Alta. L.R. (4th) 205, 339 A.R. 250, 312 W.A.C. 250, [2004] 4 W.W.R. 239, [2004] A.J. No. 45 (QL), 2004 ABCA 3, reversing a decision of the Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Appeal dismissed and cross-appeal allowed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

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Written submissions only by J. L. McDougall, Q.C., and Michael D. Schafler, for the intervener Enbridge Gas Distribution Inc.

Written submissions only by Michael A. Penny and Susan Kushneryk, for the intervener Union Gas Limited.

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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 [page151] 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).

4 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 [page152] assets it owns: it must obtain authorization from its regulator before selling an asset previously used to produce regulated services (see MacAvoy and Sidak, at p. 234).

5 Against this backdrop, the Court is being asked to determine whether the Board has jurisdiction pursuant to its enabling statutes to allocate a portion of the net gain on the sale of a now discarded utility asset to the rate-paying customers of the utility when approving the sale. Subsequently, if this first question is answered affirmatively, the Court must consider whether the Board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction: was it allowed, in the circumstances of this case, to allocate a portion of the net gain on the sale of the utility to the rate-paying customers?

6 The customers' interests are represented in this case by the City of Calgary ("City") which argues that the Board can determine how to allocate the proceeds pursuant to its power to approve the sale and protect the public interest. I find this position unconvincing.

7 The interpretation of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), the *Public Utilities Board Act*, R.S.A. 2000, c. P-45 ("PUBA"), and the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA") (see Appendix for the relevant provisions of these three statutes), can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.

[page153]

1.1 *Overview of the Facts*

8 ATCO Gas - South ("AGS"), which is a division of ATCO Gas and Pipelines Ltd. ("ATCO"), filed an application by letter with the Board pursuant to s. 25.1(2) (now s. 26(2)) of the GUA, for approval of the sale of its properties located in Calgary known as Calgary Stores Block (the "property"). The property consisted of land and buildings; however, the main value was in the land, and the purchaser intended to and did eventually demolish the buildings and redevelop the land.

According to AGS, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to customers. In fact, AGS suggested that the sale would result in cost savings to customers, by allowing the net book value of the property to be retired and withdrawn from the rate base, thereby reducing rates. ATCO requested that the Board approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize the balance of the profits resulting from the sale of the plant should be paid to shareholders. The Board dealt with the application in writing, without witnesses or an oral hearing. Other parties making written submissions to the Board were the City of Calgary, the Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. and the Municipal Interveners , who all opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

1.2 *Judicial History*

1.2.1

Alberta Energy and Utilities Board

1.2.1.1

Decision 2001-78

9 In a first decision, which considered ATCO's application to approve the sale of the property, the Board employed a "no-harm" test, assessing the potential impact on both rates and the level of service to customers and the prudence of the sale transaction, taking into account the purchaser and tender or sale process followed . The Board was of the view that the test had been satisfied. It was [page154] persuaded that customers would not be harmed by the sale, given that a prudent lease arrangement to replace the sold facility had been concluded. The Board was satisfied that there would not be a negative impact on customers' rates, at least during the five-year initial term of the lease. In fact, the Board concluded that there would be cost savings to the customers and that there would be no impact on the level of service to customers as a result of the sale. It did not make a finding on the specific impact on future operating costs; for example, it did not consider the costs of the lease arrangement entered into by ATCO. The Board noted that those costs could be reviewed by the Board in a future general rate application brought by interested parties.

1.2.1.2 *Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL)*

10 In a second decision, the Board determined the allocation of net sale proceeds. It reviewed the regulatory policy and general principles which affected the decision, although no specific matters are enumerated for consideration in the applicable legislative provisions. The Board had previously developed a "no-harm" test, and it reviewed the rationale for the test as summarized in its Decision 2001-65 (*Re ATCO Gas-North*): "The Board considers that its power to mitigate or offset potential harm to customers by allocating part or all of the sale proceeds to them, flows from its very broad

mandate to protect consumers in the public interest" (p. 16).

11 The Board went on to discuss the implications of the Alberta Court of Appeal decision in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, referring to various decisions it had rendered in the past. Quoting from its Decision 2000-41 (*Re TransAlta Utilities Corp.*), the Board summarized the "*TransAlta Formula*":

> In subsequent decisions, the Board has interpreted the Court of Appeal's conclusion to mean that where the sale price exceeds the original cost of the assets, shareholders are entitled to net book value (in historical dollars), customers are entitled to the difference between [page155] net book value and original cost, and any appreciation in the value of the assets (i.e. the difference between original cost and the sale price) is to be shared by shareholders and customers. The amount to be shared by each is determined by multiplying the ratio of sale price/original cost to the net book value (for shareholders) and the difference between original cost and net book value (for customers). However, where the sale price does not exceed original cost, customers are entitled to all of the gain on sale. [para. 27]

The Board also referred to Decision 2001-65, where it had clarified the following:

> In the Board's view, if the TransAlta Formula yields a result greater than the no-harm amount, customers are entitled to the greater amount. If the TransAlta Formula yields a result less than the no-harm amount, customers are entitled to the no-harm amount. In the Board's view, this approach is consistent with its historical application of the TransAlta Formula. [para. 28]

12 On the issue of its jurisdiction to allocate the net proceeds of a sale, the Board in the present case stated:

> The fact that a regulated utility must seek Board approval before disposing of its assets is sufficient indication of the limitations placed by the legislature on the property rights of a utility. In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> Regarding AGS's argument that allocating more than the no-harm amount to customers would amount to retrospective ratemaking, the Board again notes the decision in the TransAlta Appeal. The Court of Appeal accepted that the Board could include in the definition of "revenue" an amount payable to customers representing excess depreciation paid by them through past rates. In

> the Board's view, no question of retrospective ratemaking arises in cases where previously regulated rate base assets are being disposed of out of rate base and the Board applies the TransAlta Formula.

[page156]

> The Board is not persuaded by the Company's argument that the Stores Block assets are now 'non-utility' by virtue of being 'no longer required for utility service'. The Board notes that the assets could still be providing service to regulated customers. In fact, the services formerly provided by the Stores Block assets continue to be required, but will be provided from existing and newly leased facilities. Furthermore, the Board notes that even when an asset and the associated service it was providing to customers is no longer required the Board has previously allocated more than the no-harm amount to customers where proceeds have exceeded the original cost of the asset. [paras. 47-49]

13 The Board went on to apply the no-harm test to the present facts. It noted that in its decision on the application for the approval of the sale, it had already considered the no-harm test to be satisfied. However, in that first decision, it had not made a finding with respect to the specific impact on future operating costs, including the particular lease arrangement being entered into by ATCO.

14 The Board then reviewed the submissions with respect to the allocation of the net gain and rejected the submission that if the new owner had no use of the buildings on the land, this should affect the allocation of net proceeds. The Board held that the buildings did have some present value but did not find it necessary to fix a specific value. The Board recognized and confirmed that the *TransAlta Formula* was one whereby the "windfall" realized when the proceeds of sale exceed the original cost could be shared between customers and shareholders. It held that it should apply the formula in this case and that it would consider the gain on the transaction as a whole, not distinguishing between the proceeds allocated to land separately from the proceeds allocated to buildings.

15 With respect to allocation of the gain between customers and shareholders of ATCO, the Board tried to balance the interests of both the customers' desire for safe reliable service at a reasonable cost with the provision of a fair return on the investment made by the company:

[page157]

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred. [paras. 112-13]

16 The Board went on to conclude that the sharing of the net gain on the sale of the land and buildings collectively, in accordance with the *TransAlta Formula*, was equitable in the circumstances of this application and was consistent with past Board decisions.

17 The Board determined that from the gross proceeds of $6,550,000, ATCO should receive $465,000 to cover the cost of disposition ($265,000) and the provision for environmental remediation ($200,000), the shareholders should receive $2,014,690, and $4,070,310 should go to the customers. Of the amount credited to shareholders, $225,245 was to be used to remove the remaining net book value of the property from ATCO's accounts. Of the amount allocated to customers, $3,045,813 was allocated to ATCO Gas - South customers and $1,024,497 to ATCO Pipelines - South customers.

1.2.2 Court of Appeal of Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO appealed the Board's decision. It argued that the Board did not have any jurisdiction to allocate the proceeds of sale and that the proceeds should have been allocated entirely to the shareholders. In its view, allowing customers to share in the proceeds of sale would result in them benefiting twice, since they had been spared the costs of renovating the sold assets and would enjoy cost savings from the lease arrangements. The Court of Appeal of Alberta agreed with ATCO, allowing the appeal and setting aside the Board's decision. The [page158] matter was referred back to the Board, and the Board was directed to allocate the entire amount appearing in Line 11 of the allocation of proceeds, entitled "Remainder to be Shared" to ATCO. For the reasons that follow, the Court of Appeal's decision should be upheld, in part; it did not err when it held that the Board did not have the jurisdiction to allocate the proceeds of the sale to ratepayers.

2. Analysis

2.1 *Issues*

19 There is an appeal and a cross-appeal in this case: an appeal by the City in which it submits that, contrary to the Court of Appeal's decision, the Board had jurisdiction to allocate a portion of

the net gain on the sale of a utility asset to the rate-paying customers, even where no harm to the public was found at the time the Board approved the sale, and a cross-appeal by ATCO in which it questions the Board's jurisdiction to allocate any of ATCO's proceeds from the sale to customers. In particular, ATCO contends that the Board has no jurisdiction to make an allocation to rate-paying customers, equivalent to the accumulated depreciation calculated for prior years. No matter how the issue is framed, it is evident that the crux of this appeal lies in whether the Board has the jurisdiction to distribute the gain on the sale of a utility company's asset.

20 Given my conclusion on this issue, it is not necessary for me to consider whether the Board's allocation of the proceeds in this case was reasonable. Nevertheless, as I note at para. 82, I will direct my attention briefly to the question of the exercise of discretion in view of my colleague's reasons.

2.2 *Standard of Review*

21 As this appeal stems from an administrative body's decision, it is necessary to determine the appropriate level of deference which must be shown to the body. Wittmann J.A., writing for the Court of Appeal, concluded that the issue of jurisdiction of the Board attracted a standard of correctness. ATCO concurs with this conclusion. I agree. No deference should be shown for the Board's [page159] decision with regard to its jurisdiction on the allocation of the net gain on sale of assets. An inquiry into the factors enunciated by this Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, confirms this conclusion, as does the reasoning in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19.

22 Although it is not necessary to conduct a full analysis of the standard of review in this case, I will address the issue briefly in light of the fact that Binnie J. deals with the exercise of discretion in his reasons for judgment. The four factors that need to be canvassed in order to determine the appropriate standard of review of an administrative tribunal decision are: (1) the existence of a privative clause; (2) the expertise of the tribunal/board; (3) the purpose of the governing legislation and the particular provisions; and (4) the nature of the problem (*Pushpanathan*, at paras. 29-38).

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

24 First, s. 26(1) of the AEUBA grants a right of appeal, but in a limited way. Appeals are allowed on a question of jurisdiction or law and only after leave to appeal is obtained from a judge:

> **26(1)** Subject to subsection (2), an appeal lies from the Board to the Court of Appeal on a question of jurisdiction or on a question of law.

> **(2)** Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made
>
> (a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
> (b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

[page160]

In addition, the AEUBA includes a privative clause which states that every action, order, ruling or decision of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court (s. 27).

25 The presence of a statutory right of appeal on questions of jurisdiction and law suggests a more searching standard of review and less deference to the Board on those questions (see *Pushpanathan*, at para. 30). However, the presence of the privative clause and right to appeal are not decisive, and one must proceed with the examination of the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

26 Second, as observed by the Court of Appeal, no one disputes the fact that the Board is a specialized body with a high level of expertise regarding Alberta's energy resources and utilities (see, e.g., *Consumers' Gas Co. v. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (Div. Ct.), at para. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant v. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), at para. 14. In fact, the Board is a permanent tribunal with a long-term regulatory relationship with the regulated utilities.

27 Nevertheless, the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference. As I will elaborate below, the expertise of the Board is not engaged when deciding the scope of its powers.

[page161]

28 Third, the present case is governed by three pieces of legislation: the PUBA, the GUA and the

AEUBA. These statutes give the Board a mandate to safeguard the public interest in the nature and quality of the service provided to the community by public utilities: *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576; *Dome Petroleum Ltd. v. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), at paras. 20-22, aff'd [1977] 2 S.C.R. 822. The legislative framework at hand has as its main purpose the proper regulation of a gas utility in the public interest, more specifically the regulation of a monopoly in the public interest with its primary tool being rate setting, as I will explain later.

29 The particular provision at issue, s. 26(2)(d)(i) of the GUA, which requires a utility to obtain the approval of the regulator before it sells an asset, serves to protect the customers from adverse results brought about by any of the utility's transactions by ensuring that the economic benefits to customers are enhanced (MacAvoy and Sidak, at pp. 234-36).

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

[page162]

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. The second question is whether the method and actual

allocation in this case were reasonable. To resolve this issue, one must consider case law, policy justifications and the practice of other boards, as well as the details of the particular allocation in this case. The issue here is most likely characterized as one of mixed fact and law.

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" [page163] (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

> ... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

33 The second question regarding the Board's actual method used for the allocation of proceeds likely attracts a more deferential standard. On the one hand, the Board's expertise, particularly in this area, its broad mandate, the technical nature of the question and the general purposes of the legislation, all suggest a relatively high level of deference to the Board's decision. On the other hand, the absence of a privative clause on questions of jurisdiction and the reference to law needed to answer this question all suggest a less deferential standard of review which favours reasonableness. It is not necessary, however, for me to determine which specific standard would have applied here.

34 As will be shown in the analysis below, I am of the view that the Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate *any* portion of the proceeds of sale of the property to ratepayers.

2.3 *Was the Board's Decision as to Its Jurisdiction Correct?*

35 Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they [page164] must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority": Mullan, at pp. 9-10 (see also S. Blake, *Administrative Law in Canada* (3rd ed. 2001), at pp. 183-84).

36 In order to determine whether the Board's decision that it had the jurisdiction to allocate

proceeds from the sale of a utility's asset was correct, I am required to interpret the legislative framework by which the Board derives its powers and actions.

2.3.1 General Principles of Statutory Interpretation

37 For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation (*Construction of Statutes* (2nd ed. 1983), at p. 87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 186-87; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 54; *Barrie Public Utilities*, at paras. 20 and 86; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63, at para. 19.)

38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers) (see also D. M. Brown, *Energy Regulation in Ontario* (loose-leaf ed.), at p. 2-15).

39 The City submits that it is both implicit and explicit within the express jurisdiction [page165] that has been conferred upon the Board to approve or refuse to approve the sale of utility assets, that the Board can determine how to allocate the proceeds of the sale in this case. ATCO retorts that not only is such a power absent from the explicit language of the legislation, but it cannot be "implied" from the statutory regime as necessarily incidental to the explicit powers. I agree with ATCO's submissions and will elaborate in this regard.

2.3.2 Explicit Powers: Grammatical and Ordinary Meaning

40 As a preliminary submission, the City argues that given that ATCO applied to the Board for approval of both the sale transaction *and* the disposition of the proceeds of sale, this suggests that ATCO recognized that the Board has authority to allocate the proceeds as a condition of a proposed sale. This argument does not hold any weight in my view. First, the application for approval cannot be considered on its own an admission by ATCO of the jurisdiction of the Board. In any event, an admission of this nature would not have any bearing on the applicable law. Moreover, knowing that in the past the Board had decided that it had jurisdiction to allocate the proceeds of a sale of assets and had acted on this power, one can assume that ATCO was asking for the approval of the disposition of the proceeds should the Board not accept their argument on jurisdiction. In fact, a

review of past Board decisions on the approval of sales shows that utility companies have constantly challenged the Board's jurisdiction to allocate the net gain on the sale of assets (see, e.g., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *TransAlta Utilities Corp. (Re)*, [2002] A.E.U.B.D. No. 30 (QL); *ATCO Electric Ltd. (Re)*, [2003] A.E.U.B.D. No. 92 (QL)).

41 The starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute, s. 26(2)(d)(i) of the GUA, ss. 15(1) and 15(3)(d) of the AEUBA and [page166] s. 37 of the PUBA. For ease of reference, I reproduce these provisions:

> **GUA**
>
> **26.** ...
>
> **(2)** No owner of a gas utility designated under subsection (1) shall
>
> ...
>
> (d) without the approval of the Board,
>
> (i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them
>
> ...
>
> and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.
>
> **AEUBA**
>
> **15(1)** For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB [Energy Resources Conservation Board] and the PUB [Public Utilities Board] that are granted or provided for by any

enactment or by law.

...

(3) Without restricting subsection (1), the Board may do all or any of the following:

...

(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;

...

[page167]

PUBA

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

42 Some of the above provisions are duplicated in the other two statutes (see, e.g., PUBA, ss. 85(1) and 101(2)(d)(i) ; GUA, s. 22(1) ; see Appendix).

43 There is no dispute that s. 26(2) of the GUA contains a prohibition against, among other things, the owner of a utility selling, leasing, mortgaging or otherwise disposing of its property outside of the ordinary course of business without the approval of the Board. As submitted by ATCO, the power conferred is to approve without more. There is no mention in s. 26 of the grounds for granting or denying approval or of the ability to grant conditional approval, let alone the power of the Board to allocate the net profit of an asset sale. I would note in passing that this power is sufficient to alleviate the fear expressed by the Board that the utility might be tempted to sell assets

on which it might realize a large profit to the detriment of ratepayers if it could reap the benefits of the sale.

44 It is interesting to note that s. 26(2) does not apply to all types of sales (and leases, mortgages, dispositions, encumbrances, mergers or consolidations). It excludes sales in the ordinary course of the owner's business. If the statutory scheme was such that the Board had the power to allocate the proceeds of the sale of utility assets, as argued here, s. 26(2) would naturally apply to all sales of assets or, at a minimum, exempt only those sales below a certain value. It is apparent that allocation of sale proceeds to customers is not one of its purposes. In fact, s. 26(2) can only have limited, if any, application to non-utility assets not related to utility function (especially when the sale has passed the "no-harm" [page168] test). The provision can only be meant to ensure that the asset in question is indeed non-utility, so that its loss does not impair the utility function or quality.

45 Therefore, a simple reading of s. 26(2) of the GUA does permit one to conclude that the Board does not have the power to allocate the proceeds of an asset sale.

46 The City does not limit its arguments to s. 26(2); it also submits that the AEUBA, pursuant to s. 15(3), is an express grant of jurisdiction because it authorizes the Board to impose any condition to any order so long as the condition is necessary in the public interest. In addition, it relies on the general power in s. 37 of the PUBA for the proposition that the Board may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The intended meaning of these two provisions, however, is lost when the provisions are simply read in isolation as proposed by the City: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735; *Marche*, at paras. 59-60; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26, at para. 105. These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

47 While I would conclude that the legislation is silent as to the Board's power to deal with sale [page169] proceeds after the initial stage in the statutory interpretation analysis, because the provisions can nevertheless be said to reveal some ambiguity and incoherence, I will pursue the inquiry further.

48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading (see *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 34; Sullivan, at pp. 20-21). I will therefore proceed to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal

norms.

2.3.3 Implicit Powers: Entire Context

49 The provisions at issue are found in statutes which are themselves components of a larger statutory scheme which cannot be ignored:

> As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" ... .
>
> (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 308)

As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

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50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[page171]

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174).

52 I understand the City's arguments to be as follows : (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

2.3.3.1

Historical Background and Broader Context

54 The history of public utilities regulation in Alberta originated with the creation in 1915 of the Board of Public Utility Commissioners by *The Public Utilities Act*, S.A. 1915, c. 6. This statute was

based on similar American legislation: H. R. Milner, "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101, at p. 101. While the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue.

55 Pursuant to *The Public Utilities Act*, the first public utility board was established as a [page172] three-member tribunal to provide general supervision of all public utilities (s. 21), to investigate rates (s. 23), to make orders regarding equipment (s. 24), and to require every public utility to file with it complete schedules of rates (s. 23). Of interest for our purposes, the 1915 statute also required public utilities to obtain the approval of the Board of Public Utility Commissioners before selling any property when outside the ordinary course of their business (s. 29(g)).

56 The Alberta Energy and Utilities Board was created in February 1995 by the amalgamation of the Energy Resources Conservation Board and the Public Utilities Board (see Canadian Institute of Resources Law, *Canada Energy Law Service: Alberta* (loose-leaf ed.), at p. 30-3101). Since then, all matters under the jurisdiction of the Energy Resources Conservation Board and the Public Utilities Board have been handled by the Alberta Energy and Utilities Board and are within its exclusive jurisdiction. The Board has all of the powers, rights and privileges of its two predecessor boards (AEUBA, ss. 13, 15(1); GUA, s. 59).

57 In addition to the powers found in the 1915 statute, which have remained virtually the same in the present PUBA , the Board now benefits from the following express powers to:

1. make an order respecting the improvement of the service or commodity (PUBA, s. 80(b));
2. approve the issue by the public utility of shares, stocks, bonds and other evidences of indebtedness (GUA, s. 26(2)(a); PUBA, s. 101(2)(a));
3. approve the lease, mortgage, disposition or encumbrance of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(i); PUBA, s. 101(2)(d)(i));
4. approve the merger or consolidation of the public utility's property, franchises, privileges or rights (GUA, s. 26(2)(d)(ii); PUBA, s. 101(2)(d)(ii)); and

[page173]

5. authorize the sale or permit to be made on the public utility's book a transfer of any share of its capital stock to a corporation that would result in the vesting in that corporation of more than 50 percent of the

> outstanding capital stock of the owner of the public utility (GUA, s. 27(1); PUBA, s. 102(1)).

58 It goes without saying that public utilities are very limited in the actions they can take, as evidenced from the above list. Nowhere is there a mention of the authority to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.

59 Even in 1995 when the legislature decided to form the Alberta Energy and Utilities Board, it did not see fit to modify the PUBA or the GUA to provide the new Board with the power to allocate the proceeds of a sale even though the controversy surrounding this issue was full-blown (see, e.g., *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116). It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law (see Sullivan, at pp. 154-55). It is also presumed to have known all of the circumstances surrounding the adoption of new legislation.

60 Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates (see Milner, at p. 102; Brown, at p. 2-16.6). Estey J., speaking for the majority of this Court in *Atco Ltd.*, at p. 576, echoed this view when he said:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the [page174] community by the public utilities. Such an extensive regulatory pattern must, for its effectiveness, include the right to control the combination or, as the legislature says, "the union" of existing systems and facilities. <u>This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.</u> [Emphasis added.]

In fact, even the Board itself, on its website (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm), describes its functions as follows:

> We regulate the safe, responsible, and efficient development of Alberta's energy resources: oil, natural gas, oil sands, coal, and electrical energy; and the pipelines and transmission lines to move the resources to market. <u>On the utilities side, we regulate rates and terms of service of investor-owned natural gas</u>, electric, and water utility services, as well as the major intra-Alberta gas transmission system, <u>to ensure that customers receive safe and reliable service at just and reasonable rates</u>. [Emphasis added.]

61 The process by which the Board sets the rates is therefore central and deserves some attention in order to ascertain the validity of the City's first argument.

2.3.3.2

Rate Setting

62 Rate regulation serves several aims -- sustainability, equity and efficiency -- which underlie the reasoning as to how rates are fixed:

> ... the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future... . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high".
>
> (R. Green and M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at p. 5)

63 These goals have resulted in an economic and social arrangement dubbed the "regulatory [page175] compact", which ensures that all customers have access to the utility at a fair price -- nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see Black, at pp. 356-57; Milner, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 ("*Northwestern 1929*"), at pp. 192-93).

64 Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer *and* the investor (Milner, at p. 101). The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility.

65 The Board derives its power to set rates from both the GUA (ss. 16, 17 and 36 to 45) and the PUBA (ss. 89 to 95). The Board is mandated to fix "just and reasonable ... rates" (PUBA, s. 89(a); GUA, s. 36(a)). In the establishment of these rates, the Board is directed to "determine a rate base

for the property of the owner" and "fix a fair return on the rate base" (GUA, s. 37(1)). This Court, in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern 1979*"), at p. 691, adopted the following description of the process:

> 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 [page176] 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.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: [page177] 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.

68 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).

69 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 [page178] assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when <u>they have paid only for the use of those assets</u>. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of

assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which relies on the same principle as was adopted in *Market St. Ry. Co. v. Railroad Commission of State of California*, 324 U.S. 548 (1945).

70 Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, [page179] the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see *Northwestern 1929*, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc.

71 From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

2.3.3.3

The Power to Attach Conditions

72 As its second argument, the City submits that the power to allocate the proceeds from the sale of the utility's assets is necessarily incidental to the express powers conferred on the Board by the AEUBA, the GUA and the PUBA. It argues that the Board must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve a sale of assets. It [page180] submits that this results from the fact that the Board is allowed to attach any condition to an order it makes approving such a sale. I disagree.

73 The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

> * [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
> * [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
> * [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
> * [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
> * [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.

(See also Brown, at p. 2-16.3.)

74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. This is explained by Professor Sullivan, at p. 228:

> In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the [page181] purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. [Emphasis added.]

75 In the case at bar, s. 15 of the AEUBA, which allows the Board to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in my opinion, the attempt by the City to use it to augment the powers of the Board in s. 26(2) of the GUA must fail. The Court must construe s. 15(3) of the AEUBA in accordance with the purpose of s. 26(2).

76 MacAvoy and Sidak, in their article, at pp. 234-36, suggest three broad reasons for the requirement that a sale must be approved by the Board:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;
2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and
3. It specifically seeks to prevent favoritism toward investors.

77 Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see *National Energy Board Act (Can.) (Re)*, [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in [page182] carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.

78 In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs (MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the [page183] legislation (see Sullivan, at pp. 400-403; Côté, at pp. 482-86; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64, at para. 26; *Leiriao v.*

Val-Bélair (Town), [1991] 3 S.C.R. 349, at p. 357; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, at p. 197). Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that a broadly drawn power can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. This would go against the above principles of interpretation.

80 If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation, as was done by some states in the United States (e.g., Connecticut).

2.4 *Other Considerations*

81 Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any new economic data anticipated as a result of the sale (PUBA, s. 89(a); GUA, ss. 24, 36(a), 37(3), 40) (see Appendix).

2.5 *If Jurisdiction Had Been Found, Was the Board's Allocation Reasonable?*

82 In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether [page184] the Board's exercise of discretion by allocating the sale proceeds as it did was reasonable. Nonetheless, given the reasons of my colleague Binnie J., I will address the issue very briefly. Had I not concluded that the Board lacked jurisdiction, my disposition of this case would have been the same, as I do not believe the Board met a reasonable standard when it exercised its power.

83 I am not certain how one could conclude that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process, and, moreover, when it explicitly concluded that no harm would ensue to customers from the sale of the asset. In my opinion, when reviewing the substance of the Board's decision, a court must conduct a two-step analysis: first, it must determine whether the order was warranted given the role of the Board to *protect the customers* (i.e., was the order *necessary in the public interest*?); and second, if the first question is answered in the affirmative, a court must then examine the validity of the Board's application of the *TransAlta Formula* (see para. 12 of these reasons), which refers to the difference between net book value and original cost, on the one hand, and appreciation in the value of the asset on the other. For the purposes of this analysis, I view the second step as a mathematical calculation and nothing more. I do not believe it provides the criteria which guides the Board to determine *if it should allocate* part of the sale proceeds to ratepayers. Rather, it merely guides the Board on *what to allocate and how*

to allocate it (if it should do so in the first place). It is also interesting to note that there is no discussion of the fact that the book value used in the calculation must be referable solely to the financial statements of the utility.

84 In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed [page185] or would face some risk of harm. But the Board was clear: there was no harm or risk of harm in the present situation:

> With the continuation of the same level of service at other locations and the acceptance by customers regarding the relocation, the Board is convinced there should be no impact on the level of service to customers as a result of the Sale. In any event, the Board considers that the service level to customers is a matter that can be addressed and remedied in a future proceeding if necessary.
>
> (Decision 2002-037, at para. 54)

After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was no legitimate customer interest which could or needed to be protected by denying approval of the sale, or by making approval conditional on a particular allocation of the proceeds. Even if the Board had found a possible adverse effect arising from the sale, how could it allocate proceeds now based on an unquantified future potential loss? Moreover, in the absence of any factual basis to support it, I am also concerned with the presumption of bad faith on the part of ATCO that appears to underlie the Board's determination to protect the public from some possible future menace. In any case, as mentioned earlier in these reasons, this determination to protect the public interest is also difficult to reconcile with the actual power of the Board to prevent harm to ratepayers from occurring by simply refusing to approve the sale of a utility's asset. To that, I would add that the Board has considerable discretion in the setting of future rates in order to protect the public interest, as I have already stated.

85 In consequence, I am of the view that, in the present case, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Hence, notwithstanding my conclusion on the first issue regarding the Board's jurisdiction, I would conclude [page186] that the Board's decision to exercise its discretion to protect the public interest did not meet a reasonable standard.

3. Conclusion

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e., context, legislative intention and objective. Going further than required by reading in *unnecessary* powers of an administrative agency under the guise of statutory

interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

87 The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

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

88 BINNIE J. (dissenting):-- The respondent ATCO Gas and Pipelines Ltd. ("ATCO") is part of a large entrepreneurial company that directly and through various subsidiaries operates both regulated businesses and unregulated businesses. The Alberta Energy and Utilities Board ("Board") believes it not to be in the public interest to encourage utility companies to mix together the two types of undertakings. In particular, the Board has adopted policies to discourage utilities from using their regulated businesses as a platform to engage in land speculation to increase their return on investment outside the regulatory framework. By awarding part of the profit to the utility (and its shareholders), the Board rewards utilities for diligence in divesting themselves of assets that are no longer productive, or that could be more productively employed elsewhere. However, by crediting part of the [page187] profit on the sale of such property to the utility's rate base (i.e. as a set-off to other costs), the Board seeks to dampen any incentive for utilities to skew decisions in their regulated business to favour such profit taking unduly. Such a balance, in the Board's view, is necessary in the interest of the public which allows ATCO to operate its utility business as a monopoly. In pursuit of this balance, the Board approved ATCO's application to sell land and warehousing facilities in downtown Calgary, but denied ATCO's application to keep for its shareholders the entire profit resulting from appreciation in the value of the land, whose cost of acquisition had formed part of the rate base on which gas rates had been calculated since 1922. The Board ordered the profit on the sale to be allocated one third to ATCO and two thirds as a credit to its cost base, thereby helping keep utility rates down, and to that extent benefiting ratepayers.

89 I have read with interest the reasons of my colleague Bastarache J. but, with respect, I do not agree with his conclusion. As will be seen, the Board has authority under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17 ("AEUBA"), to impose on the sale "any additional conditions that the Board considers necessary in the public interest". Whether or not the conditions of approval imposed by the Board were necessary in the public interest was for the Board to decide. The Alberta Court of Appeal overruled the Board but, with respect, the Board is in a better position to assess necessity in this field for the protection of the public interest than either that court or this Court. I would allow the appeal and restore the Board's decision.

I. Analysis

90 ATCO's argument boils down to the proposition announced at the outset of its factum:

> In the absence of any property right or interest and of any harm to the customers arising from the [page188] withdrawal from utility service, there was no proper ground for reaching into the pocket of the utility. In essence this case is about property rights.
>
> (Respondent's factum, at para. 2)

91 For the reasons which follow I do not believe the case is about property rights. ATCO chose to make its investment in a regulated industry. The return on investment in the regulated gas industry is fixed by the Board, not the free market. In my view, the essential issue is whether the Alberta Court of Appeal was justified in limiting what the Board is allowed to "conside[r] necessary in the public interest".

A. *The Board's Statutory Authority*

92 The first question is one of jurisdiction. What gives the Board the authority to make the order ATCO complains about? The Board's answer is threefold. Section 22(1) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("GUA"), provides in part that "[t]he Board shall exercise a general supervision over all gas utilities, and the owners of them ...". This, the Board says, gives it a broad jurisdiction to set policies that go beyond its specific powers in relation to specific applications, such as rate setting. Of more immediate pertinence, s. 26(2)(d)(i) of the same Act prohibits the regulated utility from selling, leasing or otherwise encumbering any of its property without the Board's approval. (To the same effect, see s. 101(2)(d)(i) of the *Public Utilities Board Act*, R.S.A. 2000, c. P-45.) It is common ground that this restraint on alienation of property applies to the proposed sale of ATCO's land and warehouse facilities in downtown Calgary, and that the Board could, in appropriate circumstances, simply have denied ATCO's application for approval of the sale. However, the Board was of the view to allow the sale subject to conditions. The Board ruled that the greater power (i.e. to deny the sale) must include the lesser (i.e. to allow the sale, subject to conditions):

> In appropriate circumstances, the Board clearly has the power to prevent a utility from disposing of its property. [page189] In the Board's view it also follows that the Board can approve a disposition subject to appropriate conditions to protect customer interests.
>
> (Decision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), at para. 47)

There is no need to rely on any such implicit power to impose conditions, however. As stated, the Board's explicit power to impose conditions is found in s. 15(3) of the AEUBA, which authorizes the Board to "make any further order and impose any additional conditions that the Board considers necessary in the public interest". In *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557, at p. 576, Estey J., for the majority, stated:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. [Emphasis added.]

The legislature says in s. 15(3) that the conditions are to be what *the Board* considers necessary. Of course, the discretionary power to impose conditions thus granted is not unlimited. It must be exercised in good faith for its intended purpose: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. ATCO says the Board overstepped even these generous limits. In ATCO's submission:

> 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 ... .
>
> (Respondent's factum, at para. 38)

In my view, however, the issue before the Board was how much profit ATCO was entitled to earn on its investment in a regulated utility.

93 ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate [page190] making". But Alberta is an "original cost" jurisdiction, and no one suggests that the Board's original cost rate making during the 80-plus years this investment has been reflected in ATCO's ratebase was wrong. The Board proposed to apply a portion of the expected profit to future rate making. The effect of the order is prospective, not retroactive. Fixing the going-forward rate of return as well as general supervision of "all gas utilities, and the owners of them" were matters squarely within the Board's statutory mandate.

B. *The Board's Decision*

94 ATCO argues that the Board's decision should be seen as a stand-alone decision divorced from its rate-making responsibilities. However, I do not agree that the hearing under s. 26 of the GUA can be isolated in this way from the Board's general regulatory responsibilities. ATCO argues in its factum that

> the subject application by [ATCO] to the Board did not concern or relate to a rate application, and the Board was not engaged in fixing rates (if that could provide any justification, which is denied).
>
> (Respondent's factum, at para. 98)

95 It seems the Board proceeded with the s. 26 approval hearing separately from a rate setting hearing firstly because ATCO framed the proceeding in that way and secondly because this is the procedure approved by the Alberta Court of Appeal in *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171. That case (which I will refer to as *TransAlta (1986)*) is a leading Alberta authority dealing with the allocation of the gain on the disposal of utility assets and the source of what is called the *TransAlta Formula* applied by the Board in this case. Kerans J.A. had this to say, at p. 174:

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve [page191] issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

96 Given this encouragement from the Alberta Court of Appeal, I would place little significance on ATCO's procedural point. As will be seen, the Board's ruling is directly tied into the setting of general rates because two thirds of the profit is taken into account as an offset to ATCO's costs from which its revenue requirement is ultimately derived. As stated, ATCO's profit on the sale of the Calgary property will be a current (not historical) receipt and, if the Board has its way, two thirds of it will be applied to future (not retroactive) rate making.

97 The s. 26 hearing proceeded in two phases. The Board first determined that it would not deny its approval to the proposed sale as it met a "no-harm test" devised over the years by Board practice (it is not to be found in the statutes) (Decision 2001-78). However, the Board linked its approval to subsequent consideration of the financial ramifications, as the Board itself noted:

> The Board approved the Sale in Decision 2001-78 based on evidence that customers did not object to the Sale [and] would not suffer a reduction in services nor would they be exposed to the risk of financial harm as a result of the Sale *that could not be examined in a future proceeding*. On that basis the Board determined that the no-harm test had been satisfied and that the Sale could proceed. [Underlining and italics added.] (Decision 2002-037, at para. 13)

98 In effect, ATCO ignores the italicized words. It argues that the Board was *functus* after the first phase of its hearing. However, ATCO itself had agreed to the two-phase procedure, and indeed the second phase was devoted to ATCO's own application for an allocation of the profits on the sale.

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99 In the second phase of the s. 26 approval hearing, the Board allocated one third of the net gain to ATCO and two thirds to the rate base (which would benefit ratepayers). The Board spelled out

why it considered these conditions to be necessary in the public interest. The Board explained that it was necessary to balance the interests of both shareholders and ratepayers within the framework of what it called "the regulatory compact" (Decision 2002-037, at para. 44). In the Board's view:

(a) there ought to be a balancing of the interests of the ratepayers and the owners of the utility;
(b) decisions made about the utility should be driven by both parties' interests;
(c) to award the entire gain to the ratepayers would deny the utility an incentive to increase its efficiency and reduce its costs; and
(d) to award the entire gain to the utility might encourage speculation in non-depreciable property or motivate the utility to identify and dispose of properties which have appreciated for reasons other than the best interest of the regulated business.

100 For purposes of this appeal, it is important to set out the Board's policy reasons in its own words:

> To award the entire net gain on the land and buildings to the customers, while beneficial to the customers, could establish an environment that may deter the process wherein the company continually assesses its operation to identify, evaluate, and select options that continually increase efficiency and reduce costs.
>
> Conversely, to award the entire net gain to the company may establish an environment where a regulated utility company might be moved to speculate in non-depreciable property or result in the company being motivated to identify and sell existing properties where appreciation has already occurred.
>
> The Board believes that some method of balancing both parties' interests will result in optimization [page193] of business objectives for both the customer and the company. Therefore, the Board considers that sharing of the net gain on the sale of the land and buildings collectively in accordance with the TransAlta Formula is equitable in the circumstances of this application and is consistent with past Board decisions. [Emphasis added; paras. 112-14.]

101 The Court was advised that the two-third share allocated to ratepayers would be included in ATCO's rate calculation to set off against the costs included in the rate base and amortized over a number of years.

C. *Standard of Review*

102 The Court's modern approach to this vexed question was recently set out by McLachlin C.J.

in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

103 I do not propose to cover the ground already set out in the reasons of my colleague Bastarache J. We agree that the standard of review on matters of jurisdiction is correctness. We also agree that the Board's *exercise* of its jurisdiction calls for greater judicial deference. Appeals from the Board are limited to questions of law or jurisdiction. The Board knows a great deal more than the courts about gas utilities, and what limits it is necessary to impose "in the public interest" on their dealings with assets whose cost is included in the rate base. Moreover, it is difficult to think of a broader discretion than that conferred on the Board to "impose any additional conditions that the Board considers necessary in the public interest" (s. 15(3)(d) of the AEUBA). [page194] The identification of a subjective discretion in the decision maker ("the Board considers necessary"), the expertise of that decision maker and the nature of the decision to be made ("in the public interest"), in my view, call for the most deferential standard, patent unreasonableness.

104 As to the phrase "the Board considers necessary", Martland J. stated in *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, at p. 34:

> The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.

See also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), vol. 1, at para. 14:2622: "*'Objective' and 'Subjective' Grants of Discretion*".

105 The expert qualifications of a regulatory Board are of "utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause", as stated by Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335. He continued:

> Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722], it has been

> stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

(This *dictum* was cited with approval in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592.)

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106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In *TransAlta (1986)*, the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353, where this Court stated, at p. 357:

> [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest ... . [Emphasis added.]

107 This passage reiterated the *dictum* of Rand J. in *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185, at p. 190:

> It was argued, and it seems to have been the view of the Court, that the determination of public convenience and necessity was itself a question of fact, but with that I am unable to agree: it is not an objective existence to be ascertained; the determination is the formulation of an opinion, in this case, the opinion of the Board and of the Board only. [Emphasis added.]

108 Of course even such a broad power is not untrammelled. But to say that such a power is capable of abuse does not lead to the conclusion that it should be truncated. I agree on this point with Reid J. (co-author of R. F. Reid and H. David, *Administrative Law and Practice* (2nd ed. 1978), and co-editor of P. Anisman and R. F. Reid, *Administrative Law Issues and Practice* (1995)), who wrote in *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.), in relation to the powers of the Ontario Securities Commission, at p. 97:

[page196]

> ... when the Commission has acted *bona fide*, with an obvious and honest concern for the public interest, and with evidence to support its opinion, the prospect that the breadth of its discretion might someday tempt it to place itself above the law by misusing that discretion is not something that makes the existence of the discretion bad *per se*, and requires the decision to be struck down.

(The *C.T.C. Dealer Holdings* decision was referred to with apparent approval by this Court in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 42.)

109 "Patent unreasonableness" is a highly deferential standard:

> A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.
>
> (*C.U.P.E.*, at para. 164)

110 Having said all that, in my view nothing much turns on the result on whether the proper standard in that regard is patent unreasonableness (as I view it) or simple reasonableness (as my colleague sees it). As will be seen, the Board's response is well within the range of established regulatory opinions. Hence, even if the Board's conditions were subject to the less deferential standard, I would find no cause for the Court to interfere.

D. *Did the Board Have Jurisdiction to Impose the Conditions It Did on the Approval Order "In the Public Interest"?*

111 ATCO says the Board had no jurisdiction to impose conditions that are "confiscatory". Framing the question in this way, however, assumes the point in issue. The correct point of departure is not to assume that ATCO is entitled to the net gain and then ask if the Board can confiscate it. ATCO's investment of $83,000 was added in increments to its regulatory cost base as the land was acquired from [page197] time to time between 1922 and 1965. It is in the nature of a regulated industry that the question of what is a just and equitable return is determined by a board and not by the vagaries of the speculative property market.

112 I do not think the legal debate is assisted by talk of "confiscation". ATCO is prohibited by statute from disposing of the asset without Board approval, and the Board has statutory authority to

impose conditions on its approval. The issue thus necessarily turns not on the *existence* of the jurisdiction but on the *exercise* of the Board's jurisdiction to impose the conditions that it did, and in particular to impose a shared allocation of the net gain.

E. *Did the Board Improperly Exercise the Jurisdiction It Possessed to Impose Conditions the Board Considered "Necessary in the Public Interest"?*

113 There is no doubt that there are many approaches to "the public interest". Which approach the Board adopts is largely (and inherently) a matter of opinion and discretion. While the statutory framework of utilities regulation varies from jurisdiction to jurisdiction, and practice in the United States must be read in light of the constitutional protection of property rights in that country, nevertheless Alberta's grant of authority to its Board is more generous than most. ATCO concedes that its "property" claim would have to give way to a contrary legislative intent, but ATCO says such intent cannot be found in the statutes.

114 Most if not all regulators face the problem of how to allocate gains on property whose original cost is included in the rate base but is no longer required to provide the service. There is a wealth of regulatory experience in many jurisdictions that the Board is entitled to (and does) have regard to in formulating its policies. Striking the correct balance in the allocation of gains between ratepayers [page198] and investors is a common preoccupation of comparable boards and agencies:

> First, it prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers. Second, it ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder. Third, it specifically seeks to prevent favoritism toward investors to the detriment of ratepayers affected by the transaction.
>
> (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)

115 The concern with which Canadian regulators view utilities under their jurisdiction that are speculating in land is not new. In *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976, the Ontario Energy Board considered how to deal with a real estate profit on land which was disposed of at an after-tax profit of over $2 million. The Board stated:

> The Station "B" property was not purchased by Consumers' for land speculation but was acquired for utility purposes. This investment, while non-depreciable, was subject to interest charges and risk paid for through revenues and, until the gas manufacturing plant became obsolete, disposal of the land was not a feasible option. If, in such circumstances, the Board were to permit real estate profit to accrue to the shareholders only, it would tend to

> encourage real estate speculation with utility capital. In the Board's opinion, the shareholders and the ratepayers should share the benefits of such capital gains. [Emphasis added; para. 326.]

116 Some U.S. regulators also consider it good regulatory policy to allocate part or all of the profit to offset costs in the rate base. In *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), the regulator allocated a gain on the sale of land to ratepayers, stating:

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> The company and its shareholders have received a return on the use of these parcels while they have been included in rate base, and are not entitled to any additional return as a result of their sale. To hold otherwise would be to find that a regulated utility company may speculate in nondepreciable utility property and, despite earning a reasonable rate of return from its customers on that property, may also accumulate a windfall through its sale. We find this to be an uncharacteristic risk/reward situation for a regulated utility to be in with respect to its plant in service. [Emphasis added; p. 26.]

117 Canadian regulators other than the Board are also concerned with the prospect that decisions of utilities in their regulated business may be skewed under the undue influence of prospective profits on land sales. In *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991, the Ontario Energy Board determined that a $1.9 million gain on sale of land should be divided equally between shareholders and ratepayers. It held that

> the allocation of 100 percent of the profit from land sales to either the shareholders or the ratepayers might diminish the recognition of the valid concerns of the excluded party. For example, the timing and intensity of land purchase and sales negotiations could be skewed to favour or disregard the ultimate beneficiary. [para. 3.3.8]

118 The Board's principle of dividing the gain between investors and ratepayers is consistent, as well, with *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, June 27, 2003, in which the Ontario Energy Board addressed the allocation of a profit on the sale of land and buildings and again stated:

> The Board finds that it is reasonable in the circumstances that the capital gains be shared equally between the Company and its customers. In making this finding the Board has considered the non-recurring nature of this transaction. [para. 45]

119 The wide variety of regulatory treatment of such gains was noted by Kerans J.A. in *TransAlta (1986)*, at pp. 175-76, including *Re Boston Gas Co.* [page200] mentioned earlier. In *TransAlta (1986)*, the Board characterized TransAlta's gain on the disposal of land and buildings included in its Edmonton "franchise" as "revenue" within the meaning of the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13. (The case therefore did not deal with the power to impose conditions "the Board considers necessary in the public interest".) Kerans J.A. said (at p. 176):

> I do not agree with the Board's decision for reasons later expressed, but it would be fatuous to deny that its interpretation [of the word "revenue"] is one which the word can reasonably bear.

Kerans J.A. went on to find that in that case "[t]he compensation was, for all practical purposes, compensation for loss of franchise" (p. 180) and on that basis the gain in these "unique circumstances" (p. 179) could not, as a matter of law, be characterized as revenue, i.e. applying a correctness standard. The range of regulatory practice on the "gains on sale" issue was similarly noted by Goldie J.A. in *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58 (Y.C.A.), at para. 85.

120 A survey of recent regulatory experience in the United States reveals the wide variety of treatment in that country of gains on the sale of undepreciated land. The range includes proponents of ATCO's preferred allocation as well as proponents of the solution adopted by the Board in this case:

> Some jurisdictions have concluded that as a matter of equity, shareholders alone should benefit from any gain realized on appreciated real estate, because ratepayers generally pay only for taxes on the land and do not contribute to the cost of acquiring the property and pay no depreciation expenses. Under this analysis, ratepayers assume no risk for losses and acquire no legal or equitable interest in the property, but rather pay only for the use of the land in utility service.
>
> Other jurisdictions claim that ratepayers should retain some of the benefits associated with the sale of property dedicated to utility service. Those jurisdictions that have adopted an equitable sharing approach agree that a review of regulatory and judicial decisions [page201] on the issue does not reveal any general principle that requires the allocation of benefits solely to shareholders; rather, the cases show only a general prohibition against sharing benefits on the sale property that has never been reflected in utility rates.
>
> (P. S. Cross, "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44, at p. 44)

Regulatory opinion in the United States favourable to the solution adopted here by the Board is illustrated by *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), at p. 361:

> To the extent any general principles can be gleaned from the decisions in other jurisdictions they are: (1) the utility's stockholders are not *automatically* entitled to the gains from all sales of utility property; and (2) ratepayers are not entitled to all or any part of a gain from the sale of property which has never been reflected in the utility's rates. [Emphasis in original.]

121 Assets purchased with capital reflected in the rate base come and go, but the utility itself endures. What was done by the Board in this case is quite consistent with the "enduring enterprise" theory espoused, for example, in *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). In that case, Southern California Water had asked for approval to sell an old headquarters building and the issue was how to allocate its profits on the sale. The Commission held:

> Working from the principle of the "enduring enterprise", the gain-on-sale from this transaction should remain within the utility's operations rather than being distributed in the short run directly to either ratepayers or shareholders.
>
> The "enduring enterprise" principle, is neither novel nor radical. It was clearly articulated by the Commission in its seminal 1989 policy decision on the issue of gain-on-sale, D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*). Simply stated, to the extent that a utility realizes a gain-on-sale from the liquidation of an asset and replaces it with another asset or obligation while at [page202] the same time its responsibility to serve its customers is neither relieved nor reduced, then any gain-on-sale should remain within the utility's operation. [p. 604]

122 In my view, neither the Alberta statutes nor regulatory practice in Alberta and elsewhere dictates the answer to the problems confronting the Board. It would have been open to the Board to allow ATCO's application for the entire profit. But the solution it adopted was quite within its statutory authority and does not call for judicial intervention.

F. *ATCO's Arguments*

123 Most of ATCO's principal submissions have already been touched on but I will repeat them here for convenience. ATCO does not really dispute the Board's ability to impose conditions on the sale of land. Rather, ATCO says that what the Board did here violates a number of basic legal protections and principles. It asks the Court to clip the Board's wings.

124 Firstly, ATCO says that customers do not acquire any proprietary right in the company's assets. ATCO, rather than its customers, originally purchased the property, held title to it, and therefore was entitled to any gain on its sale. An allocation of profit to the customers would amount

to a confiscation of the corporation's property.

125 Secondly, ATCO says its retention of 100 percent of the gain has nothing to do with the so-called "regulatory compact". The gas customers paid what the Board regarded over the years as a fair price for safe and reliable service. That is what the ratepayers got and that is all they were entitled to. The Board's allocation of part of the profit to the ratepayers amounts to impermissible "retroactive" rate setting.

126 Thirdly, utilities are not entitled to include in the rate base an amount for *depreciation* on land and ratepayers have therefore not repaid ATCO any part of ATCO's original cost, let alone the present value. The treatment accorded gain on sales of depreciated property therefore does not apply.

[page203]

127 Fourthly, ATCO complains that the Board's solution is asymmetrical. Ratepayers are given part of the benefit of an increase in land values without, in a falling market, bearing any part of the burden of losses on the disposition of land.

128 In my view, these are all arguments that should be (and were) properly directed to the Board. There are indeed precedents in the regulatory field for what ATCO proposes, just as there are precedents for what the ratepayers proposed. It was for the Board to decide what conditions in these particular circumstances were necessary in the public interest. The Board's solution in this case is well within the range of reasonable options, as I will endeavour to demonstrate.

1. The Confiscation Issue

129 In its factum, ATCO says that "[t]he property belonged to the owner of the utility and the Board's proposed distribution cannot be characterized otherwise than as being confiscatory" (respondent's factum, at para. 6). ATCO's argument overlooks the obvious difference between investment in an unregulated business and investment in a regulated utility where the regulator sets the return on investment, not the marketplace. In *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) ("*SoCalGas*"), the regulator pointed out:

> In the non-utility private sector, investors are not guaranteed to earn a fair return on such sunk investment. Although shareholders and bondholders provide the initial capital investment, the ratepayers pay the taxes, maintenance, and other costs of carrying utility property in rate base over the years, and thus insulate utility investors from the risk of having to pay those costs. Ratepayers also pay the utility a fair return on property (including land) while it is in rate base, compensate the utility for the diminishment of the value of its depreciable

> property over time through depreciation [page204] accounting, and bear the risk that they must pay depreciation and a return on prematurely retired rate base property. [p. 103]

(It is understood, of course, that the Board does not appropriate the actual proceeds of sale. What happens is that an amount *equivalent* to two-thirds of the profit is included in the calculation of ATCO's current cost base for rate-making purposes. In that way, there is a notional distribution of the benefit of the gain amongst the competing stakeholders.)

130 ATCO's argument is frequently asserted in the United States under the flag of constitutional protection for "property". Constitutional protection has not however prevented allocation of all or part of such gains to the U.S. ratepayers. One of the leading U.S. authorities is *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). In that case, the assets at issue were parcels of real estate which had been employed in mass transit operations but which were no longer needed when the transit system converted to buses. The regulator awarded the profit on the appreciated land values to the shareholders but the Court of Appeals reversed the decision, using language directly applicable to ATCO's "confiscation" argument:

> We perceive no impediment, constitutional or otherwise, to recognition of a ratemaking principle enabling ratepayers to benefit from appreciations in value of utility properties accruing while in service. We believe the doctrinal consideration upon which pronouncements to the contrary have primarily rested has lost all present-day vitality. Underlying these pronouncements is a basic legal and economic thesis sometimes articulated, sometimes implicit that utility assets, though dedicated to the public service, remain exclusively the property of the utility's investors, and that growth in value is an inseparable and inviolate incident of that property interest. The precept of private ownership historically pervading our jurisprudence led naturally to such a thesis, and early decisions in the ratemaking field lent some support to it; if still viable, it strengthens the investor's claim. We think, however, after careful [page205] exploration, that the foundations for that approach, and the conclusion it seemed to indicate, have long since eroded away. [p. 800]

The court's reference to "pronouncements" which have "lost all present-day vitality" likely includes *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976), a decision relied upon in this case by ATCO. In that case, the Supreme Court of the United States said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the

> funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. [p. 32]

In that case, the regulator belatedly concluded that the level of depreciation allowed the New York Telephone Company had been excessive in past years and sought to remedy the situation in the current year by retroactively adjusting the cost base. The court held that the regulator had no power to re-open past rates. The financial fruits of the regulator's errors in past years now belonged to the company. That is not this case. No one contends that the Board's prior rates, based on ATCO's original investment, were wrong. In 2001, when the matter came before the Board, the Board had jurisdiction to approve or not approve the proposed sale. It was not a done deal. The receipt of any profit by ATCO was prospective only. As explained in *Re Arizona Public Service Co.*:

> In *New York Telephone,* the issue presented was whether a state regulatory commission could use excessive depreciation accruals from prior years to reduce rates for future service and thereby set rates which did not yield a just return... . [T]he Court simply reiterated and provided the reasons for a ratemaking truism: rates must be designed to produce enough revenue to pay [page206] current (reasonable) operating expenses and provide a fair return to the utility's investors. If it turns out that, for whatever reason, existing rates have produced too much or too little income, the past is past. Rates are raised or lowered to reflect current conditions; they are not designed to pay back past excessive profits or recoup past operating losses. In contrast, the issue in this proceeding is whether for ratemaking purposes a utility's test year income from sales of utility service can include its income from sales of utility property. The United States Supreme Court's decision in *New York Telephone* does not address that issue. [Emphasis added; p. 361.]

131 More recently, the allocation of gain on sale was addressed by the California Public Utilities Commission in *SoCalGas*. In that case, as here, the utility (SoCalGas) wished to sell land and buildings located (in that case) in downtown Los Angeles. The Commission apportioned the gain on sale between the shareholders and the ratepayers, concluding that:

> We believe that the issue of who owns the utility property providing utility service has become a red herring in this case, and that ownership alone does not determine who is entitled to the gain on the sale of the property providing utility service when it is removed from rate base and sold. [p. 100]

132 ATCO argues in its factum that ratepayers "do not acquire any interest, legal or equitable, in the property used to provide the service or in the funds of the owner of the utility" (para. 2). In *SoCalGas,* the regulator disposed of this point as follows:

> No one seriously argues that ratepayers acquire title to the physical property

> assets used to provide utility service; DRA [Division of Ratepayer Advocates] argues that the gain on sale should reduce future revenue requirements not because ratepayers own the property, but rather because they paid the costs and faced the risks associated with that property while it was in rate base providing public service. [p. 100]

[page207]

This "risk" theory applies in Alberta as well. Over the last 80 years, there have been wild swings in Alberta real estate, yet through it all, in bad times and good, the ratepayers have guaranteed ATCO a just and equitable return on its investment in *this* land and *these* buildings.

133 The notion that the division of risk justifies a division of the net gain was also adopted by the regulator in *SoCalGas*:

> Although the shareholders and bondholders provided the initial capital investment, the ratepayers paid the taxes, maintenance, and other costs of carrying the land and buildings in rate base over the years, and paid the utility a fair return on its unamortized investment in the land and buildings while they were in rate base. [p. 110]

In other words, even in the United States, where property rights are constitutionally protected, ATCO's "confiscation" point is rejected as an oversimplification.

134 My point is not that the Board's allocation in this case is necessarily correct in all circumstances. Other regulators have determined that the public interest requires a different allocation. The Board proceeds on a "case-by-case" basis. My point simply is that the Board's response in this case cannot be considered "confiscatory" in any proper use of the term, and is well within the range of what are regarded in comparable jurisdictions as appropriate regulatory responses to the allocation of the gain on sale of land whose original investment has been included by the utility itself in its rate base. The Board's decision is protected by a deferential standard of review and in my view it should not have been set aside.

2. The Regulatory Compact

135 The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly [page208] and receipt of revenue on a cost plus basis, the utility accepts limitations on its rate of return and its freedom to do as it wishes with property whose cost is reflected in its rate base. This was expressed in the *Washington Metropolitan Area Transit* case by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

> The ratemaking process involves fundamentally "a balancing of the investor and the consumer interests". The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation. [p. 806]

136 ATCO considers that the Board's allocation of profit violated the regulatory compact not only because it is confiscatory but because it amounts to "retroactive rate making". In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. stated, at p. 691:

> 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.

137 As stated earlier, the Board in this case was addressing a prospective receipt and allocated two thirds of it to a prospective (not retroactive) rate-making exercise. This is consistent with regulatory practice, as is illustrated by *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years :

> If land is sold at a profit, it is required that the profit be added to, i.e., "credited to", the depreciation reserve, so [page209] that there is a corresponding reduction of the rate base and resulting return. [p. 864]

The regulator's order was upheld by the New York State Supreme Court (Appellate Division).

138 More recently, in *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), the regulator commented:

> ... we found it appropriate to allocate the principal amount of the gain to offset future costs of headquarters facilities, because ratepayers had borne the burden of risks and expenses while the property was in ratebase. At the same time, we found that it was equitable to allocate a portion of the benefits from the gain-on-sale to shareholders in order to provide a reasonable incentive to the utility to maximize the proceeds from selling such property and compensate shareholders for any risks borne in connection with holding the former property. [p. 529]

139 The emphasis in all these cases is on balancing the interests of the shareholders and the ratepayers. This is perfectly consistent with the "regulatory compact" approach reflected in the

Board doing what it did in this case.

3. Land as a Non-Depreciable Asset

140 The Alberta Court of Appeal drew a distinction between gains on sale of land, whose original cost is not depreciated (and thus is not repaid in increments through the rate base) and depreciated property such as buildings where the rate base does include a measure of capital repayment and which in that sense the ratepayers have "paid for". The Alberta Court of Appeal held that the Board was correct to credit the rate base with an amount equivalent to the depreciation paid in respect of the buildings (this is the subject matter of ATCO's cross-appeal). Thus, in this case, the land was still carried on ATCO's books at its original price of $83,720 whereas the original $596,591 cost of the buildings had been depreciated through the rates charged customers to a net book value of $141,525.

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141 Regulatory practice shows that many (not all) regulators also do not accept the distinction (for this purpose) between depreciable and non-depreciable assets. In *Re Boston Gas Co.* for example (cited in *TransAlta (1986)*, at p. 176), the regulator held:

> ... the company's ratepayers have been paying a return on this land as well as all other costs associated with its use. The fact that land is a nondepreciable asset because its useful value is not ordinarily diminished through use is, we find, irrelevant to the question of who is entitled to the proceeds on the sales of this land. [p. 26]

142 In *SoCalGas*, as well, the Commission declined to make a distinction between the gain on sale of depreciable, as compared to non-depreciable, property, stating: "We see little reason why land sales should be treated differently" (p. 107). The decision continued:

> In short, whether an asset is depreciated for ratemaking purposes or not, ratepayers commit to paying a return on its book value for as long as it is used and useful. Depreciation simply recognizes the fact that certain assets are consumed over a period of utility service while others are not. The basic relationship between the utility and its ratepayers is the same for depreciable and non-depreciable assets. [Emphasis added; p. 107.]

143 In *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), the regulator commented that:

> Our decisions generally find no reason to treat gain on the sale of nondepreciable

> property, such as bare land, different[ly] than gains on the sale of depreciable rate base assets and land in PHFU [plant held for future use]. [p. 105]

144 Again, my point is not that the regulator *must* reject any distinction between depreciable and non-depreciable property. Simply, my point is that the distinction does not have the controlling weight as contended by ATCO. In Alberta, it is up to the [page211] Board to determine what allocations are necessary in the public interest as conditions of the approval of sale. ATCO's attempt to limit the Board's discretion by reference to various doctrine is not consistent with the broad statutory language used by the Alberta legislature and should be rejected.

4. Lack of Reciprocity

145 ATCO argues that the customers should not profit from a rising market because if the land loses value it is ATCO, and not the ratepayers, that will absorb the loss. However, the material put before the Court suggests that the Board takes into account both gains *and* losses. In the following decisions the Board stated, repeated, and repeated again its "general rule" that

> the Board considers that any profit or loss (being the difference between the net book value of the assets and the sale price of those assets) resulting from the disposal of utility assets should accrue to the customers of the utility and not to the owner of the utility. [Emphasis added.]

(See *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984, at p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984, at p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23.)

146 In *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984, the Board reviewed a number of regulatory approaches (including *Re Boston Gas Co.*, previously mentioned) with respect to gains on sale and concluded with respect to its own practice, at p. 12:

> The Board is aware that it has not applied any consistent formula or rule which would automatically determine the accounting procedure to be followed in the treatment of gains or losses on the disposition of utility assets. The reason for this is that the Board's determination of what is fair and reasonable rests on the merits or facts of each case.

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147 ATCO's contention that it alone is burdened with the risk on land that *declines* in value overlooks the fact that in a falling market the utility continues to be entitled to a rate of return on its

original investment, even if the market value at the time is substantially less than its original investment. As pointed out in *SoCalGas*:

> If the land actually does depreciate in value below its original cost, then one view could be that the steady rate of return [the ratepayers] have paid for the land over time has actually overcompensated investors. Thus, there is symmetry of risk and reward associated with rate base land just as there is with regard to depreciable rate base property. [p. 107]

II. Conclusion

148 In summary, s. 15(3) of the AEUBA authorized the Board in dealing with ATCO's application to approve the sale of the subject land and buildings to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" (GUA, s. 22(1)), the Board made an allocation of the net gain for the public policy reasons which it articulated in its decision. Perhaps not every regulator and not every jurisdiction would exercise the power in the same way, but the allocation of the gain on an asset ATCO sought to withdraw from the rate base was a decision the Board was mandated to make. It is not for the Court to substitute its own view of what is "necessary in the public interest".

Disposition

149 I would allow the appeal, set aside the decision of the Alberta Court of Appeal, and restore the decision of the Board, with costs to the City of Calgary both in this Court and in the court below. ATCO's cross-appeal should be dismissed with costs.

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* * * * *

APPENDIX

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17

Jurisdiction

13 All matters that may be dealt with by the ERCB or the PUB under any enactment or as otherwise provided by law shall be dealt with by the Board and are within the exclusive jurisdiction of the Board.

Powers of the Board

15(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.

(2) In any case where the ERCB, the PUB or the Board may act in response to an application, complaint, direction, referral or request, the Board may act on its own initiative or motion.

(3) Without restricting subsection (1), the Board may do all or any of the following:

(a) make any order that the ERCB or the PUB may make under any enactment;
(b) with the approval of the Lieutenant Governor in Council, make any order that the ERCB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
(c) with the approval of the Lieutenant Governor in Council, make any order that the PUB may, with the approval of the Lieutenant Governor in Council, make under any enactment;
(d) with respect to an order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), make any further order and impose any additional conditions that the Board considers necessary in the public interest;
(e) make an order granting the whole or part only of the relief applied for;
(f) where it appears to the Board to be just and proper, grant partial, further or other relief in [page214] addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.

Appeals

26(1) Subject to subsection (2), an appeal lies from the Board to the Court of

Appeal on a question of jurisdiction or on a question of law.

(2) Leave to appeal may be obtained from a judge of the Court of Appeal only on an application made

(a) within 30 days from the day that the order, decision or direction sought to be appealed from was made, or
(b) within a further period of time as granted by the judge where the judge is of the opinion that the circumstances warrant the granting of that further period of time.

...

Exclusion of prerogative writs

27 Subject to section 26, every action, order, ruling or decision of the Board or the person exercising the powers or performing the duties of the Board is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

Gas Utilities Act, R.S.A. 2000, c. G-5

Supervision

22(1) The Board shall exercise a general supervision over all gas utilities, and the owners of them, and may make any orders regarding equipment, appliances, extensions of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

(2) The Board shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which owners of gas utilities comply with the law, or as to any other matter or thing within the jurisdiction of the Board under this Act.

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Investigation of gas utility

24(1) The Board, on its own initiative or on the application of a person having an interest, may investigate any matter concerning a gas utility.

...

Designated gas utilities

26(1) The Lieutenant Governor in Council may by regulation designate those owners of gas utilities to which this section and section 27 apply.

(2) No owner of a gas utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or
(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,
(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or
(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them, or
(ii) merge or consolidate its property, franchises, privileges or rights, or any part of it or them,

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and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a gas utility designated under subsection (1) in the ordinary course of the owner's business.

...

Prohibited share transactions

27(1) Unless authorized to do so by an order of the Board, the owner of a gas utility designated under section 26(1) shall not sell or make or permit to be made on its books any transfer of any share or shares of its capital stock to a corporation, however incorporated, if the sale or transfer, by itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the gas utility.

...

Powers of Board

36 The Board, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and

hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,

(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board,

(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,

(d) require an owner of a gas utility to establish, construct, maintain and operate, but in [page217] compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

(e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Board directs, fixes or imposes.

Rate base

37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Board shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
(b) to necessary working capital.

(3) In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Board shall give due consideration to all facts that in its opinion are relevant.

Excess revenues or losses

40 In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the [page218] fixing of rates, tolls or charges, or schedules of them,
(ii) a subsequent fiscal year of the owner, or
(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of that period,

(b) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines is just and reasonable,
(c) the Board may give effect to that part of any excess revenue

received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, that the Board determines has been due to undue delay in the hearing and determining of the matter, and

(d) the Board shall by order approve

(i) the method by which, and

(ii) the period, including any subsequent fiscal period, during which,

any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (b) or (c), is to be used or dealt with.

General powers of Board

59 For the purposes of this Act, the Board has the same powers in respect of the plant, premises, equipment, service and organization for the production, distribution and sale of gas in Alberta, and in respect of the business of an owner of a gas utility and in respect of an owner of a gas utility, that are by the *Public Utilities Board Act* conferred on the Board in the case of a public utility under that Act.

Public Utilities Board Act, R.S.A. 2000, c. P-45

Jurisdiction and powers

36(1) The Board has all the necessary jurisdiction and power

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(a) to deal with public utilities and the owners of them as provided in this Act;

(b) to deal with public utilities and related matters as they concern suburban areas adjacent to a city, as provided in this Act.

(2) In addition to the jurisdiction and powers mentioned in subsection (1), the Board has all necessary jurisdiction and powers to perform any duties that are assigned to it by statute or pursuant to statutory authority.

(3) The Board has, and is deemed at all times to have had, jurisdiction to fix and settle, on application, the price and terms of purchase by a council of a municipality pursuant to section 47 of the *Municipal Government Act*

(a) before the exercise by the council under that provision of its right to purchase and without binding the council to purchase, or
(b) when an application is made under that provision for the Board's consent to the purchase, before hearing or determining the application for its consent.

General power

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

Investigation of utilities and rates

80 When it is made to appear to the Board, on the application of an owner of a public utility or of a municipality or person having an interest, present or contingent, in the matter in respect of which the application is made, that there is reason to believe that the tolls demanded by an owner of a public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, the Board

(a) may proceed to hold any investigation that it thinks fit into all matters relating to the nature [page220] and quality of the service or

the commodity in question, or to the performance of the service and the tolls or charges demanded for it,

(b) may make any order respecting the improvement of the service or commodity and as to the tolls or charges demanded, that seems to it to be just and reasonable, and

(c) may disallow or change, as it thinks reasonable, any such tolls or charges that, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities, but subject however to any provisions of any contract existing between the owner of the public utility and a municipality at the time the application is made that the Board considers fair and reasonable.

Supervision by Board

85(1) The Board shall exercise a general supervision over all public utilities, and the owners of them, and may make any orders regarding extension of works or systems, reporting and other matters, that are necessary for the convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights.

...

Investigation of public utility

87(1) The Board may, on its own initiative, or on the application of a person having an interest, investigate any matter concerning a public utility.

(2) When in the opinion of the Board it is necessary to investigate a public utility or the affairs of its owner, the Board shall be given access to and may use any books, documents or records with respect to the public utility and in the possession of any owner of the public utility or municipality or under the control of a board, commission or department of the Government.

(3) A person who directly or indirectly controls the business of an owner of a public utility within Alberta and any company controlled by that person shall give the Board or its agent access to any of the books, documents and records that relate to the business of the owner or shall furnish any information in respect

of it required by the Board.

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Fixing of rates

89 The Board, either on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,

(a) fix just and reasonable individual rates, joint rates, tolls or charges, or schedules of them, as well as commutation, mileage or kilometre rate and other special rates, which shall be imposed, observed and followed subsequently by the owner of the public utility;
(b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a public utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Board;
(c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed subsequently by the owner of the public utility;
(d) repealed;
(e) require an owner of a public utility to establish, construct, maintain and operate, but in compliance with other provisions of this or any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Board the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the public utility reasonably warrants the original expenditure required in making and operating the extension.

Determining rate base

90(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to

be imposed, observed and followed subsequently by an owner of a public utility, the Board shall determine a rate base for the property of the owner of a public utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

(2) In determining a rate base under this section, the Board shall give due consideration

(a) to the cost of the property when first devoted to public use and to prudent acquisition cost to [page222] the owner of the public utility, less depreciation, amortization or depletion in respect of each, and
(b) to necessary working capital.

(3) In fixing the fair return that an owner of a public utility is entitled to earn on the rate base, the Board shall give due consideration to all those facts that, in the Board's opinion, are relevant.

Revenue and costs considered

91(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed by an owner of a public utility,

(a) the Board may consider all revenues and costs of the owner that are in the Board's opinion applicable to a period consisting of

(i) the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them,
(ii) a subsequent fiscal year of the owner, or
(iii) 2 or more of the fiscal years of the owner referred to in subclauses (i) and (ii) if they are consecutive,

and need not consider the allocation of those revenues and costs to any part of such a period,

(b) the Board shall consider the effect of the *Small Power Research and Development Act* on the revenues and costs of the owner with respect to the generation, transmission and distribution of electric energy,

(c) the Board may give effect to that part of any excess revenue received or any revenue deficiency incurred by the owner that is in the Board's opinion applicable to the whole of the fiscal year of the owner in which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines is just and reasonable,

(d) the Board may give effect to such part of any excess revenue received or any revenue deficiency incurred by the owner after the date on which a proceeding is initiated for the fixing of rates, tolls or charges, or schedules of them, as the Board determines has been due to undue delay in the hearing and determining of the matter, and

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(e) the Board shall by order approve the method by which, and the period (including any subsequent fiscal period) during which, any excess revenue received or any revenue deficiency incurred, as determined pursuant to clause (c) or (d), is to be used or dealt with.

Designated public utilities

101(1) The Lieutenant Governor in Council may by regulation designate those owners of public utilities to which this section and section 102 apply.

(2) No owner of a public utility designated under subsection (1) shall

(a) issue any

(i) of its shares or stock, or

(ii) bonds or other evidences of indebtedness, payable in more than one year from the date of them,

unless it has first satisfied the Board that the proposed issue is to be made in accordance with law and has obtained the approval of the Board for the purposes of the issue and an order of the Board authorizing the issue,

(b) capitalize

(i) its right to exist as a corporation,
(ii) a right, franchise or privilege in excess of the amount actually paid to the Government or a municipality as the consideration for it, exclusive of any tax or annual charge, or

(iii) a contract for consolidation, amalgamation or merger,

(c) without the approval of the Board, capitalize any lease, or
(d) without the approval of the Board,

(i) sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of them, or
(ii) merge or consolidate its property, franchises, privileges or rights, or any part of them,

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and a sale, lease, mortgage, disposition, encumbrance, merger or consolidation made in contravention of this clause is void, but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage, disposition, encumbrance, merger or consolidation of any of the property of an owner of a public utility designated under subsection (1) in the ordinary course of the owner's business.

...

Prohibited share transaction

102(1) Unless authorized to do so by an order of the Board, the owner of a public utility designated under section 101(1) shall not sell or make or permit to be made on its books a transfer of any share of its capital stock to a corporation, however incorporated, if the sale or transfer, in itself or in connection with previous sales or transfers, would result in the vesting in that corporation of more than 50% of the outstanding capital stock of the owner of the public utility.

...

Interpretation Act, R.S.A. 2000, c. I-8

Enactments remedial

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

Solicitors:

Solicitors for the appellant/respondent on cross-appeal: McLennan Ross, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Bennett Jones, Calgary.

Solicitor for the intervener the Alberta Energy and Utilities Board: J. Richard McKee, Calgary.

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Solicitor for the intervener the Ontario Energy Board: Ontario Energy Board, Toronto.

Solicitors for the intervener Enbridge Gas Distribution Inc.: Fraser Milner Casgrain, Toronto.

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

Indexed as:

McLean v. British Columbia (Securities Commission)

Patricia McLean, Appellant;
v.
Executive Director of the British Columbia Securities Commission, Respondent, and
Financial Advisors Association of Canada and Ontario Securities Commission, Interveners.

[2013] 3 S.C.R. 895

[2013] 3 R.C.S. 895

[2013] S.C.J. No. 67

[2013] A.C.S. no 67

2013 SCC 67

File No.: 34593.

Supreme Court of Canada

Heard: March 21, 2013;
Judgment: December 5, 2013.

Present: LeBel, Fish, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

(82 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Administrative law -- Securities -- Standard of review -- Limitation of actions -- Appellant entering

into settlement agreement with Ontario Securities Commission in respect to certain possible improper actions -- B.C. Securities Commission initiating secondary proceedings based on settlement agreement -- B.C. Securities Act establishing limitation period of six years from date of "events" giving rise to proceedings -- Whether "events" triggering six-year limitation period are the underlying misconduct giving rise to the settlement agreement, or the settlement agreement itself -- Whether the standard of review of the Commission's decision should be correctness or reasonableness -- Having regard to the standard of review, whether there is any basis to interfere with the Commission's interpretation -- Securities Act, R.S.B.C. 1996, c. 418, ss. 159, 161(6)(d).

Summary:

On September 8, 2008, M entered into a settlement agreement with the Ontario Securities Commission in respect to misconduct that occurred in Ontario, in 2001 or earlier. The Ontario Securities Commission issued an order in the public interest barring her from trading in securities for five years and banning her from acting [page896] as an officer or director of certain entities registered in Ontario for 10 years. On January 14, 2010, the respondent notified M that he was applying to the British Columbia Securities Commission for a public interest order against her based on s. 161(6)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418. Section 161(6)(d) empowers the Commission to bring proceedings in the public interest against persons who have agreed with another jurisdiction's securities regulator, by way of a settlement agreement, to be subject to regulatory action. Section 159 of the *Securities Act* sets out that all proceedings under the Act "must not be commenced more than 6 years after the date of the events that give rise to the proceedings". The Commission issued a reciprocal order adopting the same prohibitions as are set out in the Ontario Securities Commission's order. In doing so, the Commission implicitly interpreted s. 159, as it applies to s. 161(6)(d), such that "the event" that triggered the six-year limitation period was M's entering into a settlement agreement and not the misconduct that occurred in 2001 or earlier. The Court of Appeal applied a correctness standard of review and upheld the Commission's implied decision that "the event" that gave rise to the proceedings in British Columbia under s. 161(6)(d) was the agreement in Ontario.

Held: The appeal should be dismissed

Per LeBel, Fish, Rothstein, Cromwell, Moldaver and Wagner JJ.: The question presented is whether, for purposes of s. 161(6)(d), "the events" that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. A review of the ordinary meaning, the context, and the purpose of both ss. 159 and 161(6) of the *Securities Act* reasonably supports the Commission's conclusion that the event giving rise to a proceeding under s. 161(6)(d) is the fact of having agreed with a securities regulatory authority to be subject to regulatory action. The appropriate standard of review is reasonableness. Both parties proposed reasonable interpretations of s. 159 of the *Securities Act*, as it applies to s. 161(6)(d). However, under reasonableness review, courts defer to any reasonable

interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the Commission's interpretation has not been shown to be an unreasonable one, there is no basis to interfere on judicial review.

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The Court of Appeal erred by applying a correctness standard of review. It is presumed that courts will defer to an administrative decision maker interpreting its own statute or statutes closely connected to its function. This presumption is not rebutted in this case. Nor does the question fall within any exceptional category that warrants a correctness standard. Although limitation periods generally are of central importance to the fair administration of justice, the issue here is statutory interpretation in a particular context within the Commission's specialized area of expertise. The possibility that other provincial securities commissions may arrive at different interpretations of similar statutory limitation periods is a function of the Constitution's federalist structure and does not provide a basis for a correctness review. Finally, and most significantly, the modern approach to judicial review recognizes that courts may not be as qualified as an administrative tribunal to interpret that tribunal's home statute. In particular, the resolution of unclear language in a home statute is usually best left to the administrative tribunal because the tribunal is presumed to be in the best position to weigh the policy considerations often involved in choosing between multiple reasonable interpretations of such language.

The Commission's interpretation of the limitations period here is reasonable. The ordinary meaning of "the events" in s. 159 that give rise to a proceeding under s. 161(6)(d) is the fact of having agreed with a securities regulatory authority to be subject to regulatory action. Although s. 159 predates s. 161(6), and originally limitation periods were understood to run from the date of the underlying misconduct, that drafting history is not dispositive. The phrase "the events" is deliberately open-ended and applicable to a variety of contexts. As applied to s. 161(6)(d), it can mean the date the person "has agreed with a securities regulatory authority". Finally, allowing secondary jurisdictions to wait until the conclusion of a primary proceeding obviates the need for parallel and duplicative proceedings that will overburden securities commissions and the targets of proceedings. The Commission's interpretation thus furthers the legislative goal of improving interjurisdictional cooperation between provinces and territories.

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Although the Commission's interpretation significantly extends the duration of time for which a person may be subject to regulatory action, of itself, that is not offensive to the purpose of limitation periods. Limitation periods are always driven by policy choices that attempt to balance the interests of the parties. The Commission's interpretation strikes a reasonable balance between facilitation of interprovincial cooperation and the underlying purposes of limitation periods.

Per Karakatsanis J.: The Commission was reasonable in interpreting s. 159 to require that secondary proceedings under s. 161(6) must be initiated within six years of a person being sanctioned in another jurisdiction. However, the opposite interpretation -- that the limitation period runs from the time of the underlying misconduct -- is not reasonable. Such an interpretation would require duplicative proceedings in cases, like this one, where an investigation in another jurisdiction does not conclude within six years of the underlying misconduct. It is inconsistent with the legislative objective of facilitating interjurisdictional cooperation and it is at odds with a purposive interpretation. Consequently, it would not have been open to the Commission to interpret the limitations period as the appellant urges.

Cases Cited

By Moldaver J.

Distinguished: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; **referred to:** *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132; *McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734; *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers Union of [page899] Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 (CanLII); *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *Woods (Re)*, 1997 LNBCSC 11 (QL); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII); *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL); *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Novak v. Bond*, [1999] 1 S.C.R. 808; *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII); *Nielsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478; *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Cholmondeley v.*

Clinton (1820), 2 Jac. & W. 1, 37 E.R. 527; *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Murphy v. Welsh*, [1993] 2 S.C.R. 1069; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559.

By Karakatsanis J.

Referred to: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

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Securities Act, S.N.B. 2004, c. S-5.5, s. 184(1.1).

Securities Act, S.Nu. 2008, c. 12, s. 60(3).

Securities Act, S.N.W.T. 2008, c. 10, s. 60(3).

Securities Act, S.Y. 2007, c. 16, s. 60(3).

Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 134(1.1).

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Neilson JJ.A.), 2011 BCCA 455, 312 B.C.A.C. 288, 531 W.A.C. 288, 343 D.L.R. (4th) 432, [2011] B.C.J. No. 2124 (QL), 2011 CarswellBC 2929, allowing an appeal from a decision by the British Columbia Securities Commission, 2010 BCSECCOM 262, 2010 LNBCSC 222 (QL). Appeal dismissed.

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Counsel:

Christopher H. Wirth and *Fredrick Schumann*, for the appellant.

Stephen M. Zolnay, for the respondent.

Lou Brzezinski and *John Polyzogopoulos*, for the intervener the Financial Advisors Association of Canada.

Johanna M. Superina and *Usman M. Sheikh*, for the intervener the Ontario Securities Commission.

The judgment of LeBel, Fish, Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

MOLDAVER J.:--

I. Introduction

1 In Canada, the individual provinces and territories bear primary responsibility for the regulation of stocks, bonds, and other securities. However, because modern securities markets transcend provincial and territorial borders, the provinces and territories have in recent years taken steps to harmonize their securities laws and to improve cooperation between their securities regulators.

2 As a result of these efforts, the British Columbia Securities Commission (the "Commission"), like all of its provincial and territorial peers, has been empowered to bring proceedings in the public interest against persons who, among other things, have agreed with another jurisdiction's securities regulator, by way of a settlement agreement, to be subject to regulatory action; see s. 161(6)(d) of the *Securities Act*, R.S.B.C. 1996, c. 418. In the jargon of the industry, these proceedings are known as "secondary proceedings" because they piggy-back on another jurisdiction's efforts. Subject to a few exceptions, all proceedings under the *Act* - secondary or otherwise - "must not be commenced more than 6 years after the date of the events that give rise to the proceedings" (s. 159).

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3 At issue in this appeal is whether, for purposes of s. 161(6)(d), "the events" that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. The Commission takes the position that the settlement agreement is the triggering event. On that basis, it commenced secondary proceedings against the appellant after she entered into a settlement agreement with another regulator, even though the underlying misconduct referred to in that agreement occurred roughly nine years earlier. Had the Commission adopted the alternative interpretation, as the appellant argues it should have, the secondary proceeding would have been commenced outside the six-year limitation period and thus been statute-barred.

4 Applying the governing standard of review, which I consider to be reasonableness, I am satisfied that the Commission's interpretation is a reasonable construction of the relevant statutory language. Significantly, the Commission's conclusion supports the legislative objective of facilitating interjurisdictional cooperation in secondary proceedings and does so without undercutting the crucial role of limitation periods. Accordingly, I see no reason to interfere and would dismiss the appeal.

II. Facts

A. *The Primary Investigation and The Settlement Agreement*

5 The facts are straightforward and undisputed. From March 1996 to June 2001, the appellant, Patricia McLean, served as a director of Hucamp Mines Ltd., a reporting issuer registered in Ontario under the *Securities Act*, R.S.O. 1990, c. S.5. Beginning in July 2001, the appellant began cooperating with the Ontario Securities Commission ("OSC") in respect of "certain possible improper actions at Hucamp" (Settlement Agreement Between OSC Staff and Patricia McLean, at para. 63 (A.R., at p. 45)). The particulars of the alleged misconduct are not relevant, but the timing is - the allegations pertain to conduct that occurred in 2001 or earlier.

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6 On July 11, 2005, the OSC announced that it would hold a hearing under its public interest powers to sanction the appellant and certain others for their alleged misconduct at Hucamp; see *Securities Act*, ss. 127 and 127.1. Such powers, which exist in each of the provincial and territorial statutes, confer a "very wide discretion" to make whatever orders the OSC considers to be in the public interest (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at para. 39).

7 Three years later, on September 8, 2008, the appellant entered into a settlement agreement with the OSC staff wherein she "consent[ed] to the making of [such] an order against her" (Settlement Agreement, at para. 2 (A.R., at p. 33)). On the same day, the OSC approved the settlement agreement and issued the agreed-upon order (*McLean (Re)*, 2008 LNONOSC 660, 31 O.S.C.B. 8734).

8 In its pertinent parts, the OSC order barred the appellant for five years from trading in securities (with some exceptions) and banned her for ten years from acting as an officer or director of certain entities registered under the Ontario *Securities Act*. By virtue of the OSC's provincial jurisdiction, the reach of these sanctions did not extend beyond Ontario's borders. No one challenges the propriety of the OSC's order.

B. *The Secondary Investigation and the B.C. Order*

9 All was quiet for the next 15 months - until January 14, 2010 to be exact - when the appellant was notified by the Executive Director of the B.C. Securities Commission (the respondent) that he was applying to the Commission under s. 161(1) of the *Act* for a "public interest" order against her based on s. 161(6)(d). For present purposes, the relevant aspects of those provisions are as follows:

[page904]

159 [Limitation Period] Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

...

161 (1) [Enforcement Orders] If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

...

(b) that

...

(ii) the person or persons named in the order, ...

...

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

...

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer or registrant,

(ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

...

(6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person

(a) has been convicted in Canada or elsewhere of an offence

(i) arising from a transaction, business or course of conduct related to securities or exchange contracts, or
(ii) under the laws of the jurisdiction respecting trading in securities or exchange contracts,

(b) has been found by a court in Canada or elsewhere to have contravened the laws of the jurisdiction respecting trading in securities or exchange contracts,
(c) is subject to an order made by a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, imposing sanctions, conditions, restrictions or requirements on the person, or
(d) has agreed with a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, to be subject to sanctions, conditions, restrictions or requirements.

10 In asserting that it had authority to make an order under s. 161(1) based on s. 161(6)(d), the Commission relied on the appellant's settlement agreement with the OSC. And thus began the present case.

11 There is no dispute that had the Commission proceeded *solely* under s. 161(1), the proceeding would have run afoul of s. 159. The respondent accepts that the six-year limitation period in s. 159 as applied to s. 161(1) alone begins to run from "the last event in the series of events which form the course of conduct" sanctioned by the order (R.F., at para. 79, citing *Heidary (Re)*, 2000 LNONOSC 79, 23 O.S.C.B. 959, at p. 961). By January 2010, it had been almost nine years since the last event described in the settlement agreement.

12 The question in this case is whether the same conclusion holds true for secondary proceedings initiated using s. 161(6)(d). If it does, as the appellant contends, the Commission's order must be set aside for the same reason that an order based on [page906] s. 161(1) alone would be - it had been almost nine years after the last event described in the settlement agreement and three years beyond the requisite limitation period. If, however, the clock under s. 161(6)(d) starts running on the date of the settlement agreement referred to in that provision, as the Commission concluded, the Commission's order must stand because the proceeding was commenced well within the six-year window prescribed by s. 159.

III. Proceedings Below

A. *British Columbia Securities Commission, 2010 BCSECCOM 262 (CanLII)*

13 After receiving notice of the secondary proceeding, the appellant "made extensive written submissions on the limitation period issue" to the Commission arguing that it lacked authority to make an order against her by virtue of s. 159 (A.F., at para. 10). She raised no other issues or arguments.

14 The Commission implicitly rejected the appellant's limitations argument by issuing what it termed a "reciprocal order" that was substantially identical to the OSC order. In particular, the Commission barred the appellant from trading in securities under s. 161(1)(b) (except for those trades permitted under the OSC order) and prohibited her from acting as an officer or director of certain entities registered under the *Act* under s. 161(1)(d)(i) and (ii). The prohibitions expired on the same day as the OSC order - that is, five years and ten years, respectively, from September 8, 2008.

15 As a consequence of the twin orders from the Ontario and B.C. Commissions, the appellant was prohibited from engaging in substantially identical conduct in both Ontario and British Columbia for identical periods of time.

[page907]

B. *British Columbia Court of Appeal, 2011 BCCA 455, 312 B.C.A.C. 288*

16 On appeal, the appellant reiterated her limitations argument. The B.C. Court of Appeal concluded that "generally the interpretation of a limitation period provision in a statute by an administrative tribunal will engage the standard of correctness" (para. 15). Applying that standard, it nonetheless found in favour of the Commission. On a "plain reading", the court concluded that "although the acts which gave rise to the Ontario proceedings obviously occurred before the agreement was made, the event that gave rise to the [B.C.] proceedings under s. 161(6)(d) was the agreement in Ontario" (para. 20). The interpretation put forward by the appellant "would eliminate the effective operation of s. 161(6)(d) which cannot have been the intention of the Legislature" (*ibid*.).

17 The appellant also challenged the Commission's failure to give reasons for its order, both as to the limitation period and as to why the order was in the public interest. As regards the limitation argument, the court held that "although it might have been of assistance" had the Commission given reasons for its interpretation of s. 159, reasons were not essential because the question was one of law reviewable on a standard of correctness (para. 27). With respect to the order being in the public interest, the court concluded that "the complete absence of reasons makes appellate review of the public interest aspect of the decision and the sanctions imposed impossible" (para. 30). Hence, the

court remitted the matter to the Commission for a "brief explanation" (para. 31). The Commission subsequently provided such an explanation (2012 BCSECCOM 50 (CanLII)), and that aspect of its decision is not challenged before this Court.

IV. Issues

18 At issue in this appeal is the proper interpretation of the limitation period in s. 159 as it relates to public interest orders made under s. 161(6)(d) of the *Act*. The following two questions arise:

[page908]

(1) What is the standard of review for the Commission's interpretation of s. 159 as it applies to s. 161(6)(d)?
(2) Having regard to the applicable standard of review, is there any basis to interfere with the Commission's interpretation?

V. Analysis

A. *Standard of Review*

(1) The Presumption of Reasonableness Review for Home Statutes

19 As noted, the Court of Appeal was of the view that the standard of review was correctness. Before this Court, the parties and the intervener, the OSC, disagreed on that issue. For the reasons that follow, I am satisfied that the standard of review is reasonableness.

20 Before turning to my analysis, I pause to note that the standard of review debate is one that generates strong opinions on all sides, especially in the recent jurisprudence of this Court. However, the analysis that follows is based on this Court's existing jurisprudence - and it is designed to bring a measure of predictability and clarity to that framework.[1]

21 Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54).[2] Recently, in an attempt to further simplify matters, this Court held that an administrative decision [page909] maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).

22 The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. First, this Court has long recognized that certain categories of questions - even when they involve the interpretation of a home statute - warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16). The appellant follows both these routes in urging us to accept a correctness standard. I propose to deal with her second argument first as it can be dispensed with quickly.

(2) The Presumption of Reasonableness Review Is Not Rebutted

23 The appellant contends that the presumption of reasonableness review has been rebutted. She relies on our recent decision in *Rogers*, where we held that a correctness standard was appropriate because of a statutory scheme under which both an administrative tribunal and the courts had concurrent jurisdiction at first instance in interpreting the relevant statute.

24 This case is different. As Rothstein J. made clear in *Rogers*, it was the fact that both the tribunal and the courts "may each have [had] to consider the same legal question at first instance" that "rebutt[ed] the presumption of reasonableness review" (para. 15 (emphasis added)). Here, the legal question is the interpretation of s. 159 as it applies to s. 161(6)(d) [page910] - and it is *solely* the Commission that is tasked with considering that matter in the first instance. Accordingly, there is no possibility of conflicting interpretations with respect to the question actually at issue. The logic of *Rogers* is thus inapplicable.

(3) The Question Does Not Fall Into an Exceptional Category

25 I return then to the appellant's first argument - that the question presented falls into an exceptional category warranting "correctness" review. Post-*Dunsmuir*, it has become fashionable for counsel to argue that the question before an administrative decision maker falls into one of the few recognized exceptional categories. One wave of cases focuses on whether the question raised is a "true" question of *vires* or jurisdiction; see *Alberta Teachers*, at paras. 37-38 (citing various cases). In that case, the Court expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility (para. 34).[3]

26 A second wave - the one which the appellant now rides - focuses on "general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22, referring to *Dunsmuir*, at para. 60); see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers [page911] Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R.

458. In each of these cases, this Court unanimously found that the question presented did not fall into this exceptional category - and I would do so again here.

27 The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

28 Here, the appellant's arguments in support of her contention that this case falls into the general question category fail for three reasons. First, although I agree that limitation periods, as a conceptual matter, are *generally* of central importance to the fair administration of justice, it does not follow that the Commission's interpretation of *this* limitation period must be reviewed for its correctness. The meaning of "the events" in s. 159 is a nuts-and-bolts question of statutory interpretation confined to a particular context. Indeed, the arguably complex legal doctrines such as discoverability that the appellant says demand correctness review (see A.R.F., at para. 9) have been specifically *excluded* from any application to s. 159. The appellant recognizes this fact elsewhere in her submissions (A.F., at para. 25, citing *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 (CanLII), at para. 28). Accordingly, there is no question of law of central importance to the legal system as a whole, let alone one that falls outside the Commission's specialized area of expertise.

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29 Second, while it is true that reasonableness review in this context necessarily entails the possibility that other provincial and territorial securities commissions may arrive at different interpretations of their own statutory limitation periods, I cannot agree that such a result provides a basis for correctness review - and thus judicially mandated "consisten[cy] ... across the country" (A.R.F., at para. 13). No one disputes that each of the provincial and territorial legislatures can enact entirely different limitation periods. Indeed, one of them has; see Manitoba's *Securities Act*, C.C.S.M., c. S50, s. 137 (providing an eight-year period, instead of the six-year norm). By the same token, it may be the case that provincial and territorial securities regulators come to differing (but nonetheless reasonable) interpretations of those limitation periods (though that has yet to occur). If there is a problem with such a hypothetical outcome, it is a function of our Constitution's federalist structure - not the administrative law standards of review.

30 Third, and most significantly, the problem with the appellant's argument is her narrow view of the Commission's expertise. In particular, the appellant argues that limitation periods "are not in themselves part of substantive securities regulation, the area of the [Commission's] specialised expertise" (A.R.F., at para. 9). The argument presupposes a neat division between what one might

call a "lawyer's question" and a "bureaucrat's question". The logic seems to be that because the meaning of "the events" in s. 159 cannot possibly require any great technical expertise - there is, after all, no specialized "bureaucratese" to interpret - why should the matter be left to the Commission?

31 While such a view may have carried some weight in the past, that is no longer the case. The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy [page913] context within which that agency must work" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, *per* Wilson J.; see also *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 92; *Mowat*, at para. 25).

32 In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations (*Dunsmuir*, at para. 47; see also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405). Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*

33 The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* - not the courts - to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

B. *The Commission's Interpretation of Section 159 Was Reasonable*

(1) Overview

(a) *The Appellant's Position*

34 In a nutshell, the appellant argues that s. 161(6) merely "codifies the [Commission's] already-existing ability to rely on convictions, findings, orders, or agreements as *evidence* of a person's conduct contrary to the public interest" (A.F., [page914] at para. 40 (emphasis in original)). The law is clear that the Commission could - and did - issue reciprocal orders using its existing power under s. 161(1) on the strength of factual findings in other jurisdictions prior to the introduction of s. 161(6); see, e.g., *Woods (Re)*, 1997 LNBCSC 11 (QL), at p. 5 (where the Commission relied on "the findings of fact and law of the Ontario courts, and the enforcement orders made by the Ontario Securities Commission"); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII),

at para. 4 (where the Commission drew the facts "solely from the decision and order of the [Alberta Securities Commission] and the judgment of the Alberta Provincial Court").

35 In those earlier cases, "the events" meant the underlying misconduct - and no one suggests otherwise. As such, the Commission's choice to rely on the "procedural shortcut" reflected in s. 161(6)(d) does not change the nature of the proceedings such that the *agreement* becomes *the event* (A.F., at para. 40). Rather, because s. 161(6)(d) must be fused with s. 161(1), the proceedings remain s. 161(1) proceedings - and "the events" must thus remain the underlying misconduct.

(b) *The Respondent's Position*

36 The respondent says that the appellant's argument is untenable because the plain wording of s. 161(6) says nothing about decisions, orders, or settlement agreements being admissible as "evidence". Rather, "the provisions empower the Commission to make an order in specific circumstances (*i.e.*, if a person is subject to another regulator's order or has agreed to be subject to sanctions)" (R.F., at para. 53). Because securities investigations do not always conclude within the six-year window, the purpose of s. 161(6)(d) would be undermined if the Commission were "barred from making an order in any case where the extra-provincial proceeding concludes more than six [page915] years after the date of the wrongdoer's misconduct" (R.F., at para. 84). Put simply, on the appellant's interpretation, the limitation period could expire before the event referred to in s. 161(6)(d) ever occurs - and that would all but defeat the purpose of the provision.

(c) *The Choice Between the Two Interpretations*

37 For the reasons that follow, I conclude that both interpretations are reasonable. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at pp. 4-5, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30).

38 It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable - no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation - and the administrative decision maker must adopt it.

39 But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are

reasonable. The litmus test, of course, is that if the Commission had adopted the other interpretation - that is, if the Commission had agreed with the appellant - [page916] I am hard-pressed to conclude that we would have rejected its decision as unreasonable.

40 The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

41 Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable.* And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review - even in the face of a competing reasonable interpretation.

(2) Ordinary Meaning

42 Beginning with the ordinary meaning of "the events", on the surface it would appear that "the even[t]" giving rise to a proceeding under s. 161(6)(d) is the fact of "ha[ving] agreed with a securities regulatory authority" to be subject to regulatory action. By ordinary meaning, I refer simply to the "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning would thus appear to support the Commission's interpretation.

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43 However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because

> [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

(*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

44 That possibility is realized here. Though the ordinary meaning seems apparent enough, digging deeper into the context and purpose of the provision casts some doubt on that conclusion - and introduces the possibility of another reasonable interpretation.

(3) Drafting History

45 The limitation period in s. 159 predates the addition of s. 161(6) by roughly a decade. Before s. 161(6) was introduced by the *Securities Amendment Act, 2006*, S.B.C. 2006, c. 32, it was clear that s. 159 ran from the date of the underlying misconduct; see, e.g., *Dennis (Re)*, 2005 BCSECCOM 65, 2004 LNBCSC 705 (QL), at para. 38; *Bapty*, at para. 28. As mentioned, the parties do not contend otherwise.

46 It was only with the addition of s. 161(6) that the start date for the limitations clock became unclear. Given that the legislature chose not to change the wording of s. 159 after it added s. 161(6), it stands to reason that the legislature intended "the events" in s. 159 to continue to refer to the misconduct at issue, regardless of the addition of s. 161(6). In other words, the original meaning of "the events" did not change overnight. And [page918] as Dickson J. (as he then was) observed, "words must be given the meanings they had at the time of enactment" (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 265, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 163). If one accepts this line of reasoning, it lends support to the appellant's interpretation.

47 On the other hand, one could argue that the original meaning of "the events" never changed - all that did was what qualified as an "event" in a particular context. It is important to distinguish between these two concepts. As Professor Sullivan has explained, "even though the meaning of a word remains constant, the things or events that fall within its ambit may change dramatically over time" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 149; see also P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 287-88). This argument, which lends support to the Commission's interpretation, is best illustrated by a contextual reading of s. 159, to which I now turn.

(4) The Provision Read in Context

48 The use of the phrase "the events that give rise to the proceedings" in s. 159 is relatively open-ended, as can be seen when contrasted with the language used in other limitations provisions in the *Act*. For example, s. 140(a), which provides for limitation periods for actions for rescission, speaks of "180 days after the date of the transaction that gave rise to the cause of action". Section 140.94, which concerns actions related to secondary market disclosure, speaks of "3 years after the date on which the document containing the misrepresentation was first released".

49 The distinctive diction of s. 159 arguably makes sense in context. Unlike ss. 140 and 140.94, which refer to specific proceedings in the *Act*, s. 159 is a residual limitation provision applicable to

all other proceedings. Thus, it stands to reason that "the [page919] events" is a deliberately open-ended phrase because it must be capable of applying to a variety of different contexts. As applied to s. 161(1)(a)(i), "the events" read in its ordinary sense means the date of the misconduct whereby a person was "contravening ... a provision of [the] Act". That, of course, was the interpretation as understood prior to the introduction of s. 161(6). But it is also easy to see how, as applied to s. 161(6)(a), "the events" can mean the date the person "has been convicted ... of an offence". And as applied to s. 161(6)(d), the provision at issue here, "the events" can mean the date the person "has agreed with a securities regulatory authority [...] to be subject to sanctions, conditions, restrictions or requirements".

50 What the appellant asks the Commission to do is to interpret "the events that give rise to the proceedings" restrictively as "the *misconduct* that gives rise to the proceedings". Indeed, that is essentially how Manitoba's general limitation provision reads; see *Securities Act*, s. 137 ("the proceedings to prosecute a person or company for an offence under this Act shall not be commenced after eight years after the date on which the offence was committed"). It cannot be said, however, that a contextual reading of s. 159 points toward such a restrictive interpretation. Rather, a flexible reading of "the events" - capable of adapting to the various provisions to which it is applied, including new provisions added over time, such as s. 161(6)(d) itself - makes more sense in context. Accordingly, and setting aside whatever quibbles one might have with the significance of the provision's drafting history, a contextual reading of s. 159 supports the Commission's interpretation.

(5) The Nature of Secondary Proceedings

51 For better or worse, securities regulation in Canada remains largely a matter of provincial and territorial jurisdiction. However, given the reality of [page920] interprovincial, if not international, capital markets, "[t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27). That is where provisions such as s. 161(6)(d) come in.

52 In 2004, recognizing the inefficiencies of the existing framework, all the provinces and territories (except Ontario, for reasons that are not relevant here) signed a memorandum of understanding ("MOU"); see *A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation* (online). The MOU set up a "passport system" for securities regulation, which provides a single window of access to market participants. Under this passport system,

> [h]ost jurisdictions will rely on the securities regulator in the primary jurisdiction of a market participant for the enforcement of the requirements of securities laws applicable to those areas covered by the passport system.
>
> * The securities regulator in a host jurisdiction that receives a complaint about a market participant will conduct a preliminary assessment of the

> complaint and refer the complaint along with their findings and the documents compiled to the primary jurisdiction for further investigation and, if appropriate, enforcement action.
>
> * The host securities regulator will await the outcome of the primary securities regulator's investigation and will undertake its own investigation and, if appropriate, enforcement action if it is in the public interest to do so or if the primary securities regulator has referred the matter back to the host securities regulator for further action. [Emphasis added; para. 5.6.]

53 Not long after the MOU was signed, the B.C. legislature introduced legislation to implement its provisions, including the secondary proceeding [page921] powers now found in s. 161(6); see Bill 20, *Securities Amendment Act, 2006*; Bill 28, *Securities Amendment Act, 2007*. Section 161(6)(d), of course, recognizes settlement agreements in other jurisdictions; other provisions speak to convictions for securities-related offences (s. 161(6)(a)), judicial findings as to securities laws (s. 161(6)(b)), and regulatory orders (s. 161(6)(c)).

54 As a consequence of these legislative amendments, while the Commission cannot abrogate its responsibility to make its own determination as to whether an order is in the public interest, one could argue, as the respondent does, that s. 161(6) obviates the need for inefficient parallel and duplicative proceedings in British Columbia by expressly providing a new basis on which to initiate proceedings. In other words, s. 161(6) achieves the legislative goal of facilitating interprovincial cooperation by providing a triggering "event" *other than the underlying misconduct*. The corollary to this point must be the ability to actually rely on that triggering event - that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) - in commencing a secondary proceeding. But the appellant's reading of s. 159 as it applies to s. 161(6) leads to the troublesome conclusion that the Commission could be time-barred from proceeding under this provision *before the triggering event even exists*.

55 The appellant's response is that where there is a risk that the six-year limitation window could expire before the primary jurisdiction has completed its proceeding, British Columbia and every other secondary province and territory should initiate their own proceedings in reliance on s. 161(1) alone - or, in the case of another province or territory, their provincial or territorial equivalent of that section - with the possibility that s. 161(6) or its equivalent could be invoked [page922] later on. Of course, the implication of this approach is clear: the appellant says that s. 161(6) does not change anything with respect to the timing of when a secondary proceeding must begin.

56 The facts of this case, however, illustrate how problematic the appellant's interpretation can prove in practice. Though the OSC was first alerted to the issues at Hucamp in 2001, it did not commence formal proceedings until 2005 (four years later). A settlement agreement was not reached until 2008 (a further three years later, and a full seven years after the last event of misconduct). No one suggests this lengthy period reflects any foot-dragging on the OSC's part. And yet, on the appellant's view, as the calendar turned to 2007, the B.C. Commission should have

commenced its own proceeding under s. 161(1) so as to preserve its ultimate authority to make an order using both ss. 161(1) and 161(6)(d). If that had been done, the appellant seems to accept that the Commission could then have waited until the conclusion of the OSC's proceeding to make its actual order.

57 The difficulty with the appellant's approach is that if each province and territory has to initiate proceedings before its limitations clock runs out - instead of relying on the outcome of the proceedings in the primary jurisdiction - overlapping cases would clog up the legal system and overburden the securities commissions. A multiplicity of simultaneous proceedings would also place a high burden on the target of the proceedings, who could well face multiple proceedings all across the country, all needing to be defended simultaneously.

58 On the other hand, allowing secondary jurisdictions to use s. 161(6) such that they can wait until the *conclusion* of the primary proceeding avoids some of these complications. That can happen only if the secondary jurisdictions are allowed to begin their work (and their limitation clocks start ticking) once the original proceeding has actually concluded - and no earlier. As such, it can be said that *the very purpose of s. 161(6) is to provide a [page923] new limitation clock*. Unless it is interpreted in this manner, s. 161(6) is no solution to the challenges inherent in the decentralized structure of securities regulation in Canada.

59 In the end, the Commission's interpretation is a reasonable one because it furthers the legislature's manifest goal of improving interprovincial cooperation. The appellant's interpretation, by contrast, fits uneasily with the broader indicators of legislative intent available to us. In reducing s. 161(6) to a belts-and-suspenders codification of what is already common practice, her interpretation does little to improve interprovincial cooperation. I do not say that the appellant's interpretation is inconsistent with such efforts - only that it does not further them to the same extent as the Commission's interpretation.

(6) The Purpose of Limitation Periods

60 I would be wary of focussing only on the legislative purpose of secondary provisions while overlooking the legislative purpose of limitation periods. Instead, regard must also be had for the legislative purpose of both s. 161(6)(d) *and* s. 159.

61 The appellant fears that the Commission's interpretation undermines two of the three purposes of limitation periods, namely, allowing for repose and encouraging diligence (*Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 67). Most notable is the possibility that allowing the limitations clock to start with each new proceeding would allow a string of secondary proceedings, piggy-backing on each other, which could stretch for decades. We are told that "[w]ith twelve jurisdictions having such provisions, a person could be subject to serial proceedings for *seventy-four years*" (A.F., at para. 54 (emphasis in original)).

62 There is also a related concern with respect to s. 161(6)(c), which provides that the

Commission may commence a proceeding so long as a person is [page924] "subject to an order" by another regulator. Public interest orders may last 20 years or more; see, e.g., *Friedland (Re)*, 2010 BCSECCOM 654 (CanLII) (20 years); *Nielsen (Re)*, 2013 LNONOSC 254, 36 O.S.C.B. 3478 (25 years); *Robinson (Re)*, 2013 LNABASC 295, 2013 ABASC 317 (CanLII) (permanent); *Maitland Capital Ltd. (Re)*, 2012 LNONOSC 95, 35 O.S.C.B. 1729 (permanent). Were the Commission able to commence a secondary proceeding six years *after* a person is no longer "subject to" such a primary order, that approach could radically expand the length of the limitation period - even beyond 74 years.

63 Such concerns, in my view, are not idle. Limitations periods exist for good reasons, two of which deserve mention here. First, "[t]here comes a time ... when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29). Second, at some point "[i]t is better that the negligent [plaintiff], who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation" (*Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, at p. 577; see also *M. (K.)*, at p. 30).

64 Against those rationales, the appellant's interpretation has something to it. Manifestly, the Commission's reading significantly extends the duration of time for which a person may be subject to regulatory action. Common sense suggests that the authorities will always want more time to go after law-breakers, but fairness demands their chase eventually come to an end. Absent more, regard for the purpose of limitation periods thus counsels in favour of the appellant's interpretation.

65 There is, however, a simple answer to the disquieting hypotheticals raised by the appellant. Although securities commissions are conferred with broad discretion to make orders in the public interest, their authority "is not unlimited" (*Asbestos [page925] Minority Shareholders*, at para. 41). Accordingly, no order - secondary or otherwise - is immune from appellate review for its reasonableness; see, e.g., *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, 35 B.C.L.R. (5th) 281 (where the court found the Commission's order under s. 161(6)(d) unreasonable because it imposed a severe sanction in sole reliance on another jurisdiction's settlement agreement in which no wrongdoing was admitted).

66 "[T]here is always a perspective within which a statute is intended to operate" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140). And keeping the appellant's concerns in mind, it seems to me that a regulator that sought to act on these scenarios would run afoul of the legislative purpose of limitation periods and distort the purpose of secondary proceeding provisions.

67 To his credit, the respondent acknowledges as much in his oral and written submissions (see transcript, at p. 55; R.F., at para. 90). In what I believe is a reasonable and responsible approach, he accepts the following three propositions:

1. Regardless of which of the four secondary proceeding clauses in s. 161(6) is at issue, "the events" refers to the date the relevant action first occurred.

Accordingly, if a settlement agreement is entered into on January 1, 2013 and terminates on January 1, 2015, it is the *first* date, not the second, which starts the clock.

2. A secondary proceeding may not be commenced under s. 161(6) if the period of the original order has already lapsed. In other words, using the same example, the Commission could not commence a secondary proceeding on February 1, 2015, because the original order would no longer be in place at that time.

[page926]

3. Any order initiated using s. 161(6) must be based on an *original* proceeding in the primary jurisdiction. Secondary proceedings cannot be "stacked" on top of one another in the manner feared by the appellant.

Although this is not the case to put our stamp of approval on these concessions, to my mind, they make eminent good sense. Thus, to the extent that regulators commence secondary proceedings in these situations, they must, as always, be prepared to defend the reasonableness of their decisions on appellate review.

68 While it is true that the application of s. 159 to the secondary proceeding provisions such as s. 161(6)(d) will have the effect, as a practical matter, of extending the period under which the cloud of potential regulatory action hangs over a person, that, of itself, is not offensive to the legislative purpose of limitation provisions. Limitations periods are always "driven by specific policy choices of the legislatures" (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 230, *per* Rothstein J., dissenting), as they attempt to "balance the interests of both sides" (*Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at p. 1080).

69 The Commission's interpretation strikes a reasonable balance between facilitation of interprovincial cooperation and the underlying purposes of limitation periods. Thus, notwithstanding the appellant's reasonable concerns, I am unable to conclude that the Commission's interpretation is rendered unreasonable in light of the purpose of limitation periods.

(7) Conclusion on the Commission's Interpretation

70 A review of the ordinary meaning, the context, and the purpose of both ss. 159 and 161(6) reasonably supports the conclusion that "the even[t]" giving rise to a proceeding under s. 161(6)(d) is the fact of "ha[ving] agreed with a securities regulatory authority" to be subject to regulatory action. That is not to say that the appellant's interpretation [page927] is not a reasonable alternative. But as I have said, when faced with two competing reasonable interpretations that result from a lack

of clarity in its home statute, the Commission, with the benefit of its expertise, is entitled to choose between them. Courts must respect that choice.

C. *The Commission's Failure to Give Reasons*

71 Briefly, I note that the Commission here failed to give reasons for its interpretation of s. 159. Instead, the Commission issued its order and, in doing so, impliedly decided that the proceeding was not time-barred. As noted in *Alberta Teachers*, "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions" (at para. 54; see also *Dunsmuir*, at para. 47). Nonetheless, "when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal" (at para. 55; see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58).

72 Unlike *Alberta Teachers*, in the case at bar, we do not have the benefit of the Commission's reasoning from its decisions in other cases involving the same issue (see paras. 56-57). However, a basis for the Commission's interpretation is apparent from the arguments advanced by the respondent, who is also empowered to make orders under (and thus to interpret) s. 161(1) and (6). These arguments follow from established principles of statutory interpretation. Accordingly, though reasons would have been preferable, there is nothing to be gained here from requiring the Commission to explain on remand what is readily apparent now.

VI. Disposition

73 For these reasons, I would dismiss the appeal with costs.

[page928]

The following are the reasons delivered by

74 KARAKATSANIS J.:-- I agree with Justice Moldaver's proposed disposition of this appeal and with much of his analysis. I accept his conclusion that the British Columbia Securities Commission was reasonable in interpreting the limitation period contained in s. 159 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, to require that secondary proceedings under s. 161(6) of the Act must be initiated within six years of a person being sanctioned in another jurisdiction, not within six years of the underlying misconduct.

75 However, I part company with my colleague when he suggests that the opposite interpretation urged by the appellant - that the limitation period runs from the time of the underlying misconduct, not the Ontario Securities Commission order - is also reasonable. I do not agree.

76 While the text of the provision, or its drafting history, might bear different interpretations if considered in a vacuum, the legislative objective of facilitating interjurisdictional cooperation weighs heavily against the appellant's interpretation.

77 Here, legislatures across Canada have enacted similar provisions to permit secondary proceedings in furtherance of interjurisdictional cooperation and consistency in securities regulation and enforcement across the country.[4] These objectives are also reflected in the *Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation*. As my colleague notes, this Court has recognized [page929] that interjurisdictional cooperation is "indispensable" to securities regulation: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27. It is particularly important in light of *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

78 On the appellant's reading, the British Columbia Securities Commission may only initiate secondary proceedings against a person if it does so within six years of the underlying misconduct. This would mean that in cases - like this one - where an investigation in another jurisdiction does not conclude in an order or settlement within six years of the underlying misconduct, the Commission could not use its secondary proceedings power unless it had already started proceedings before the six year clock had elapsed. The appellant's solution, that the Commission could instead initiate its own primary proceedings before the other jurisdiction's had concluded, strikes me as duplication that is inconsistent with the objectives of the secondary proceedings regime.

79 In this context, I am not persuaded that it would have been open to the Commission to reasonably interpret the limitation period as the appellant urges. It is at odds with a purposive interpretation.

80 My colleague's conclusion that both interpretations are reasonable would permit securities commissions in different jurisdictions across the country to come to completely opposite conclusions about the application of essentially equivalent statutory provisions enacted for the same purposes. Such a result has the potential to thwart the legislative objectives of consistency and cooperation that underlie the secondary proceedings regime.

[page930]

81 As my colleague notes, the disposition of this appeal does not require us to decide whether the appellant's alternative interpretation is reasonable.

82 Accordingly, with this reservation regarding my colleague's reasons, I too would dismiss the appeal.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellant: Stockwoods, Toronto.

Solicitor for the respondent: British Columbia Securities Commission, Vancouver.

Solicitors for the intervener the Financial Advisors Association of Canada: Blaney McMurtry, Toronto.

Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.

1 For a critique of the present framework, see M. Teplitsky, "Standard of review of administrative adjudication: 'What a tangled web we weave . . .'" (2013), *Advocates' Soc. J.* 3.

2 Although technically a statutory appeal and not an application for judicial review, general administrative law principles still apply (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92 and 598-99; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21).

3 I note that the U.S. Supreme Court has recently shut this door; see *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013) ("the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage" because "a separate category of 'jurisdictional' interpretations does not exist" (pp. 1868 and 1874)).

4 See *Securities Act*, R.S.A. 2000, c. S-4, s. 198(1.1); *Securities Act*, R.S.B.C. 1996, c. 418, s. 161(6); *The Securities Act*, C.C.S.M., c. S50, s. 148.4(1); *Securities Act*, S.N.B. 2004, c. S-5.5, s. 184(1.1); *Securities Act*, R.S.N.L. 1990, c. S-13, s. 127(1.1); *Securities Act*, R.S.N.S. 1989, c. 418, s. 134(1A); *Securities Act*, S.N.W.T. 2008, c. 10, s. 60(3); *Securities Act*, S.Nu. 2008, c. 12, s. 60(3); *Securities Act*, R.S.O. 1990, c. S.5, s. 127(10); *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 60(3); *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2, s. 134(1.1); *Securities Act*, S.Y. 2007, c. 16, s. 60(3).

SUPREME COURT OF CANADA

CITATION: British Columbia Human Rights Tribunal *v.* Schrenk, 2017 SCC 62

APPEAL HEARD: March 28, 2017
JUDGMENT RENDERED: December 15, 2017
DOCKET: 37041

BETWEEN:

British Columbia Human Rights Tribunal
Appellant

and

Edward Schrenk
Respondent

- and -

Canadian Association of Labour Lawyers, Canadian Construction Association, Community Legal Assistance Society, West Coast Women's Legal Education and Action Fund, Retail Action Network, Alberta Federation of Labour, International Association of Machinists and Aerospace Workers Local Lodge 99, Ontario Human Rights Commission and African Canadian Legal Clinic
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT: (paras. 1 to 70)	Rowe J. (Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)
CONCURRING REASONS: (paras. 71 to 95)	Abella J.
DISSENTING REASONS: (paras. 96 to 131)	McLachlin C.J. (Côté and Brown JJ. concurring)

British Columbia Human Rights Tribunal *Appellant*

v.

Edward Schrenk *Respondent*

and

Canadian Association of Labour Lawyers,
Canadian Construction Association,
Community Legal Assistance Society,
West Coast Women's Legal Education and Action Fund,
Retail Action Network,
Alberta Federation of Labour,
International Association of Machinists and Aerospace Workers Local Lodge 99,
Ontario Human Rights Commission and
African Canadian Legal Clinic *Interveners*

Indexed as: British Columbia Human Rights Tribunal *v.* Schrenk

2017 SCC 62

File No.: 37041.

2017: March 28; 2017: December 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Human rights — Human Rights Tribunal — Jurisdiction — Discrimination — Employment — Act prohibiting a "person" from discriminating against someone "regarding employment" — Scope of prohibition — Complaint alleging discrimination at workplace by co-worker — Whether discrimination "regarding employment" can be perpetrated by someone other than complainant's employer or superior — Whether British Columbia Human Rights Tribunal erred in finding that it had jurisdiction over complaint — Human Rights Code, R.S.B.C. 1996, c. 210, ss. 1 "employment", "person", 13(1)(b), 27(1)(a).

S-M worked for Omega and Associates Engineering Ltd. as a civil engineer on a road improvement project. Omega had certain supervisory powers over employees of Clemas Construction Ltd., the primary construction contractor on the project. Clemas employed S as site foreman and superintendent. When S made racist and homophobic statements to S-M on the worksite, S-M raised the comments with Omega. Following further statements by S, Omega asked Clemas to remove S from the site. Clemas did so without delay, but S continued to be involved on the project in some capacity. When the harassment continued, Clemas terminated S's employment.

S-M filed a complaint before the British Columbia Human Rights Tribunal against S alleging discrimination on the basis of religion, place of origin, and sexual orientation. S applied to dismiss the complaint, arguing that s. 13 of the *Human Rights Code* had no application because S-M was not in an employment

relationship with S. The Tribunal held that it had jurisdiction to deal with the complaint and, accordingly, it denied S's application under s. 27(1)(a) of the Code. The British Columbia Supreme Court dismissed S's application for judicial review, but the Court of Appeal allowed S's appeal and found that the Tribunal erred in law by concluding that it had jurisdiction over the complaint.

Held (McLachlin C.J. and Côté and Brown JJ. dissenting): The appeal should be allowed.

Per Moldaver, Karakatsanis, Wagner, Gascon and **Rowe** JJ.: Section 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Reading the Code in line with the modern principle of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, s. 13(1)(b) prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer.

In determining whether discriminatory conduct has a sufficient nexus with the employment context, the Human Rights Tribunal must conduct a contextual analysis that considers all relevant circumstances. Factors which may inform this analysis include: (1) whether the respondent was integral to the claimant's workplace; (2) whether the impugned conduct occurred in the claimant's workplace; and (3) whether the claimant's work performance or work environment was negatively

affected. These factors are not exhaustive and their relative importance will depend on the circumstances. This contextual interpretation furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker.

This contextual approach to determining whether conduct amounts to discrimination "regarding employment" is supported by the text, the scheme and the purpose of the Code. It is equally supported by the legislative history of the Code and it aligns with the recent jurisprudence.

The text of s. 13(1)(b) prohibits employment discrimination by any "person". In the context of the Code, the term "person" defines the class of actors against whom the prohibition in s. 13(1)(b) applies. The ordinary meaning of "person" is broad, and encompasses a broader range of actors than merely any person with economic authority over the complainant. The definition of "person" in s. 1 of the Code is not exhaustive and provides additional meanings that supplement its ordinary meaning. Next, the words "regarding employment" are critical because they delineate the kind of discrimination that s. 13(1)(b) prohibits. In this case, they indicate that the discrimination at issue must be related to the employment context in some way without solely prohibiting discrimination within hierarchical workplace relationships. Section 13(1)(b) defines who can suffer workplace discrimination rather than restricting who can perpetrate discrimination. In this way, it prohibits

discriminatory conduct that targets employees so long as that conduct is sufficiently related to the employment context.

The scheme of the Code reinforces this contextual interpretation of s. 13(1)(b). First, the presumption against redundancy in legislative drafting underpins the view that the prohibition against discrimination "regarding employment" applies to more than just employers, who are already subject to a prohibition against discrimination "regarding any term or condition of employment". Further, where the Code seeks to limit the class of actors against whom a particular prohibition applies, it employs specific language which contrasts with the use of the general term "person". Finally, the structure of the Code supports an approach that views employment as a context requiring remedy against the exploitation of vulnerability rather than as a relationship needing unidirectional protection.

The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. Here, the contextual approach aligns with the remedial purposes set out in s. 3 of the Code as it gives employees a greater scope to obtain remedies before the Tribunal.

Finally, while the legislative history is not determinative, it indicates that the British Columbia Legislature intended to expand the scope of s. 13(1)(b) when it removed the word "employer" and replaced it with the much broader term "person".

Consequently, applying the correctness standard of review, the Tribunal did not err in concluding that S's conduct was covered by s. 13(1)(b) despite the fact that he was not S-M's employer or superior in the workplace. As the foreman of the worksite, S was an integral and unavoidable part of S-M's work environment. S's discriminatory behaviour had a detrimental impact on the workplace because it forced S-M to contend with repeated affronts to his dignity. This conduct amounted to discrimination regarding employment: it was perpetrated against an employee by someone integral to his employment context. S-M's complaint was consequently within the jurisdiction of the Tribunal pursuant to s. 13(1)(b) of the Code.

Per **Abella** J.: The issue in this case is whether employment discrimination under the British Columbia *Human Rights Code* can be found where the harasser is not in a position of authority over the complainant. The analysis requires that the meaning of employment discrimination be considered in a way that is consistent with, and emerges from, the Court's well-settled human rights principles, and not just the particular words of the *Code*. Applying these principles leads to the conclusion that an employee is protected from discrimination related to or associated with his or her employment, whether or not he or she occupies a position of authority. The Human Rights Tribunal, as a result, has jurisdiction to hear the complaint.

The starting point for the discrimination analysis is the *prima facie* test for discrimination set out in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360. In the employment context, the complainant must demonstrate that he or she has

a characteristic protected under the *Code*, has experienced an adverse impact "regarding employment", and that the protected characteristic was a factor in the adverse impact. The question posed by s. 13(1)(b) is whether the complainant has experienced an adverse impact related to or associated with his or her employment. Section 13(1)(b) is meant to protect all employees from the indignity of discriminatory conduct in a workplace, verbal or otherwise. The discrimination inquiry is concerned with the impact on the complainant, not the intention or authority of the person who is said to be engaging in discriminatory conduct. The key is whether that harassment has a detrimental effect on the complainant's work environment. Discrimination can and does occur in the absence of an economic power imbalance. It cannot depend on technical lines of authority which may end up defeating the goals of human rights legislation. *All* individuals have the right to be protected from discrimination in the workplace, including those in a position of authority. This approach is responsive to the realities of modern workplaces, many of which consist of diverse organizational structures.

While employers have a special duty and capacity to address discrimination, this does not prevent individual harassers from also potentially being held responsible, whether or not they are in authority roles. Prohibiting all "persons" in a workplace from engaging in discrimination recognizes that preventing employment discrimination is a shared responsibility among those who share a workplace. This is especially so where the employer's best efforts are inadequate to resolve the issue or where, as here, the subject of the assault himself occupies a

position of some authority. The harasser's degree of control and ability to stop the offensive conduct is clearly relevant, but this goes to the factual matrix, not to the jurisdiction of the Tribunal to hear the complaint.

Per **McLachlin** C.J. and Côté and Brown JJ. (dissenting): The workplace discrimination prohibition in s. 13(1)(b) of the *Human Rights Code* applies only to employer-employee or similar relationships and authorizes claims against those responsible for ensuring that workplaces are free of discrimination. This conclusion is consistent with the text, context and purpose of s. 13(1)(b), as well as with the jurisprudence. Therefore, the Human Rights Tribunal had no jurisdiction over the complaint.

The text of the provision, read as a whole, suggests that the Legislature was targeting discrimination committed directly or through inaction by an employer or a person in an employer-like relationship with the complainant. Section 1 of the Code defines "employment" in terms of the relationship between the complainant and the employer, master or principal which suggests that there is something about the nature or extent of responsibility over work or the workplace that defines who can perpetrate discrimination "regarding employment" for the purpose of s. 13(1)(b). The use of the word "person" at the outset of s. 13(1) neither expands nor limits the ambit of the section because the words controlling the ambit of the protection are "regarding employment".

A contextual reading of s. 13(1) also supports that view. First, s. 14 provides a separate protection against discrimination by unions and associations. If s. 13(1)(b) were interpreted so as to allow claims against anyone in the workplace, most of s. 14 would be redundant. Second, the scheme of the Code suggests that ss. 7 to 14 not intended to govern private acts of discrimination between individuals in a general sense. In provisions where the prohibition initially appears broad enough to catch private communications or interactions between private citizens more generally, specific exclusions are set out. No such exclusions are present in s. 13(1)(b), simply because it was not intended to cover such broad claims. Third, the scheme of the Code also supports the view that the Legislature was concerned with power imbalances — rather than targeting all acts of discrimination, it narrowed its focus to discrimination by those in a position of power over more vulnerable people. Fourth, if s. 13(1)(b) enables a claim based on emails sent after S was removed from the project and workplace, it is not clear how s. 13(1)(b) and s. 7(2) can be reconciled. Under that provision, no complaint can be brought on the basis of a discriminatory, though private, communication between individuals. Finally, s. 44(2) of the Code confirms the Legislature's intent to target discrimination arising from the employment or equivalent relationship. It makes employers and their equivalents respondents in workplace discrimination claims.

Focussing on those responsible for maintaining a discrimination-free workplace also upholds the Code's purpose. Where they fail to intervene to prevent or correct discrimination, s. 13(1)(b) is engaged. While this interpretation may preclude

claims under the Code against harassing co-workers, an employee's remedy is to go to the employer or person responsible for providing a discrimination-free workplace. If the employer fails to remedy the discrimination, the employee can bring a claim against the employer under s. 43 of the Code.

Finally, an interpretation of s. 13(1)(b) predicated on the responsibilities of employers and their equivalents is consistent with the jurisprudence, whereas the broad interpretation proposed by the majority would conflict with the jurisprudence in two ways. First, it would narrow the principle that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies. Second, it is difficult to see how a co-worker like S could ever claim a bona fide occupational requirement as a justification for his conduct.

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By Rowe J.

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[1989] 1 S.C.R. 1252; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425.

By Abella J.

Distinguished: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; **referred to:** *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

By McLachlin C.J. (dissenting)

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Enterprises Ltd., [1989] 1 S.C.R. 1252; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

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Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 7(b).

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Human Rights Act, S.B.C. 1984, c. 22, s. 8.

Human Rights Act, S.M. 1974, c. 65, s. 6(1)(a).

Human Rights Amendment Act, 1992, S.B.C. 1992, c. 43, s. 6.

Human Rights Code, R.S.B.C. 1996, c. 210, ss. 1 "discrimination", "employment", "person", 3, 7 to 14, 27, 37(2)(a), (b), (c)(i), (d)(iii), 43, 44.

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385 B.C.A.C. 185, 665 W.A.C. 185, 2016 CLLC ¶230-025, [2016] 9 W.W.R. 440, 400 D.L.R. (4th) 44, 84 C.H.R.R. D/40, [2016] B.C.J. No. 658 (QL), 2016 CarswellBC 869 (WL Can.), setting aside a decision of Brown J., 2015 BCSC 1342, [2015] B.C.J. No. 1629 (QL), 2015 CarswellBC 2155 (WL Can.), affirming a decision of the British Columbia Human Rights Tribunal, 2015 BCHRT 17, [2015] B.C.H.R.T.D. No. 17 (QL), 2015 CarswellBC 190 (WL Can.). Appeal allowed, McLachlin C.J. and Côté and Brown JJ. dissenting.

Katherine Hardie and *Devyn Cousineau*, for the appellant.

Mark D. Andrews, Q.C., David G. Wong and *Stephanie D. Gutierrez*, for the respondent.

Douglas Wray and *Jesse Kugler*, for the intervener the Canadian Association of Labour Lawyers.

David Outerbridge and *Jeremy Opolsky*, for the intervener the Canadian Construction Association.

Lindsay M. Lyster and *Juliana Dalley*, for the intervener the Community Legal Assistance Society.

Clea F. Parfitt and *Rajwant Mangat*, for the intervener the West Coast Women's Legal Education and Action Fund.

Robin J. Gage, *Kate Feeney* and *Erin Pritchard*, for the intervener the Retail Action Network.

Kristan McLeod, for the interveners the Alberta Federation of Labour and the International Association of Machinists and Aerospace Workers Local Lodge 99.

Reema Khawja, for the intervener the Ontario Human Rights Commission.

Faisal Mirza, *Danardo Jones* and *Dena M. Smith*, for the intervener the African Canadian Legal Clinic.

The judgment of Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ. was delivered by

ROWE J. —

I. Introduction

[1] This case is about the scope of the prohibition against discrimination "regarding employment" under s. 13(1)(b) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210. On April 3, 2014, Mr. Mohammadreza Sheikhzadeh-Mashgoul filed a complaint with the appellant, the British Columbia Human Rights Tribunal, against the respondent, Mr. Edward Schrenk, alleging employment

discrimination based on religion, place of origin, and sexual orientation. Mr. Schrenk responded with an application to dismiss under s. 27(1)(a) of the Code, in which he argued that the alleged conduct was not discrimination "regarding employment" and was consequently beyond the jurisdiction of the Tribunal. The crux of Mr. Schrenk's argument is simple: as he was not in a position of economic authority over Mr. Sheikhzadeh-Mashgoul — he was neither his employer nor his superior in the workplace — his conduct, however egregious, could not be considered discrimination "regarding employment" within the meaning of the Code.

[2] At issue, then, is the question of whether discrimination "regarding employment" can ever be perpetrated by someone other than the complainant's employer or superior in the workplace. To be clear, the issue is not whether Mr. Schrenk's alleged conduct would amount to *discrimination*; no one disputes this. Rather, the question in this appeal is whether such discrimination was "regarding employment".

[3] I conclude that it was. The scope of s. 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Rather, its protection extends to all employees who suffer discrimination with a sufficient connection to their employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer. Consequently, the Tribunal did not err in concluding that Mr.

Schrenk's conduct was covered by s. 13(1)(b) despite the fact that he was not Mr. Sheikhzadeh-Mashgoul's employer or superior in the workplace.

II. Facts

[4] Mr. Sheikhzadeh-Mashgoul was a civil engineer working for Omega and Associates Engineering Ltd., an engineering firm hired by the municipality of Delta in British Columbia to supervise a road improvement project. In that capacity, he supervised work by Clemas Contracting Ltd., the primary construction contractor hired by Delta to carry out the project.

[5] The contract between Delta and Clemas specified that Omega, acting as consulting engineer, had certain supervisory powers over Clemas employees, including the right to ask for the removal of any Clemas worker who appeared "to be incompetent or to act in a disorderly or intemperate manner".

[6] Work on the project began in August 2013. Clemas employed Mr. Schrenk as site foreman and superintendent. There is nothing to indicate that Mr. Sheikhzadeh-Mashgoul and Mr. Schrenk had met before this.

[7] Mr. Sheikhzadeh-Mashgoul immigrated to Canada from Iran and identifies as Muslim. In his complaint before the Tribunal, he alleges a number of incidents involving Mr. Schrenk. For the purpose of considering the question in this appeal, neither the Tribunal nor this Court make findings of fact nor is there a

disposition on the merits of Mr. Sheikhzadeh-Mashgoul's complaint. Rather the facts as alleged by Mr. Sheikhzadeh-Mashgoul are treated as being accurate.

[8] The first incident occurred in September 2013 when Mr. Schrenk asked Mr. Sheikhzadeh-Mashgoul about his background. Upon learning of Mr. Sheikhzadeh-Mashgoul's origin and religion, Mr. Schrenk asked in front of other employees, "You are not going to blow us up with a suicide bomb, are you?" (2015 BCHRT 17 ("Tribunal decision"), at para. 18 (CanLII)). Another incident occurred in November 2013, when Mr. Schrenk shoved Mr. Sheikhzadeh-Mashgoul and called him a "fucking Muslim piece of shit" (*ibid.*, at para. 20). As Mr. Sheikhzadeh-Mashgoul went to call his supervisor, Mr. Schrenk continued, asking "Are you going to call your gay friend?" (*ibid.*, at para. 23).

[9] Mr. Sheikhzadeh-Mashgoul raised Mr. Schrenk's comments with his employer, Omega. The possibility of removing Mr. Schrenk from the worksite — should his behaviour persist — was discussed at a regularly scheduled meeting between Mr. Schrenk, Mr. Sheikhzadeh-Mashgoul and representatives from Omega, Delta and Clemas.

[10] Mr. Schrenk persisted. On December 13, 2013, he yelled at Mr. Sheikhzadeh-Mashgoul, "Go back to your mosque where you came from" (Tribunal decision, at para. 28). After this incident, both Delta and Omega asked Clemas to remove Mr. Schrenk from the site. Although Clemas did so without delay, Mr.

Schrenk continued to be involved on the project in some capacity until January 2014. For the time being, he remained a Clemas employee on other projects.

[11] Mr. Schrenk's removal from the worksite did not end Mr. Sheikhzadeh-Mashgoul's troubles. In March 2014, Mr. Schrenk sent an unsolicited email to Mr. Sheikhzadeh-Mashgoul in which he made derogatory insinuations about his sexual orientation. Mr. Schrenk copied the email to two Clemas supervisors; Mr. Sheikhzadeh-Mashgoul forwarded it to Omega, which in turn forwarded it to Clemas. Clemas' project superintendent requested that Mr. Schrenk stop sending such emails. Nevertheless, the next day Mr. Schrenk sent another derogatory email of a homophobic nature to Mr. Sheikhzadeh-Mashgoul. That email was also forwarded to Clemas. Following this, Clemas terminated Mr. Schrenk's employment on March 28, 2014.

[12] On April 3, 2014, Mr. Sheikhzadeh-Mashgoul filed a complaint before the Tribunal against Mr. Schrenk, Clemas, and Delta, alleging discrimination on the basis of religion, place of origin, and sexual orientation, all of these being prohibited grounds of discrimination under the Code. He later withdrew the claim against Delta.

[13] Mr. Schrenk and Clemas both applied to dismiss the complaint pursuant to s. 27(1)(a), (b), (c) and (d)(ii) of the Code. Under s. 27(1)(a), they argued that the Tribunal did not have jurisdiction over the complaint because Mr. Sheikhzadeh-Mashgoul was not in an employment relationship with Clemas or Mr.

Schrenk and, hence, s. 13 of the Code had no application. This appeal relates only to Mr. Schrenk's application under s. 27(1)(a).

III. Relevant Statutory Provisions

[14] The relevant portions of the Code read:

> **1** In this Code:
>
> . . .
>
> **"employment"** includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and **"employ"** has a corresponding meaning;
>
> . . .
>
> **"person"** includes an employer, an employment agency [a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons], an employers' organization [an organization of employers formed for purposes that include the regulation of relations between employers and employees], an occupational association [an organization, other than a trade union or employers' organization, in which membership is a prerequisite to carrying on a trade, occupation or profession] and a trade union [an organization of employees formed for purposes that include the regulation of relations between employees and employers];
>
> . . .
>
> **3** The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free

participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

. . .

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

. . .

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

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

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

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

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

(ii) further the purposes of this Code;

. . .

44 (1) A proceeding under this Code in respect of a trade union, employers' organization or occupational association may be taken in its name.

(2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

IV. Decisions Below

A. *British Columbia Human Rights Tribunal, 2015 BCHRT 17*

[15] In their application to dismiss, Mr. Schrenk and Clemas both argued that the Tribunal had no jurisdiction under s. 13(1)(b) as neither of them were in an employment relationship with Mr. Sheikhzadeh-Mashgoul. Mr. Schrenk emphasized that he could not discriminate against Mr. Sheikhzadeh-Mashgoul regarding his employment as he had no control over him.

[16] The Tribunal held that it had jurisdiction to deal with the complaint. Accordingly, it denied Mr. Schrenk's and Clemas' applications under s. 27(1)(a). It also denied their application for dismissal of the complaint under other subsections of s. 27. This latter part of the decision is not dealt with in this appeal.

[17] With regard to s. 13(1)(b), the Tribunal found that it prohibits a "person" from discriminating regarding employment and that the Code does not limit "person" to an employer or someone in an employment-like relationship with the complainant. The Tribunal had regard to this Court's statement in *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, that "quasi-constitutional legislation . . . attracts a generous interpretation to permit the achievement of its broad public purposes" (para. 17). In light of this, the Tribunal held that s. 13 "protects those in an employment context", including a complainant who is an employee "who suffers a disadvantage in his or her employment in whole or in part because of his or her membership in a protected group" (para. 45). The Tribunal further held that protection under s. 13 is "not limited to discrimination by an employer" (para. 46). The Tribunal concluded:

> . . . following on the generous interpretation of the *Code* reiterated by the Supreme Court of Canada in *McCormick*, protection of employees on a construction site against other actors on that site falls within the broad public policy purposes of the *Code*. Like employees in a single workplace with one employer, the cohort of employees and dependent contractors on a construction site may work for different employers, but are all engaged in a common enterprise: completing the project whatever it may be. Generally, they work in close proximity to, and interact with, one another. It would be unduly artificial and not in keeping with the broad public policy purposes of the *Code* to exclude employees on a

> construction site from the protections mandated by s. 13 simply because the alleged perpetrator of discriminatory behaviour worked for another employer on that site. [para. 50]

[18] With respect to Mr. Schrenk's application, the Tribunal found that he could be liable under s. 13 given that Mr. Sheikhzadeh-Mashgoul was an employee — although not an employee of Clemas or Mr. Schrenk — who claimed that he had been negatively affected in his employment because of discriminatory harassment by Mr. Schrenk. The Tribunal found that such discrimination could occur even though Mr. Sheikhzadeh-Mashgoul, as supervising engineer, had significant influence over how Clemas and Mr. Schrenk performed their work.

B. *Supreme Court of British Columbia, 2015 BCSC 1342*

[19] Mr. Schrenk sought judicial review of the Tribunal's decision. As he had before the Tribunal, Mr. Schrenk argued that the complaint did not fall within the scope of s. 13(1)(b) because Mr. Sheikhzadeh-Mashgoul was not in an employment relationship with him or with Clemas, based on the factors set out in *McCormick.*

[20] Brown J. dismissed the petition. Applying the standard of correctness as required by the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, she concluded that the Tribunal did not err in its interpretation and application of s. 13(1)(b) to the case. In her view, the issue before the Tribunal was not whether Mr. Sheikhzadeh-Mashgoul was in an employment relationship with either Mr. Schrenk or Clemas but rather whether he had experienced discrimination "regarding

employment". Justice Brown viewed Mr. Schrenk's interpretation as unduly narrow. Rather, she concluded that restricting s. 13(1)(b) to claims against one's employer or against another employee of that same employer would "be contrary to common sense and to current employment circumstances" (para. 9 (CanLII)).

C. *British Columbia Court of Appeal, 2016 BCCA 146, 400 D.L.R. (4th) 44*

[21] The Court of Appeal unanimously allowed Mr. Schrenk's appeal. Applying the standard of correctness, it found the Tribunal erred in law by concluding that it had jurisdiction to deal with the complaint.

[22] Willcock J.A. stated that the Tribunal had based its finding that it had jurisdiction on three factors: Mr. Sheikhazadeh-Mashgoul "was an 'employee'. . . ; the conduct negatively affected him in his employment; and [Mr. Schrenk], the purported source of the discrimination, was a 'person'" (para. 32). Willcock J.A. viewed the question differently: it was not whether Mr. Schrenk came within the definition of "person" or whether Mr. Sheikhzadeh-Mashgoul was engaged in "employment", but rather "whether the allegation made by [Mr. Sheikhazadeh-Mashgoul] against [Mr. Schrenk] was a complaint about conduct that might possibly amount to discrimination 'regarding employment'" (para. 30).

[23] Willcock J.A. concluded that jurisdiction under s. 13(1)(b) was not so wide as to encompass "conduct [by] any person that might be said to have adversely

affected an employee in their employment" (para. 31). He drew the following distinction:

> There is a difference between the emotional and psychological burdens imposed upon disadvantaged people as a result of ignorant, malicious, or thoughtless comments made by those they encounter in day-to-day life, and those which amount to discrimination regarding employment. With respect to the former, a human rights tribunal may be able to do nothing. Bigots and xenophobes impose invidious and lasting harms, but they may be avoided on the street without fear of employment-related economic consequences. The subjects of discrimination should not have to bear any economic burden as a result of that discrimination. That is the sphere in which the legislature acted, and that is one of the ills that the *Code* expressly seeks to address. [para. 33]

[24] For Willcock J.A. discrimination "regarding employment" requires the improper exercise of *economic power* in the traditional "master-servant" relationship and this is all that s. 13(1)(b) is intended to guard against (Code, s. 1). Thus, the Tribunal's jurisdiction is limited to addressing complaints against those who have the power to inflict discriminatory conduct as a condition of employment. On this basis, Willcock J.A. concluded:

> Not all insults inflicted upon employees, even in the course of their employment, amount to discrimination regarding employment. Such insults can amount to discrimination regarding employment if the wrongdoer is clothed by the employer with such authority that he or she is able to impose that unwelcome conduct on the complainant as a condition of employment, or if the wrongdoing is tolerated by the employer. If the wrongdoer has no such power or authority, the Tribunal has jurisdiction to consider whether the complainant's employer played some role in allowing the conduct to occur or continue, in which case the insult is endured as a consequence of employment. But even then, the Tribunal has no jurisdiction over the wrongdoer. [Emphasis deleted; para. 36.]

[25] Applying this to the present case, Willcock J.A. found that the Tribunal did not "have jurisdiction to address a complaint made against one who is rude, insulting or insufferable but who is not in a position to force the complainant to endure that conduct as a condition of his employment" (para. 44). Consequently, the Tribunal did not have jurisdiction over Mr. Schrenk as he was not in a position to impose the discriminatory conduct on Mr. Sheikhzadeh-Mashgoul as a condition of his employment.

[26] The Tribunal appealed the Court of Appeal's decision to this Court.

V. Issue

[27] Did the Tribunal err in concluding that discriminatory harassment by a co-worker may fall within the scope of the prohibition against discrimination "regarding employment" under s. 13(1)(b) of the Code?

VI. Analysis

[28] The standard of review is correctness by virtue of s. 59 of the *Administrative Tribunals Act*. As this Court stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 50, "[w]hen applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question". Accordingly, it is

necessary to conduct our own analysis as to whether the Tribunal erred in its interpretation of s. 13(1)(b).

[29] I note at the outset that this appeal calls for an exercise in statutory interpretation. The question before this Court is whether the words of s. 13(1)(b) of the Code can encompass discrimination only by an employer or a superior in the workplace. While we disagree in the result, the Chief Justice and I agree that this question requires an interpretation of the words "regarding employment". For this reason, I respectfully differ from Justice Abella when she suggests that our analysis need not be rooted in "the particular words of British Columbia's Code" (para. 73). While human rights jurisprudence provides significant guidance regarding the scope of "discrimination" *generally*, our starting point remains the words adopted by the British Columbia Legislature when defining the scope of discrimination "regarding employment" *specifically*.

[30] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, this Court endorsed the modern principle of statutory interpretation, which must guide our interpretation of the Code in this appeal:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[31] Added to the modern principle are the particular rules that apply to the interpretation of human rights legislation. The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 546-47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at pp. 1133-36; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90). As this Court has affirmed, "[t]he Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes" (*McCormick*, at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§19.3 to 19.7.

[32] That said, "[t]his interpretive approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found" (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371). It is for this reason that our interpretation of s. 13(1)(b) must be grounded in the text and scheme of the statute *and* reflect its broad purposes.

A. *The Text of Section 13(1)(b)*

[33] The language of the Code provides the first indicator that we must adopt the broad interpretation of s. 13(1)(b) favoured by the Tribunal. For convenience, I will set out again s. 13 of the Code:

> **13** (1) A person must not
>
> > (a) refuse to employ or refuse to continue to employ a person, or
> >
> > (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[34] The place to start is with the term "person" in the first line of s. 13(1). In its ordinary meaning, the term "person" generally refers to a human being. In the context of the Code, it also defines the class of actors against whom the prohibition in s. 13(1)(b) applies. The ordinary meaning of "person" is broad; certainly, it encompasses a broader range of actors than merely any person with economic authority over the complainant. It is significant that the Legislature chose to prohibit employment discrimination by any "person". Had it intended only to prohibit employment discrimination by employers — or some other narrow class of individuals — it could easily have done so by using a narrower term than "person".

[35] To this end, I note that s. 1 of the Code provides the following inclusive definition:

> **1** In this Code:
>
> …
>
> **"person"** includes an employer, an employment agency [a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons], an employers' organization [an organization of employers formed for purposes that include the regulation of relations between employers and employees], an occupational association [an organization, other than a trade union or employers' organization, in which membership is a prerequisite to carrying on a trade, occupation or profession] and a trade union [an organization of employees formed for purposes that include the regulation of relations between employees and employers];

[36] Although the Code enumerates various individuals and entities who come within the definition of "person", the definition in s. 1 is not exhaustive. Because the definition "includes" these individuals and entities, it is explicitly not limited to them. In my view, the Code provides *additional* meanings to the word "person" that, for the purposes of the Code's operation, supplement the ordinary meaning of the word. In this sense, Mr. Schrenk is a "person" within the word's ordinary meaning; a corporate employer, such as Clemas, is a "person" within the word's supplemental meaning as clarified by s. 1 of the Code.

[37] Next, the words "regarding employment" are critical because they delineate the kind of discrimination that s. 13(1)(b) prohibits. Initially, I note that "regarding" is a term that broadly connects two ideas. In this case, the discrimination at issue must be "regarding" employment in that it must be *related to* the employment context in some way. This interpretation aligns with earlier decisions of this Court concerning workplace discrimination under various human rights statutes. In *Robichaud*, for example, Justice La Forest defined the terms "in the course of employment" in s. 7(b) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as meaning "work- or job-related" and "as being in some way related or associated with the employment" (pp. 92 and 95). This broad interpretation was also adopted by Chief Justice Dickson in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at p. 1293, with regard to the terms "in respect of employment" under s. 6(1)(a) of the Manitoba *Human Rights Act*, S.M. 1974, c. 65. According to Chief Justice Dickson, the difference between the words "in the course of employment" and "in respect of employment" was not significant (p. 1293). Any difference between those words and the words "regarding employment" is equally negligible.

[38] Based on my reading of the Code, the term "regarding employment" does not solely prohibit discrimination within hierarchical workplace relationships. If this were the case, then the words discrimination "regarding employment" would essentially mean discrimination "by employers or workplace superiors". In my view, s. 13(1)(b) does not restrict who can *perpetrate* discrimination. Rather, it defines who can *suffer* employment discrimination. In this way, it prohibits discriminatory conduct

that targets *employees* so long as that conduct has a sufficient nexus to the employment context. Determining whether conduct falls under this prohibition requires a *contextual* approach that looks to the particular facts of each claim to determine whether there is a sufficient nexus between the discrimination and the employment context. If there is such a nexus, then the perpetrator has committed discrimination "regarding employment" and the complainant can seek a remedy against *that* individual.

[39] By contrast, the Chief Justice proposes that, while s. 13(1)(b) is meant "to cover *all* forms of workplace discrimination," its scope is limited to targeting "only those responsible for intervening and halting the events in question" (para. 123 (emphasis in original)). She writes that "[t]he 'employment' that is the subject of the protection accorded by s. 13(1)(b) is defined in terms of the relationship between the complainant and the employer, master or principal" (para. 109). In this sense, she proposes a narrow *relational* approach to the words "regarding employment," wherein discrimination, as contemplated by s. 13(1)(b), can only be the responsibility of certain individuals within the employment relationship — namely, employers or workplace superiors.

[40] I would reject this approach for two reasons. First, while I agree that the term "employment" under the Code connotes, *inter alia*, a relationship between an employer and an employee, it does not follow that discrimination "regarding employment" must be perpetrated by someone *within that relationship*. Indeed, it

would be unduly formalistic to assume that the only relationship that can impact our employment is that which we share with our employer. Other workplace relationships — those we share with our colleagues, for example — can be sources of discrimination "regarding employment" despite the fact that it is only our employer who controls our paycheck.

[41] Second, the Chief Justice's approach to the words "regarding employment" is necessarily premised on a narrow view of how power is exercised in the workplace. The premise, in my view, is the following: as the *only* relationship defined by an imbalance of power is that shared between employer and employee, it is *only* the employer who is in a position to discriminate "regarding employment". This power is essentially economic in character. As the employer controls the economic benefits and conditions of employment, only the conduct of the employer can constitute discrimination "regarding employment".

[42] Respectfully, this fails to capture the reality of how power is exercised in the workplace. For one, non-employers can exercise economic power over employees. A regular patron at a restaurant, for example, can exercise *economic* coercion over a server through tips. If the exercise of economic power is central to the concept of discrimination "regarding employment", then this relationship, too, should fall within its scope.

[43] More importantly, however, economics is only one axis along which power is exercised between individuals. Men can exercise gendered power over

women, and white people can exercise racialized power over people of colour. The exploitation of identity hierarchies to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination. Indeed, the statutory purposes listed in the Code expressly extend beyond removing barriers to "economic" participation in society and include removing "social, political and cultural" barriers as well (s. 3(a)).

[44] Admittedly, these examples are not limited to the employment context, but they are exacerbated in the employment context where a complainant is particularly vulnerable. This is because employees, in the *context* of their work, are a captive audience to those who seek to discriminate against them. Certain passages of the Court of Appeal's reasons reflect this point. At para. 33, Willcock J.A. purports to distinguish discrimination "regarding employment" from "thoughtless comments made by those [we] encounter in day-to-day life" on the basis that the latter "may be avoided on the street without fear of employment-related economic consequences". That may be so, but it only highlights the unique vulnerability of the employment *context*. Whether a server is harassed by the restaurant owner or the bar manager, by a co-worker, or by a regular and valued patron, the server is nonetheless being harassed in a situation from which there is no escape by simply walking further along the street.

B. *The Scheme of the Code*

[45] The requirement to read the legislative text "harmoniously with the scheme of the Act" reinforces the broad interpretation of s. 13(1)(b) I propose (Driedger, at p. 87). Guided by the modern principle, courts must not construe particular provisions in isolation; rather, individual provisions must be considered in light of the act as a whole, with each provision informing the meaning given to the rest (see Sullivan, at §13.3). This rule ensures that statutes are read as coherent legislative pronouncements. In this regard, "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain" (*ibid.*, at §8.23).

[46] This presumption must play a role in our interpretation so as to ensure that no provision of the Code is "interpreted so as to render it mere surplusage" (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28). Yet this is precisely the result if we adopt the interpretation proposed by Mr. Schrenk. This is because s. 13(1)(b) contains two disjunctive prohibitions: the first refers to discrimination regarding "employment"; the second refers to discrimination regarding "any term or condition of employment". In my view, this suggests that the former targets discrimination *against employees generally* whereas the latter targets discrimination *by employers specifically*, given that only employers control the terms and conditions of employment. To limit discrimination "regarding employment" to circumstances where the employer makes enduring discrimination a "condition" of employment — whether through his own action or through his inaction in the face of discrimination by a third party — would arguably render "regarding employment" redundant with

discrimination "regarding any term or condition of employment" contrary to the presumption against redundancy (Code, s.13(1)(b)). Although this conclusion is not decisive in itself, it reinforces the broad reading I propose.

[47] Considering the patterns of expression in the Code further reinforces the interpretation of s. 13(1)(b) as applying beyond the confines of employer-employee relationships. In particular, where the Code seeks to limit the class of actors against whom a particular prohibition applies, it employs specific language rather than barring a "person" from engaging in discriminatory conduct. For example, s. 12 of the Code expressly limits the category of actors who can perpetrate wage discrimination to employer[s]". Similarly, s. 14 specifically bars "trade union[s], employers' organization[s] or occupational association[s]" from discriminating in relation to various aspects of union membership. The contrasting use of the general term "person" with these specific terms suggests that the prohibition against discrimination "regarding employment" found in s. 13(1)(b) applies to more than just employers. With respect, I do not share the view of the Chief Justice that the word "person" in s. 13 "neither expands nor limits the ambit of the section" (para. 110). It seems to me irreconcilable with the fact that, when the Legislature sought to limit the applicability of a prohibition to "employers", it did so explicitly.

[48] Finally, the structure of the Code supports an approach that views employment as a *context* requiring remedy against the exploitation of vulnerability rather than as a *relationship* needing unidirectional protection. According to the Chief

Justice, the scheme of the Code reflects an intent to protect two things: first, specific relationships — namely, those shared by patrons and business owners (s. 8), landlords and tenants (s. 10), and employers and employee (s. 13) — and second, public communications — i.e. discriminatory publication (s. 7) and job postings (s. 11). In my view, however, a contextual lens better captures the scheme of ss. 7 to 14 because it provides a complete explanation for the underlying logic of these sections of the Code. All of these provisions capture *contexts* of vulnerability in which "discrimination" (defined in s. 1 as applying to all of these contexts) may arise. This includes ss. 7 and 11. Discriminatory publications are prohibited by s. 7, not because they are public *per se* but because minority groups are particularly vulnerable to hate speech in the context of publication. The same goes for the context of discriminatory employment advertisements (s. 11), which, too, are publicly disseminated.

[49] By contrast, the Chief Justice says the scheme of ss. 7 to 14 targets two things: certain relationships and public communications. Regarding the latter, she reasons that the Code was "not intended to govern private acts of discrimination between individuals" (para. 117). But this conflicts with the relationships she concedes are targeted by the Code. Interactions in the accommodation (s. 8), property (s. 9), tenancy (s. 10), fair wages (s. 12) and employment (s. 13) contexts are all "private" in that they do not involve the state and can occur inconspicuously. Viewing the Code's scheme harmoniously, then, requires understanding ss. 7 to 14 as contexts of vulnerability and not as exclusively public acts of discrimination (ss. 7 and 11) when the Code undoubtedly targets private acts as well (ss. 8 to 10, 12 and 13).

C. *The Purposes of the Code*

[50] The modern principle of interpretation requires that courts approach statutory language in the manner that best reflects the underlying aims of the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament. As Professor Sullivan notes, "[i]n so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided" (Sullivan, at §9.3).

[51] The clear statement of purpose set out in the Code must guide our interpretation of s. 13(1)(b):

> **3** The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[52] This sets out an ambitious aim that supports an expansive and *not* a restrictive approach to the terms "regarding employment" in s. 13(1)(b). Indeed, nothing in the stated purposes of the Code suggests limiting the application of s. 13(1)(b) to formal employment relationships or to those analogous to employment by virtue of the economic control and dependency between the parties. Nor do the stated purposes suggest restricting the operation of the legislative scheme to remedying the potential discrimination that can arise via economic power imbalances in the workplace while leaving other types of discriminatory harassment to persist unabated.

[53] A nuanced understanding of discrimination underpins the conclusion that one of the purposes of s. 13(1)(b) is to protect employees from the indignity of discriminatory conduct in the workplace. Admittedly, decisions relating to hiring, promotion, discipline, and termination — should they be based on a *protected characteristic* — are all obvious means by which those with formal authority can discriminate against employees. But it would be superficial to conclude that employers and other superiors are the only ones who can discriminate "regarding employment". While discrimination by one's employer is particularly insidious for the reasons identified by the Court of Appeal — in that it exploits an economic power imbalance — other forms of conduct can amount to discrimination "regarding employment" in the absence of such economic power.

[54] I add that the Code is not limited to the purpose of preventing discrimination. It also aims to "promote a climate of understanding and mutual

respect where all are equal in dignity and rights" and to "provide a means of redress for those persons who are discriminated against contrary to this Code" (s. 3(b) and (e)). The Chief Justice's interpretation of the Code is at odds with these aims because it places responsibility for protecting human rights exclusively on those who wield formal authority in the employment relationship. It also risks leaving the victims of discrimination without a remedy in many situations. Under a narrow approach, the employer would be exclusively responsible for ensuring a discrimination-free workplace. In other words, if you suffer discrimination at the hands of a colleague, your only remedy under the Code would lie against your employer. This would oblige your employer to intervene by disciplining the perpetrator or terminating his or her employment, for example, but it would not allow you to seek a remedy against the perpetrator *directly*.

[55] This narrow reading allegedly follows from the fact that discrimination is only "regarding employment" when it is perpetrated — or, at the very least, tolerated — by the employer. As the employer is the only actor with formal power over the employment relationship, only the employer can be held accountable for its failure to prevent or redress discrimination. This is not a problem for the Chief Justice, who argues that "there will always be an entity in any work context that is responsible for ensuring that workers enjoy a discrimination-free environment" (para. 123). It is for this reason that the Chief Justice concludes that s. 13(1)(b) only "trains its regulatory guns on those responsible for intervening and halting the events in question" (para. 123). Respectfully, this narrow focus misses the mark set by the Code's remedial

purposes (and, in the context of employment discrimination, ignores how the Code "trains its regulatory guns" on a "person" and not "those responsible for intervening" (s. 13(1)). For instance, what can you do when your employer has no disciplinary authority over the perpetrator? As in this case, what happens when the perpetrator is not employed by the same employer? Based on the narrow reading, the individual perpetrator evades responsibility under s. 13(1)(b) and the complainant is left without a remedy.

[56] In my view, while the person in control of the complainant's employment may be *primarily* responsible for ensuring a discrimination-free workplace — a responsibility that is recognized in s. 44(2) of the Code — it does not follow that only a person who is in a relationship of control and dependence with the complainant is responsible for achieving the aims of the Code. Rather, the aspirational purposes of the Code require that individual perpetrators of discrimination be held accountable for their actions. This means that, in addition to bringing a claim against their employer, the complainant may also bring a claim against the individual perpetrator. The existence of this additional claim is especially relevant when the discriminatory conduct of a co-worker persists *despite* the employer having taken all possible steps to stop it.

[57] The following example highlights the practical consequences of adopting a narrow approach that focuses solely on discrimination by employers. Consider an employee who endures years of discriminatory harassment at the hands of a co-

worker who commits that harassment covertly, such that the employer is unaware of it despite exercising diligent supervision. Under the narrow approach, this may not be discrimination "regarding employment" as the employer is unaware of the discrimination and thus may not be faulted for not intervening. A perverse consequence flows from this: as long the employer acted with reasonable diligence, the Tribunal may find that the complainant never suffered discrimination "regarding employment" for the period leading up the moment when he or she finally musters the courage to report the years of abuse by their co-worker.

[58] The narrow reading leaves such an employee with limited remedies. Once alerted to the discriminatory conduct, an employer will presumably discipline the co-worker who has harassed the complainant for multiple years and may even terminate their employment. But the Tribunal could go further. The Tribunal can, like the employer, order that the harasser cease his or her discriminatory behaviour (Code, s. 37(2)(a)), but it can also order the harasser to "ameliorate" their discriminatory harm (s. 37(2)(c)(i)); order the harasser to pay compensation to the complainant (s. 37(2)(d)(iii)); and declare the conduct discriminatory, which can have symbolic significance (s. 37(2)(b)). These remedies go beyond those available to the employer and further the purposes of the Code.

[59] In the end, a *relational* approach leaves complainants with access to too few remedies and narrows the range of actors who can be held accountable for their conduct. The unfortunate consequence of this is that individual perpetrators like Mr.

Schrenk may be immunized from liability before the Tribunal simply because they do not share a common employer with the victim of their harassment. The *contextual* approach I propose, by contrast, gives employees greater scope to obtain remedies before the Tribunal. This aligns with the remedial purposes of the Code. Insofar as both the relational and the contextual interpretations of "regarding employment" are plausible, the interpretive approach set out in our jurisprudence relative to human rights laws favours the more generous reading.

D. *The Legislative History of Section 13(1)(b)*

[60] It is well established that the legislative history of statutes can be relied on to guide the interpretation of statutory language (*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; see also *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 33). The legislative evolution of an enactment forms part of the "entire context" to be considered as part of the modern approach to statutory interpretation (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). In this case, the legislative history of s. 13 adds support to the broad interpretation of the scope of s. 13(1)(b).

[61] The legislative history of the Code is particularly instructive because it suggests that the British Columbia Legislature has incrementally extended the range of parties who are prohibited from discriminating regarding employment. In 1969, the proscription against discrimination "in regard to employment" in what was then the

Human Rights Act, S.B.C. 1969, c. 10, applied only to an "employer" (s. 5). The term "employer" was defined as including "every person, firm, corporation, agent, manager, representative, contractor, or sub-contractor having control or direction of, or responsible, directly or indirectly, for, the employment of any employee" (s. 2(d)). In 1973, the definition of employer was removed, and the definition of employment was added (*Human Rights Code of British Columbia Act*, S.B.C. 1973, c. 119, s. 1). At this point, employers remained the only parties who were specifically prohibited from discrimination regarding employment. That changed in 1984 when the scope of the prohibition was expanded to apply to a "person or anyone acting on his behalf" (*Human Rights Act*, S.B.C. 1984, c. 22, s. 8).

[62] A pivotal amendment came in 1992, when the legislation was amended to prohibit a "person" from discriminating against another person "with respect to employment" (*Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, s. 6). In 1996, that language was revised to "regarding employment" (s. 13(1)(b)) with the entry into force of the Code, which remains in force to this day. This history shows an expansion of the parties who are subject to the Code's remedies for discrimination, from "every person . . . having control or direction of . . . the employment of any employee" to a "person".

[63] While the legislative history of the Code is not determinative, it is highly indicative of the fact the British Columbia Legislature intended to expand the scope of s. 13(1)(b) when it removed the word "employer" and replaced it with the much

broader term "person". This conclusion is reinforced by the presumption that legislative change is purposeful (Sullivan, at §23.22). The evolution of the language of s. 13(1)(b) indicates an intention to expand, rather than constrain, the responsibility for ensuring a discrimination-free workplace to all who are in a position to discriminate regarding another's employment.

E. *The Relevance of McCormick*

[64] The interpretation proposed by Mr. Schrenk and adopted by the Court of Appeal states that the words "regarding employment" limit the scope of s. 13(1)(b) to relationships defined by control (on the part of the perpetrator of discrimination) and dependency (on the part of the complainant). In other words, the control of the perpetrator and the correlating dependency of the complainant are necessary to bring the complaint within the ambit of s. 13(1)(b). This limitation, it is argued, flows from the fact that it is only the person who controls the complainant's employment who is in a position to discriminate with regard to that employment. It follows that remedies under s. 13 exist solely against those in positions of formal or economic power over the complainant, namely their employer or superiors. For this reason, Mr. Schrenk relies on the factors in *McCormick* to determine whether he was in a relationship of control and dependency with Mr. Sheikhzadeh-Mashgoul and thus determine whether their relationship falls under the scope of s. 13(1)(b).

[65] Reliance on *McCormick* in this way is misplaced. The interpretation of "employment relationship" articulated in *McCormick*, at para. 23, was used to

determine whether the person who allegedly suffered discrimination was in an employment relationship for the purpose of the Code. In other words, *McCormick* identified who qualifies for the protection of s. 13 *by virtue of being an employee*. Once it is determined that a complainant is an employee, however, *McCormick* does not address the question of who may perpetrate discrimination regarding employment.

[66] The Chief Justice appears to adopt a similar view as Mr. Schrenk when she states that *McCormick* "confirmed that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies" (para. 130). With respect, the contextual approach I propose does not disregard that relational inquiry; it simply applies that inquiry in the same manner as the Court did in *McCormick*: to the prospective complainant. *McCormick* does indeed require a relational analysis but only in respect of who can *suffer* employment discrimination and not who can *perpetrate* it. *McCormick*, at paras. 45-46, holds that someone who is not an *employee* under the Code cannot suffer *employment* discrimination. It does not hold that only employers can perpetrate employment discrimination. This follows from the fact that it is the *vulnerability* of being an employee that warrants special legislative protection under the Code. The contextual approach I propose is consistent with *McCormick* in that it limits the protection of s. 13(1)(b) to *employees*.

F. *Conclusion on the Scope of Section 13(1)(b)*

[67] Reading the Code in line with the modern principle of statutory interpretation and the particular rules that apply to the interpretation of human rights legislation, I find that s. 13(1)(b) prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context. In determining whether discriminatory conduct has such a sufficient nexus, the Tribunal must conduct a *contextual* analysis that considers all relevant circumstances. Factors which may inform this analysis include: (1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work environment was negatively affected. These factors are not exhaustive and their relative importance will depend on the circumstances. In my view, this contextual interpretation furthers the purposes of the Code by recognizing how employee vulnerability stems not only from economic subordination to their employers but also from being a captive audience to other perpetrators of discrimination, such as a harassing co-worker.

[68] With this in mind, I do not dispute that whether discrimination occurs "in the workplace" or is "related to or associated with [the complainant's] employment" may be relevant to characterizing that discrimination as being "regarding employment" (Justice Abella's reasons, at para. 74). But I am of the view that such findings alone — without a sufficient nexus to the employment context — could not constitute employment discrimination.

[69] Applying this contextual approach to the present case, I find that the alleged conduct by Mr. Schrenk would come within the ambit of s. 13(1)(b). As the foreman of the worksite, Mr. Schrenk was an integral and unavoidable part of Mr. Sheikhzadeh-Mashgoul's work environment. By denigrating Mr. Sheikhzadeh-Mashgoul on the basis of religion, place of origin, and sexual orientation, his discriminatory behaviour had a detrimental impact on the workplace because it forced Mr. Sheikhzadeh-Mashgoul to contend with repeated affronts to his dignity. This conduct amounted to discrimination regarding employment: it was perpetrated against an employee by someone integral to his employment context. Mr. Sheikhzadeh-Mashgoul's complaint was consequently within the jurisdiction of the Tribunal pursuant to s. 13(1)(b) of the Code.

VII. Disposition

[70] I would allow the appeal and affirm the Tribunal's decision. As no party sought costs, I would not award costs.

The following are the reasons delivered by

ABELLA J. —

[71] Mohammedreza Sheikhzadeh-Mashgoul is a civil engineer who was subjected to derogatory comments and emails regarding his place of origin, religion,

and sexual orientation from Edward Schrenk, who worked for another employer on the same construction site. Mr. Sheikhzadeh-Mashgoul filed a complaint with the British Columbia Human Rights Tribunal against Mr. Schrenk and his employer, Clemas Contracting Ltd., alleging employment discrimination contrary to s. 13(1)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[72] Mr. Schrenk and his employer brought an application to dismiss the complaint under s. 27(1)(a)[1] of the *Code* on the basis that the Tribunal did not have jurisdiction over the claim. They argued that because Mr. Schrenk was not in a position of authority over Mr. Sheikhzadeh-Mashgoul, the conduct could not constitute discrimination "regarding employment" within the meaning of s. 13(1)(b).

[73] The issue in this case is whether employment discrimination under the *Code* can be found where the harasser is not in a position of authority over the complainant. I have had the benefit of reading Justice Rowe's reasons and agree with his conclusion, but, with respect, would approach it somewhat differently. It seems to me that what the analysis in this case requires is that we consider the meaning of employment discrimination in a way that is consistent with, and emerges from, our well-settled human rights principles, and not just the particular words of British Columbia's *Code*.

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[1] Applications to dismiss were made under s. 27(1)(a), (b), (c) and (d)(ii). Only s. 27(1)(a) is at issue in this appeal. It states:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;

[74] Applying these principles leads, in my view, to the conclusion that an employee is protected from discrimination related to or associated with his or her employment, including humiliating and degrading harassment in the workplace, whether or not he or she occupies a position of authority. The Tribunal, as a result, has jurisdiction to hear the complaint.

Background

[75] Mr. Sheikhzadeh-Mashgoul immigrated to Canada from Iran and is a Muslim. He works for the engineering firm Omega and Associates Engineering Ltd., which was hired by the municipality of Delta to act as consulting engineers on a road improvement project. Mr. Sheikhzadeh-Mashgoul was responsible for supervising the contracting work done by Clemas, which employed Mr. Schrenk as a site foreman.

[76] Mr. Sheikhzadeh-Mashgoul complains of numerous offensive comments made by Mr. Schrenk during the project regarding his place of origin, religion, and sexual orientation. On learning of Mr. Sheikhzadeh-Mashgoul's religion and place of origin, Mr. Schrenk asked "You are not going to blow us up with a suicide bomb, are you?" He shoved Mr. Sheikhzadeh-Mashgoul and called him a "fucking Muslim piece of shit" in the presence of other Clemas employees. When Mr. Sheikhzadeh-Mashgoul went to call his supervisor following a heated exchange with Mr. Schrenk, he was asked, "Are you going to call your gay friend?"

[77] Mr. Sheikhzadeh-Mashgoul met with representatives of Omega, Clemas, and Delta, including Mr. Schrenk, where it was agreed that if the behaviour continued, Mr. Schrenk would be removed from the site. Mr. Schrenk did continue, telling Mr. Sheikhzadeh-Mashgoul in another incident, "Go back to your mosque where you came from." Even after he was removed from the job site, Mr. Schrenk continued to harass Mr. Sheikhzadeh-Mashgoul by sending derogatory emails. As a result, Clemas decided to terminate Mr. Schrenk's employment.

[78] Mr. Sheikhzadeh-Mashgoul filed a complaint with the Tribunal against Mr. Schrenk, Clemas, and Delta, alleging employment discrimination. He later withdrew the claim against Delta. Mr. Schrenk and Clemas both applied to dismiss the complaint pursuant to s. 27(1)(a), arguing that the Tribunal lacked jurisdiction.

[79] In a decision by Walter Rilkoff, the Tribunal found that there was jurisdiction over the complaint. In the Tribunal's view, the prohibition against employment discrimination applies to "persons", and is not limited to those in a direct employment relationship with or position of control over the complainant.

[80] At the Supreme Court of British Columbia, Brown J. dismissed Mr. Schrenk's application for judicial review. In her view, the issue was not whether Mr. Sheikhzadeh-Mashgoul was in an employment relationship with Mr. Schrenk and Clemas, but whether he had experienced discrimination regarding his employment. To interpret the *Code* more narrowly would be contrary to common sense and current employment circumstances.

[81] The Court of Appeal for British Columbia unanimously allowed Mr. Schrenk's appeal ((2016), 400 D.L.R. (4th) 44). It disagreed with the Tribunal's analysis, concluding instead that employment discrimination can only occur if someone is in a position of authority and can force the complainant to endure that conduct as a condition of employment. Without that authority, the Tribunal may "consider whether the complainant's employer played some role in allowing the conduct" but has no jurisdiction over the individual wrongdoer.

[82] In my respectful view, there is no requirement that a harasser be in a position of authority before he or she is subject to the jurisdiction of the Tribunal. Mr. Schrenk relies on *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] 2 S.C.R. 108, to argue that a relationship of control and dependency between the complainant and respondent is determinative.

[83] *McCormick* was addressing whether employment discrimination could be found where the claimant himself designed and agreed to the contractual employment term complained of. In the harassment context, the direct analogy would be a harasser claiming to be the victim of a discriminatory workplace where it is his own conduct that has poisoned that workplace. *McCormick* did not purport to limit the jurisdiction of the Tribunal only to situations where there is discriminatory treatment by someone in a position of authority.

[84] I agree with the Tribunal and the Supreme Court of British Columbia that the Tribunal has jurisdiction over the complaint.

Analysis

[85] It is well-established that the *Code* has a quasi-constitutional character and should be interpreted generously to give effect to its broad public purposes (*Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). These purposes include protecting individuals from adverse treatment based on protected group characteristics; in short, identifying and eliminating discrimination (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at p. 92; *McCormick*, at para. 18). This aspirational goal is set out in s. 3[2] of the *Code* and enforced in the employment context through s. 13(1), which states:

> **Discrimination in employment**
>
> **13**(1) A person must not
>
> > (a) refuse to employ or refuse to continue to employ a person, or
> >
> > (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[2] **3** The purposes of this Code are as follows: (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia; (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights; (c) to prevent discrimination prohibited by this Code; (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code; (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[86] This case engages s. 13(1)(b). The starting point for the discrimination analysis is the *prima facie* test for discrimination set out in *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360, a case involving discrimination in the provision of educational services to children with learning disabilities. This test was reaffirmed in the employment context in *Stewart v. Elk Valley Coal Corp.*, [2017] 1 S.C.R. 591. In this appeal, therefore, to establish a *prima facie* case of discrimination, Mr. Sheikhzadeh-Mashgoul must demonstrate that he has a characteristic protected under the *Code*, has experienced an adverse impact "regarding employment", and that the protected characteristic was a factor in the adverse impact (*Moore*, at para. 33).

[87] The words "regarding employment" have been broadly construed since this Court's decision in *Robichaud*. There, La Forest J. interpreted the phrase "in the course of employment" under the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 7(b), to mean "work- or job-related", or "in some way related or associated with the employment" (pp. 92 and 95). The same meaning was given to the words "in respect of employment" in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at p. 1293. It applies equally here. The question, then, is whether Mr. Sheikhzadeh-Mashgoul has experienced discrimination, namely an adverse impact related to or associated with his employment.

[88] As is clear from this test, the discrimination inquiry is concerned with the impact on the complainant, not the intention or authority of the person who is said to be engaging in discriminatory conduct. This emphasis on impact, not intention, was

the basis in *Stewart* for McLachlin C.J. declining to add a requirement of stereotypical or arbitrary decision-making to the *prima facie* test (para. 45).

[89] Cases of discrimination involving harassment in the workplace are also informed by this focus on impact. In *Janzen*, sexual harassment was defined non-exhaustively to include "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" (p. 1284). The key is whether that harassment has "a detrimental effect on the complainant's work environment" (Michael Hall, "Racial Harassment in Employment: An Assessment of the Analytical Approaches" (2006-2007), 13 *C.L.E.L.J.* 207, at p. 212).

[90] The purpose of s. 13(1)(b) is to protect employees from the indignity of discriminatory conduct, verbal or otherwise, in a workplace. Discrimination can and does occur in the absence of an economic power imbalance. It cannot depend on technical lines of authority which may end up defeating the goals of human rights legislation. While employment discrimination is often, not surprisingly, focused on the ability of employers to subject complainants to discriminatory conduct as a condition of employment, *all* individuals have the right to be protected from discrimination in the workplace, including those in a position of authority.

[91] This is reflected in how British Columbia's legislation has expanded liability for employment discrimination beyond simply employers and their agents. Section 13(1)(b), which now prohibits employment discrimination by a "person", is

the result of a series of legislative amendments. In 1969, only an "employer" was prohibited from employment discrimination (*Human Rights Act*, S.B.C. 1969, c. 10, s. 5). This was extended in 1984 to a "person or anyone acting on his behalf" (*Human Rights Act*, S.B.C. 1984, c. 22, s. 8). In 1992, it was expanded again to prohibit a "person" from engaging in employment discrimination (*Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, s. 6). This, it seems to me, is a clear indication that the legislature wanted to prevent employment discrimination not only from "employers", but from *any* person in the workplace.

[92] This approach is responsive to the realities of modern workplaces, many of which consist of diverse organizational structures which may have different employers and complex work relationships. Prohibiting all "persons" in a workplace from engaging in discrimination recognizes that preventing employment discrimination is a shared responsibility among those who share a workplace.

[93] There is no doubt that employers have a special duty and capacity to address discrimination, but this does not prevent individual perpetrators of discriminatory conduct from also potentially being held responsible, whether or not they are in authority roles. This is especially so where the employer's best efforts are inadequate to resolve the issue or where, as here, the subject of the assault himself occupies a position of some authority. The harasser's degree of control and ability to stop the offensive conduct is clearly relevant, but this goes to the factual matrix, not to the jurisdiction of the Tribunal to hear the complaint.

[94] Mr. Sheikhzadeh-Mashgoul has claimed discriminatory harassment based on place of origin, religion, and sexual orientation. The fact that Mr. Schrenk is not in a position of authority over him does not deprive the Tribunal of jurisdiction under s. 13(1)(b) to determine whether, based on the evidence, there has been discrimination.

[95] The appeal is allowed and the conclusion of the Tribunal that it had jurisdiction over the complaint, is restored. The parties have agreed not to seek costs.

The reasons of McLachlin C.J. and Côté and Brown JJ. were delivered by

THE CHIEF JUSTICE —

I. Introduction

[96] The question on this appeal is whether the workplace discrimination prohibition in s. 13 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, applies only to employer-employee or similar relationships. The British Columbia Court of Appeal concluded that it did. I agree. Accordingly, I would dismiss the appeal.

[97] Section 13(1) of the Code provides:

> **13** (1) A person must not

> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[98] The complainant, Mr. Sheikhzadeh-Mashgoul, was working on a road improvement project for the Corporation of Delta, a municipality in British Columbia, as the site representative for the consulting engineers (Omega and Associates Engineering Ltd.). The respondent, Mr. Schrenk, worked on the same project as the foreman for the lead contractor (Clemas Contracting Ltd.). They worked on the same job site together, but were employed by different employers. The allegations of discrimination involved racist and homophobic statements made by Mr. Schrenk on the job site. The complainant reported the harassment to his employer, Omega. Omega asked Clemas to remove Mr. Schrenk from the job site, which it did. Soon after, Mr. Schrenk stopped working on the project entirely. However, Mr. Schrenk continued to send the complainant derogatory emails. When Clemas became aware of the emails, it terminated Mr. Schrenk's employment.

[99] The complainant brought his complaint against Mr. Schrenk, Delta and Clemas, however only the complaint against Mr. Schrenk remains relevant. Mr. Schrenk applied to have the complaint dismissed without a hearing under s. 27(1) of the Code, arguing, among other things, that there was no employment relationship

between him and the complainant. The British Columbia Human Rights Tribunal concluded that the scope of s. 13 is broad and is not limited to situations where there is an employment-like relationship, giving it jurisdiction over the complaint: 2015 BCHRT 17. The British Columbia Supreme Court dismissed Mr. Schrenk's application for judicial review: 2015 BCSC 1342.

[100] The British Columbia Court of Appeal reversed these decisions: 2016 BCCA 146, 400 D.L.R. (4th) 44. It held that the Tribunal had no jurisdiction over the complaint because Mr. Schrenk and the complainant were not in an employment or employment-like relationship. Discrimination "regarding employment" under s. 13(1)(b) requires the wrongdoer against whom the claim is made to have power or authority over the complainant.

[101] I agree. This case turns entirely on the interpretation of s. 13(1)(b) of the Code. I conclude that the protection provided by that provision focusses on the employment relationship — a relationship between employer and employee or similar relationship. Section 13(1)(b) authorizes claims against those who are responsible for ensuring that workplaces are free of discrimination. This conclusion is consistent with the text, context and purpose of s. 13(1)(b), as well as with the jurisprudence.

II. Analysis

[102] The question is whether the Tribunal's interpretation of s. 13(1) of the Code was correct.

[103] To interpret a statutory provision like s. 13(1), the Court must consider the text or words of the provision; the legislative and social context of the provision; and the purpose of the provision: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Prior court decisions on the interpretation of the provision are always helpful. The ultimate goal is to determine what the legislature intended. Human rights legislation should be interpreted broadly in order to facilitate the public-oriented objectives of such statutes: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 17; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604, at paras. 65-69. Nevertheless, the interpretation must still be rooted in the words of the relevant provisions: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371.

A. *Text*

[104] The text of s. 13(1)(b), read as a whole, supports the conclusion that the provision is intended to cover discrimination perpetrated by an employer or a person in an employer-like relationship with the complainant.

[105] Section 13(1)(b) protects against *discrimination by a person against another regarding employment*, on specified protected grounds. The words "regarding employment" and "person" are critical.

[106] Section 1 of the Code defines "employment" and "person".

> **"employment"** includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and **"employ"** has a corresponding meaning;
>
> …
>
> **"person"** includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;

[107] The phrase in s. 13(1)(b) — discrimination "regarding employment or any term or condition of employment" — is at first blush broad enough to include any conduct relating to employment in the workplace. This said, it is worth noting that the word chosen is not "workplace" but "employment". The former bears no connotation of a relationship between an employer and employee, but the latter does.

[108] Section 1 of the Code defines "employment" in terms of relationships: "'employment' includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal . . . ". Moreover, although the definition begins with the term "includes", which suggests that what follows is not exhaustive, "employment" expressly *does not include* the relationship of a particular principal and agent if a *non*-substantial part of that agent's services relate to the affairs of that principal. This suggests that there is something about the nature or extent of responsibility over work or the workplace that defines who can perpetrate discrimination "regarding employment" for the purpose of s. 13(1)(b).

[109] Reading the s. 1 definition of "employment" into the phrase "regarding employment" in s. 13(1)(b), we can rephrase it as follows: "regarding activity arising out of a relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal". The "employment" that is the subject of the protection accorded by s. 13(1)(b) is defined in terms of the relationship between the complainant and the employer, master or principal. This makes sense. Employers, masters, principals or their equivalents all have power and responsibility over the workplace in which the complainant finds himself. If the provincial Legislature had intended s. 13(1)(b) to allow claims against anyone at a workplace, it is difficult to understand why it went to the trouble of using the word "employment" instead of "workplace", and then defining "employment" in terms of the relationship between employer and employee, master and apprentice or principal and agent, thereby confining it to situations where the employer or its equivalent has control or power over the employee, apprentice or agent. The separate inclusion of "regarding . . . any term or condition of employment" in s. 13(1)(b) suggests that the Legislature wanted to target both behaviour flowing out of the relationship between a person in authority and his or her employee generally, as well as specific discrimination in the agreement that establishes that relationship.

[110] It is argued that the use of the word "person" at the outset of s. 13(1) ("[a] person must not") instead of "employer", "master" or "principal" signals that the Legislature intended the provision to apply to circumstances beyond discrimination

within the power of an employer, master or principal. However, if one accepts that the words controlling the ambit of the protection are "regarding employment" (i.e. regarding a matter arising out of a relationship of or like that of master-servant), this argument loses its force. The term "person" neither expands nor limits the ambit of the section.

[111] In summary, while the text or words of the provision are not entirely clear, read as a whole, they suggest that the Legislature was targeting discrimination committed directly or through inaction by an employer, master, principal or similar against an employee in the course of their relationship.

B. *Context*

[112] A contextual reading of s. 13(1) supports the view that the Legislature was targeting discrimination arising out of an employer-employee or analogous relationship.

[113] In interpreting a statutory provision, one must look at the legislative context — that is, how the provision fits in and functions in the statutory scheme when considered together with other provisions: see R. Sullivan, *Statutory Interpretation*, (3rd ed. 2016), at pp. 173-79. Each provision is presumed to have a role to play in the overall scheme. An interpretation of one provision that makes another redundant or that conflicts with other provisions or the overall terms of the

statute strongly indicates that the legislature intended that the provision be interpreted differently.

[114] The Code covers a number of kinds of discrimination, including discrimination by unions and associations (s. 14); discriminatory publication (s. 7); and discrimination in tenancy premises (s. 10).

[115] The first contextual consideration that presents itself is the separate protection against discrimination by unions and occupational associations in s. 14 of the Code. Discrimination by unions and associations is, by definition, linked to the complainant's work. If s. 13(1)(b) were interpreted so as to allow claims against anyone in the workplace, most of s. 14 would be redundant. Conversely, if s. 13(1)(b) is confined to claims between persons in an employer-employee or similar relationship, the need for s. 14 becomes apparent. It is possible, of course, that the Legislature intended partial or total redundancy, so it included unions in a separate section simply to highlight that particular issue and provide more detail, as it arguably did with wage discrimination in s. 12. However, it is equally, if not more, plausible to conclude that the Legislature did not consider discrimination by unions or similar groups to be covered by s. 13(1)(b), and went on to cover discrimination by those groups in s. 14.

[116] More broadly, the Code makes a clear distinction between private interactions between private individuals, which are generally not covered, and designated classes of relationships, which are covered. The scheme of the Code is to

describe categories of general protections based on relationships and/or activities, and to exclude interactions between private individuals that might otherwise be caught. Thus, under s. 7 (discriminatory publication), no complaint can be brought on the basis of a discriminatory, though private, communication between individuals (s. 7(2)). And under s. 10 (discrimination in tenancy premises), no complaint can be brought with respect to discriminatory conduct by someone choosing roommates (s. 10(2)(a)). Leaving s. 13 aside, the remaining provisions address circumstances where such exceptions are not needed because they are irrelevant: ss. 8 and 9 describe commercial transactions, s. 11 describes communications that are public by nature (job postings), s. 12 describes decisions that can only be taken by employers (wage discrimination), and as noted, s. 14 addresses unions and occupational associations. The scheme of the Code thus suggests that, where a particular species of discrimination could be read to encompass private interactions between private individuals, the drafter chose to include limiting language so as to clearly indicate that the private sphere falls outside the scope of the Code.

[117] From this we can infer a general legislative policy that ss. 7 to 14 of the Code were intended to apply to discrimination arising out of certain classes of relationships or, in the case of ss. 7 and 11 specifically, discriminatory public communications. They were not intended to govern private acts of discrimination between individuals in a general sense — they were intended to address only the specific interactions they describe. This supports the view that s. 13(1)(b) was never intended as a provision that would enable claims against an individual on the basis of

all of his or her workplace interactions, unless those interactions have some bearing on employment (defined as a relationship) rather than simply on work, writ large. In provisions where the prohibition initially appears broad enough to catch private communications or interactions between private citizens more generally (e.g. ss. 7 and 10), specific exclusions are set out. No such exclusions are present in s. 13(1)(b), simply because it was not intended to cover such broad claims.

[118] The scheme of the Code also supports the view that the Legislature was concerned with power imbalances. The target of many of the sections is someone who controls access to a service (s. 8), accommodation (ss. 8 and 10), property and tenancy (ss. 9 and 10), fair wages (s. 12), or membership in an association (s. 14). Rather than targeting all acts of discrimination, the Legislature — when not specifically addressing the harm of discriminatory public communications — narrowed its focus to discrimination by those in a position of power over more vulnerable people. All of these examples reflect different contexts in which discrimination can arise; this is why they are enumerated in the Code. However, the Legislature went further to indicate the types of relationships or communications that are of particular concern in these contexts. These, therefore, inform the nature of claims under the Code.

[119] Another difficulty is that, if s. 13(1)(b) enables a claim against Mr. Schrenk on the basis of the emails he sent after he was removed from the project and workplace, it is not clear how that provision and s. 7(2) can be reconciled. When

does a communication between individuals who no longer work together become private?

[120] Section 44(2) of the Code, which provides that "[a]n act or thing done or omitted by an employee . . . of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person", confirms the Legislature's intent to target discrimination arising from the employment or equivalent relationship. It makes employers and their equivalents respondents in workplace discrimination claims. This is both consistent with the reading of s. 13(1)(b) I propose and with the Court's decisions in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 91-96, and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at pp. 1292-94, which, with respect, focus solely on the ambit of the *employer*'s responsibility for the conduct of employees toward others in the workplace. Section 44(2) suggests that concerns about workplace control, systemic remediation, and ultimate responsibility animate such claims.

[121] It is argued that the interpretation of s. 13(1)(b) should be informed by the general backdrop of workplace harassment, which can come not only from employers, but from many sources. While this may be true, the question at issue is whether we can infer that the Legislature intended the provision to capture all claims against any person who engages in workplace discrimination — whether predicated on the existence of a relationship of power imbalance or not. A contextual reading of

the scheme and provisions of the Code suggests the latter was not the Legislature's intention.

C. *Purpose*

[122] Section 3(a) of the Code offers an expansive objective — "to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia". Paragraph (b) is also broad — "to promote a climate of understanding and mutual respect where all are equal in dignity and rights". However, the remaining three objectives, which focus on discrimination, inequality and redress, are expressly confined to measures found in the Code. The purpose of the Code, accurately described, is to contribute to the long-term goals set out in paras. (a) and (b) via the specific tools the Code provides for combatting discrimination and inequality.

[123] My reading of s. 13(1)(b) is consistent with this objective. Section 13(1)(b) may be read as targeting workplace discrimination that arises out of the employer-employee relationship or its equivalents. It is meant to cover *all* forms of workplace discrimination to which a worker is susceptible. However, it trains its regulatory guns on those responsible for intervening and halting the events in question. Where those responsible for guaranteeing discrimination-free workplaces fail to intervene to prevent or correct discrimination, s. 13(1)(b) is engaged. Since there will always be an entity in any work context that is responsible for ensuring that

workers enjoy a discrimination-free environment, this reading of s. 13(1)(b) does not thwart the purpose of the Code.

[124] It is argued that this interpretation of s. 13(1)(b) will leave victims of discrimination by their co-workers without a remedy — a result that would be inconsistent with the broad remedial purpose of statutes like the Code. This is not the case. Interpreting s. 13(1)(b) as confined to employer-employee and equivalent relationships may preclude claims under the Code against harassing co-workers. But it does not preclude complaints against the entities responsible for ensuring that the workplace is free of discrimination, like a common employer or other individuals or organizations that bear responsibility for the workplace in question.

[125] An employee for whom leaving work is not an option is not a "captive audience" (Justice Rowe's reasons, at para. 67) for a co-worker's harassment. Her remedy is not to confront her co-worker, but to go to the employer or person responsible for providing a discrimination-free workplace. If the employer fails to remedy the discrimination, the employee can bring a claim against the employer without fear of reprisal (Code, s. 43). Where the employer fails to take appropriate steps to correct the discrimination, the Tribunal may determine that the employer's conduct itself constitutes discrimination, giving the employee access to the full range of remedies provided by the Code.

[126] It is argued that harassment by or to a passer-by on work premises should be covered by s. 13(1)(b). The answer is that the Code does cover this harassment. If

discrimination to a worker occurs and the person responsible for protecting that worker (e.g. the employer) fails to protect the worker, s. 13(1)(b) is engaged. This would also apply to a customer harassing an employee, such as a patron harassing a server at a restaurant. Employers have a duty to intervene, and if they do not, they may be held responsible under s. 13(1)(b). If it is the customer who is harassed, she has recourse under different provisions of the Code: ss. 8(1), 9 and 10(1).

[127] It is also argued in this case that an employment-based conception of s. 13(1)(b) provides Mr. Sheikhzadeh-Mashgoul with no remedy against Mr. Schrenk directly in response to the emails Mr. Schrenk sent after they no longer worked together. However, this result flows from the explicit exclusion from protection of those who receive discriminatory private communications under s. 7(2) of the Code. If a discriminatory email is broadcast publicly, s. 7(1) would be engaged, but if the email remains private, the Code is clear: it provides no remedy. To read s. 13(1)(b) to include such emails when they were private would be to ignore the express language of the Code.

[128] Finally, it is suggested that confining s. 13(1)(b) to employment and employment-like relationships absolves discriminators from direct responsibility for their conduct. This does not mean, however, that discrimination will be allowed to flourish. Instead of casting its net indiscriminately to allow claims against any individual who commits a discriminatory act or utters a discriminatory word at a workplace, the Legislature chose to focus on those responsible for maintaining a

discrimination-free workplace. Far from undermining the Code's purpose, this choice upholds it.

D. *Jurisprudential Consistency*

[129] An interpretation of s. 13(1)(b) predicated on the responsibilities of employers and their equivalents is consistent with the jurisprudence.

[130] First, the broad interpretation proposed by my colleagues would narrow this Court's decision in *McCormick*, which confirmed that the nature of the relationship between complainant and respondent is dispositive of whether s. 13(1)(b) applies. If all that is required to link a complainant to a respondent under s. 13(1)(b) is a common work environment or a "sufficient nexus with the employment context" (Justice Rowe's reasons, at para. 67), it would be unnecessary to consider the relationship between parties, as *McCormick* instructs. Second, it is difficult to see how someone in a co-worker position like Mr. Schrenk could ever claim a *bona fide* occupational requirement as a justification for his conduct, as explained in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, which provides the governing framework for assessing workplace discrimination claims. On the interpretation I propose, these difficulties do not arise.

III. Conclusion

[131] For these reasons, I conclude that s. 13(1)(b) is limited to claims arising out of employment or equivalent relationships. I would dismiss the appeal.

Appeal allowed, MCLACHLIN C.J. *and* CÔTÉ *and* BROWN JJ. *dissenting*.

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

Solicitors for the respondent: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Canadian Association of Labour Lawyers: CaleyWray, Toronto.

Solicitors for the intervener the Canadian Construction Association: Torys, Toronto.

Solicitors for the intervener the Community Legal Assistance Society: Moore Edgar Lyster, Vancouver; Community Legal Assistance Society, Vancouver.

Solicitors for the intervener West Coast Women's Legal Education and Action Fund: Clea F. Parfitt, lawyer, Vancouver; West Coast LEAF, Vancouver.

Solicitors for the intervener the Retail Action Network: Underhill, Boies Parker, Gage & Latimer, Vancouver; BC Public Interest Advocacy Centre, Vancouver.

Solicitors for the interveners the Alberta Federation of Labour and the International Association of Machinists and Aerospace Workers Local Lodge 99: Chivers Carpenter, Edmonton.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitors for the intervener the African Canadian Legal Clinic: Faisal Mirza Professional Corporation, Mississauga; African Canadian Legal Clinic, Toronto.

COURT OF APPEAL FOR ONTARIO

CITATION: Aubrey Dan Family Trust v. Ontario (Finance), 2017 ONCA 875
DATE: 20171116
DOCKET: C62438

Simmons, Rouleau and Brown JJ.A.

BETWEEN

Aubrey Dan Family Trust

Appellant

and

Minister of Finance

Respondent

Mark Tonkovich and Jacques Bernier, for the appellant

Andrea Jackett, for the respondent

Heard: October 16, 2017

On appeal from the order of Justice Sidney N. Lederman of the Superior Court of Justice, dated June 10, 2016, with reasons reported at 2016 ONSC 3801.

REASONS FOR DECISION

[1] The appellant appeals from an order dismissing its summary judgment motion.

[2] The appellant moved for summary judgment allowing its appeal from a reassessment of provincial income tax issued under the Ontario *Income Tax Act*, R.S.O. 1990, c. I.2 (the "Ontario Act"), for the 2007 taxation year.[1]

[3] On its motion, the appellant asserted that the reassessment occurred after the limitation period for reassessing Ontario income tax had passed. The appellant argued that limitation waiver form T2029, which it had submitted for the 2007 taxation year, is a prescribed form under the federal *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Federal Act"), but the form did not operate to waive the limitation period for reassessing income tax under the Ontario Act. That is because waiver form T2029 had never been "prescribed" for the purposes of the Ontario Act by means of an order of the Provincial Minister: s. 1(1) of the Ontario Act[2]. In any event, advice from government agencies that no order or other document exists that prescribed waiver form T2029 for the purposes of the Ontario Act "called in question" whether it had been prescribed for purposes of the Ontario Act: s. 48(15) of the Ontario Act.

[4] The motion judge found that the relevant limitation period had expired but rejected the appellant's argument that no valid waiver was submitted. Among other things, the motion judge concluded that waiver form T2029 was deemed, by

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[1] The statutes cited in these reasons have undergone amendments that are not reflected herein. Quotations of statutory provisions reflect the versions in force at the relevant time.
[2] The full text of all relevant provisions of the Ontario Act and the Federal Act is included in Appendix 'A' to these reasons.

s. 48(15) of the Ontario Act, “to be a form prescribed by order of the Provincial Minister” under the Ontario Act. He also concluded that the waiver form had “not been called into question by the Provincial Minister or anyone acting on his behalf” within the meaning of s. 48(15). The motion judge therefore held that the waiver form signed by the appellant was valid for the purposes of waiving the limitation period for reassessment of Ontario income tax.

[5] The appellant does not dispute that waiver form T2029 is a prescribed form for the purposes of the Federal Act. However, it submits that s. 48(15) is a procedural and evidentiary provision that only operates to dispense with formal proof; it does not operate to deem that waiver form T2029 has been “prescribed by order of the Provincial Minister” for the purposes of the Ontario Act when that has never occurred: s. 1(1) of the Ontario Act; and *Murphy v. Minister of National Revenue*, 2009 FC 1226, [2010] 3 C.T.C. 1. In any event, the advice that no such order exists “called in question” the form and prevented the operation of s. 48(15).

[6] We do not accept the appellant’s submissions.

[7] The combined operation of s. 10 of the Ontario Act, which adopts certain provisions of the Federal Act, and s. 152(4) of the Federal Act permit reassessment of Ontario tax after a taxpayer’s normal reassessment period in respect of a taxation year where the taxpayer “has filed with the Minister a waiver in prescribed

form within the normal reassessment period for the taxpayer in respect of the year": s. 152(4)(a)(ii) of the Federal Act.

[8] Section 48(15) of the Ontario Act states that "[e]very form purporting to be a form prescribed … by the Provincial Minister shall be deemed to be a form prescribed by order of the Provincial Minister under … [the Ontario] Act unless called in question by the Provincial Minister or by some person acting for the Provincial Minister or Her Majesty."

[9] As noted by the motion judge, given the existence of a long-standing collection agreement between the Ontario government and the Federal government, by operation of s. 1(1) of the Ontario Act, "Provincial Minister" in s. 48(15) of the Ontario Act means the Minister of National Revenue for Canada.

[10] Further, waiver form T2029 "bears the insignia of the … [Canada Revenue Agency ("CRA")] and the Government of Canada and … is regularly used by the CRA." In the motion judge's words, "[i]n this way, it implies or purports to be a prescribed form." Moreover, "[e]xplicit wording on the form that it purports to be a form prescribed under the Ontario Act is not required for subsection 48(15) to apply."

[11] We agree with the motion judge that *Murphy* does not assist the appellant. In that case, it was held that a deeming provision in the Federal Act (s. 244(13)) could not assist where a document was signed and issued by a CRA official who

lacked the statutory authority to do so. Here, no delegated statutory authority is required to authorize any signatures on waiver form T2029.

[12] As the motion judge observed, this case is more akin to the decisions of the British Columbia Court of Appeal in *R. v. Point*, 119 C.C.C. 117; *R. v. Watson*, 2006 BCCA 233, [2006] 4 C.T.C. 61; and *R. v. Smith*, 2007 BCCA 499, [2007] 1 C.T.C. 147, in which that court relied on deeming provisions in the Federal Act (s. 244(16) or a predecessor thereof), which is akin to s. 48(15) of the Ontario Act, to find that forms were prescribed forms under the Federal Act.

[13] The scope of s. 48(15) is to be determined based on a proper interpretation of the Ontario Act. While "all statutes … must be interpreted in a textual, contextual and purposive way", the context of an income tax statute may lead to "an emphasis on textual interpretation": *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 11. Section 48(15) deems waiver form T2029 to be a prescribed form.

[14] We agree with the motion judge that s. 48(15) avoids the necessity of formal proof of an order of the Minister of National Revenue and that "[t]he prescription imposed by the Minister [of National Revenue] is sufficiently evidenced by the aforesaid indicia on the form." Further, as we have said, the appellant does not dispute that waiver form T2029 is a prescribed form for the purposes of the Federal Act.

[15] Accordingly, under the first part of s. 48(15) of the Ontario Act, waiver form T2029 clearly purports "to be a form prescribed or authorized by the [Minister of National Revenue]". Further, on a proper reading of the second part of s. 48(15), waiver form T2029 "shall be deemed to be a form prescribed by order of the [Minister of National Revenue] under this Act". The meaning is clear. This form purporting to be "prescribed or authorized by the [Minister of National Revenue] shall be deemed to be … prescribed by order of the [Minister of National Revenue]" under the Ontario Act.

[16] Finally, we agree with the motion judge that advice to appellant's counsel from government agencies under freedom of information type legislation and a statement in the respondent's motion factum did not amount to calling into question form T2029 as a prescribed form. The statements upon which the appellant relies were to the effect that no order or other document exists prescribing waiver form T2029 for the purposes of waiving the normal reassessment period under the Ontario Act.

[17] However, as stated by the motion judge, "[w]aiver form T2029 is a form utilized for federal purposes and purports to be the form prescribed or authorized by the Minister of National Revenue" – a fact the appellant does not dispute.

[18] Moreover, there is no evidence that it has been “called in question by the Provincial Minister or by some person acting for the Provincial Minister or Her Majesty.”

[19] The appeal is therefore dismissed with costs to the respondent on a partial indemnity scale fixed in the amount of $10,000 inclusive of disbursements and applicable taxes.

“Janet Simmons J.A.”
“Paul Rouleau J.A.”
“David Brown J.A.”

Appendix 'A'[3]

Income Tax Act, R.S.O. 1990, c. I.2.

Interpretation
1. (1) In this Act,

…

"Federal Act" means the *Income Tax Act* (Canada);

…

"Minister" means the Minister of National Revenue for Canada, but in any provision of the Federal Act that is incorporated by reference in this Act, unless a collection agreement has been entered into, a reference to the Minister shall be read and construed for the purposes of this Act as a reference to the Provincial Minister;

…

"prescribed", in the case of a form or the information to be given on a form, means prescribed by order of the Provincial Minister, and, in any other case, means prescribed by regulation;

…

"Provincial Minister" means the Minister of Finance or, where a collection agreement is entered into, means,

(a) the Receiver General for Canada, in relation to the remittance of an amount as or on account of tax payable under this Act, and

(b) the Minister, in relation to the administration and enforcement of this Act other than,

(i) sections 8.5 and 8.6, subsections 10 (3) and (4) and sections 22.1, 28, 45, 49 and 53,

(i.1) section 8.4.1,

(i.2) Divisions C.1 and C.2 of Part II and provisions of this Act and the Federal Act that apply in respect of provisions in those Divisions,

(ii) in relation to the assessment of a penalty under subsection 19 (3.1),

---

[3] As previously noted, these provisions reflect the relevant sections in force at the relevant times.

(iii) in relation to an objection to an assessment of a penalty under subsection 19 (3.1) or an appeal from such an assessment, and

(iv) Part III as it applies in relation to the Ontario child care supplement for working families;

…

Assessments and withholdings
10. (1) The following provisions of the Federal Act apply for the purposes of this Act and, in their application, any reference in them to section 150 or subsection 150 (1) of the Federal Act shall be read to include a reference to subsection 9 (1) of this Act:

1. Section 151.
2. Subsections 152 (1), (1.11), (1.12), (2), (3), (3.1), (4), (4.01), (4.1), (4.2), (4.3), (4.4), (5), (6), (7), (8) and (9).
3. Subsections 153 (1), (1.1), (1.2) and (3) and 156.1 (4).
4. Subsections 227 (5), (5.1), (8.3) and (8.4). 1997, c. 10, s. 4 (3); 1999, c. 9, s. 123 (1-3);

…

Forms prescribed or authorized
48. (15) Every form purporting to be a form prescribed or authorized by the Provincial Minister shall be deemed to be a form prescribed by order of the Provincial Minister under this Act unless called in question by the Provincial Minister or by some person acting for the Provincial Minister or Her Majesty.

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

Assessment and reassessment
152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

…

Proof of documents
244 (13) Every document purporting to have been executed under, or in the course of the administration or enforcement of, this Act over the name in writing of the Minister, the Deputy Minister of National Revenue, the Commissioner of Customs and Revenue, the Commissioner of Revenue or an officer authorized to exercise a power or perform a duty of the Minister under this Act is deemed to have been signed, made and issued by the Minister, the Deputy Minister, the Commissioner of Customs and Revenue, the Commissioner of Revenue or the officer unless it has been called in question by the Minister or by a person acting for the Minister or Her Majesty.

…

Forms prescribed or authorized
244 (16) Every form purporting to be a form prescribed or authorized by the Minister shall be deemed to be a form authorized under this Act by the Minister unless called in question by the Minister or by a person acting for the Minister or Her Majesty.

…

Definitions
248 (1) In this Act,

…

Minister means the Minister of National Revenue;

…

prescribed means

(a) in the case of a form, the information to be given on a form or the manner of filing a form, authorized by the Minister,

(a.1) in the case of the manner of making or filing an election, authorized by the Minister, and

(b) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation;

COURT FILE NO.: 302/07
DATE: 20090811

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, LOW AND KARAKATSANIS JJ.

B E T W E E N:

PRESTIGE TOYS LTD. Appellant	*Vincenzo Rondinelli*, for the Appellant and Respondent in the Cross Appeal
- and -	
REGISTRAR, MOTOR VEHICLE DEALERS ACT Respondent/ Appellant, Cross Appeal	*Christopher L Ezrin*, for the Respondent and the Appellant in the Cross Appeal
- and -	
SVETLANA LIOUBIMOVA Respondent in the Cross Appeal	*Christopher L. Ezrin*, for the Respondent in the cross appeal
	HEARD at Toronto: June 30, 2009

KARAKATSANIS J.:

[1] The appellant, Prestige Toys Ltd. (Prestige), appeals a decision by the Licence Appeal Tribunal dated June 13, 2007. The Tribunal directed the respondent, the Registrar under the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.41 (the *MVDA*), to carry out its proposal to revoke Prestige's registration as a motor vehicle dealer pursuant to s. 5(1) of the *MVDA*. The Tribunal found insufficient evidence to direct revocation of Svetlana Lioubimova's registration as a salesperson. An appeal to the Divisional Court lies under s. 11 of the *Licence Appeal Tribunal Act*, S.O. 1999, c. 12, Sched. G. The appellant asks

that the order directing revocation of the registration of Prestige be set aside. The respondent, the Registrar, cross appeals asking that the Tribunal's decision not to direct the revocation of the registration of Lioubimova be set aside, and that the Registrar be directed to carry out the proposal to revoke Lioubimova's motor vehicle salesperson registration.

Overview

[2] The Registrar issued a proposal dated July 20, 2006 to revoke the registration of Prestige as a motor vehicle dealer and of Lioubimova as a motor vehicle salesperson. The grounds for the revocations included: a conviction against Prestige for breach of the *Business Practices Act*, R.S.O. 1990, c. B.18, as amended by *Consumer Protection Statute Law Amendment Act, 2002*, S.O. 2002, c. 30, Sched. E, s. 1; failure to disclose material facts about a vehicle to purchasers in three different sales transactions; and misrepresentation of the selling price of vehicles on bills of sale. The proposal was based upon the Registrar's investigation of three sales transactions in 2005.

[3] Lioubimova was the sole officer and director of Prestige. There was evidence that she was actively involved in the management of the dealership in a small office environment. However, she was not the salesperson who sold the car in any of the sales transactions before the Tribunal.

[4] Prestige and Lioubimova both faced charges under s. 17 of the *Business Practices Act* for failing to make full disclosure of material facts with respect to the sale of a 2001 Mercedes s500 for $46,500 to Consumer A. The vehicle had been branded as "salvage" as a result of fire damage and had been written off and re-built. The Tribunal accepted the purchaser's testimony that she was not advised that it had been branded as "salvage" or rebuilt. Prestige pleaded guilty and the charges against Lioubimova were withdrawn.

[5] Consumer B purchased a 1998 BMW from Prestige for $14,000. The vehicle's accident history was not disclosed to the purchaser at the time of sale. She asked whether the car had a prior accident history and was told it had not. As well, the bill of sale that Prestige provided during the investigation did not correspond with the purchase price or the bill of sale provided to Consumer B at the time of purchase. The Tribunal found that the bill of sale did not disclose the vehicle's accident history which was clearly known to both Prestige and Lioubimova when they acquired the vehicle.

[6] Consumer C purchased a 1999 Ford Expedition for $11,740 in August 2005 and received a bill of sale in that amount at the time of purchase. The bill of sale that Prestige provided during the investigation showed a purchase price of $4,000 and other discrepancies. Consumer C had never seen that document and the signature on the document was not hers. In August 2006, after the investigation had commenced and she had been randomly sent a questionnaire to complete, Consumer C received a telephone call from Prestige; she was told "in case anyone asked," that the dealer had only made $4,000 from its sale to her.

The Statutory Framework

[7] Pursuant to s. 3(1)(a) of *MVDA*, a person must not carry on business as a motor vehicle dealer unless registered under the Act.

[8] Section 5 deals with entitlement to registration. Subsection 5(1) provides:

> 5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
> (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
> (c) the applicant is a corporation and,
>
> (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
>
> (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
>
> (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The Tribunal Decision

[9] The Tribunal made reference only to s. 5(1)(b) in its reasons. It found that Prestige did not disclose material information to the consumers at the time of sale in the three transactions described above and therefore did not act with integrity and honesty. Further, the Tribunal found that two different versions of the bill of sale were created in the sales involving Consumers B and C; by evidencing the sale with a false and misleading document, Prestige was not in compliance with its obligations under the legislation. The Tribunal also found there was evidence of an attempt to cover up the discrepancies after the proposal was issued. The Tribunal concluded that the past conduct of Prestige afforded reasonable grounds for the belief that it will not carry on business in accordance with the law and with honesty and integrity and that its licence should be revoked.

[10] The Tribunal found that Lioubimova, the sole officer and director, "bears ultimate responsibility for ensuring the integrity of the Dealer's business operation." On at least three occasions, her direct employees in a small office environment provided false information to her consumers and failed to maintain honest and proper records for her business. The Tribunal stated that, "This is a clear failure which demonstrates, at the very

least, inadequate supervision and control necessary for a registered business enterprise obligated to abide by consumer protection standards."

[11] The Tribunal found that there was no evidence that Lioubimova was personally involved in any of the sales transactions before the Tribunal or that she was aware of the improper or dishonest activity. The Tribunal concluded that there was insufficient evidence to conclude that her past conduct affords reasonable grounds for the belief that she will not carry on the business of salesperson with law, honesty and integrity.

Standard of Review

[12] Generally, the standard of review for decisions of the Licence Appeal Tribunal is one of reasonableness (see *Goselin v. Ontario (Motor Vehicle Dealers Act, Registrar)*, [2009] O.J. No. 1433 at para. 2 (Div. Ct.); *Allright Automotive Repair Inc. v. Ontario (Motor Vehicle Dealers Act, Registrar)*, [2008] O.J. No. 1557 at para. 5 (Div. Ct.)).

[13] The licence holder submits that the Tribunal's interpretation of the statutory provisions of the *MVDA* should be subject to the standard of review of correctness. The Registrar submits that the cross-appeal raises general legal principles relating to piercing the corporate veil and that the appropriate standard of review for such an issue is correctness.

[14] As noted in *Dunsmuir v. New Brunswick*, [2009] S.C.J. No. 9 (at paras. 54-55, 60), the standard of review for questions of law may depend upon the nature of the question in issue. Where the question is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. Deference will usually be afforded where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

[15] A measure of deference is appropriate where a tribunal's governing statute provides a specialized adjudicative regime for resolving disputes. Under the *Licence Appeal Tribunal Act*, the determination of whether past conduct of an applicant or registrant affords reasonable grounds for belief that it will not carry on business in accordance with law, honesty and integrity is a core function of the Tribunal. This is the case not only in relation to the registration of car dealerships or salespersons under the *MVDA*, but also in relation to registrations or licences under numerous other statutes containing a similar provision. The Tribunal therefore applied a statutory provision with which it has particular familiarity. As well, with respect to the principal's responsibility for the actions of the corporation, the legal and factual issues are intertwined and cannot be readily separated. In these circumstances, a deferential standard of reasonableness applies.

Was the Tribunal entitled to consider the past conduct of the corporate car dealership?

[16] Prestige submits that the Tribunal erred in considering the past conduct of the corporate car dealership and that its decision cannot be reconciled with the decision of the Divisional Court in *Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* (1988), 65 O.R. (2d) 526. It is argued that the Tribunal was not entitled to consider the past conduct of the corporate car dealership under s. 5(1)(b) but was restricted to a consideration of the past conduct of its officers or directors under s. 5(1)(c)(ii).

[17] In its reasons, the Tribunal referred to the past conduct of the corporate dealership. It referred only to s. 5(1)(b) and did not refer to s. 5(1)(c)(ii).

[18] In *Coates*, the corporate dealership was convicted of an offence. Based upon that conviction, the Tribunal revoked the registration of both the corporate dealership and the director and officer who was a registered salesperson. There was no evidence of the individual's personal involvement in the offence and the company had some 60 employees. The Divisional Court held that there was no evidence of the nature and quality of the director's operational control and that "it could not be presumed that the individual appellant had knowledge of what they were doing." The Court held that the Tribunal was not entitled to revoke the registration of either the corporation or the officer and director.

[19] The Divisional Court in *Coates* stated, at paras. 25-26:

> The plain meaning of s. 5 is that a non-corporate applicant is subject to s. 5(1)(a) and (b) and a corporate applicant is subject to s. 5(1)(c). The past conduct of officers and directors alone is relevant to the grant or continuance of a corporation's registration. Why the legislature saw fit to not include reference to the past conduct of a corporation is not clear. What is clear is that a statute affecting livelihood must not be warped to fit the objectives of an administrative tribunal however laudable they might be.
>
> To read "applicant" in s. 5(1) to include corporation is to ignore the distinctions the statue itself draws. It is a reading that, in my respectful opinion, is unacceptable.

[20] The above interpretation of s. 5(1) has the effect of permitting a corporation that commits offences or breaches its statutory obligations to continue to operate provided the officers and directors have no direct involvement in the unlawful conduct. Such an interpretation undermines the effective regulation of the industry and the consumer protection purpose of the legislation. This interpretation of s. 5(1) in *Coates* has not been considered by any other court in Ontario.

[21] The law governing statutory interpretation has evolved substantially in the last 20 years. The Supreme Court of Canada has now well established the principle that a modern purposive approach to statutory interpretation requires that "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) at p. 87). See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, at paras. 95-96.

[22] The *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 64(1) further justifies a strong emphasis on a purposive approach:

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

[23] In my view, a purposive approach leads to a different conclusion regarding the interpretation of s. 5(1) of the *MVDA* from that in *Coates* and, as a result, the interpretation in *Coates* should be revisited.

[24] In my view, the Tribunal was entitled to consider the past conduct of the corporate car dealership under s. 5(1)(b), as well as the past conduct of its sole officer and director under s. 5(1)(c)(ii). An interpretation that permits the Registrar and the Tribunal to examine the past conduct of both the corporation and its officers and directors is consistent with the purpose of the Act as traced through its legislative history and with its increased focus on consumer protection. While the *MVDA* affects livelihood, as noted in *Coates*, amendments to broaden the ambit of the past conduct that may be considered in determining whether to grant, renew or revoke a registration have expanded its consumer protection focus. It is also consistent with the language of the *MVDA.*

[25] The purpose of legislation can also be established through an examination of its evolution through amendments. They may show a change in direction in the purpose of the statute. (See Ruth Sullivan, in her book *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law Inc., 2007) at 203-205). The Supreme Court of Canada has used such an approach to determine the purpose of legislation through an examination of its evolution through amendments: see *Zeitel v. Ellscheid*, [1994] S.C.R. 142; *Montreal v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141.

[26] The original legislation introduced in 1964 did not contain a section specifically addressing the past conduct of corporations. The *Used Car Dealers Act*, S.O. 1968-69, c. 136, added s. 5(1)(b) and the clear statutory authority to look at the conduct of the corporation or its officers or directors. Section 5(1)(b) provided:

> where the applicant is a corporation, its financial responsibility or the record of past conduct of the corporation or its officers or directors is such that it would not be in the public interest for the registration or renewal to be granted.

[27] In 1971, the *Civil Rights Statute Law Amendment*, S.O. 1971, c. 50, amended several of the statutes dealing with licensing and registrations and added the right to look at the past conduct of a corporation's officers or directors. The current version of s. 5(1) of the *MVDA* was introduced at that time. Section 5(1)(c) provides consumers with greater protection by permitting the Tribunal to pierce the corporate veil and examine the conduct of the officers and directors of the corporation.

[28] Clearly, the legislative amendments to permit consideration of the past conduct of the principals of a corporation is an effort to enhance consumer protection and supports an interpretation of s. 5(1) of the *MVDA* that permits the Tribunal to consider both clauses (b) and (c) in relation to a corporate registrant. The section should not be interpreted in a manner to permit the corporation to avoid the consequences of conduct that it has admitted. For example, the addition of s. 5(1)(c) allows the Registrar and Tribunal to consider the actions of officers and directors of a new corporation without any previous record. However, s. 5(1)(b) allows them to consider the past conduct of the corporation as well.

[29] The language of s. 5(1) also supports an interpretation that permits the Tribunal to consider the past conduct of both the corporation and its officers and directors. The word 'applicant', or person, includes a corporation: *Legislation Act, 2006*, s. 87. The opening words of s. 5(1)(c) recognize that an applicant may be a corporation. Section 5(1) sets out alternative grounds that may disentitle an applicant to a registration or renewal of a registration. Accordingly, the language itself does not require that clauses (b) and (c) be mutually exclusive. The statute does not draw a distinction between an applicant and a corporation, but rather provides a means to pierce the corporate veil where the applicant is a corporation.

[30] As a result, a purposive interpretation of s. 5(1) permits the Tribunal to consider both the past conduct of a corporate registrant under s. 5(1)(b) and the past conduct of its officers and directors under s. 5(1)(c). Therefore, the Tribunal's decision that the registration of Prestige should be revoked based upon the past conduct of the corporate dealership was reasonable.

Was the Tribunal reasonable in directing the revocation of Prestige's registration based upon the conduct of its officer and director?

[31] Even if the Tribunal was required to rely only upon the past conduct of the officer and director of Prestige, its decision to direct the revocation of Prestige's registration was reasonable on that basis.

[32] In *Allright Automotive Repair*, above, the Court found that the failure of a manager to effectively supervise the activities of a salesperson who entered into a number of fraudulent transactions justified revocation of both the dealership's licence and the manager's own salesperson licence.

[33] Even in *Coates*, the Court noted that evidence of the nature and quality of the officer's and director's operational control would have been relevant to the issue of whether he was personally involved in the wrongdoing of the corporation. In that case, the individual operated a company with some 60 employees and it could not be presumed that the individual appellant had knowledge of the employees' activities.

[34] In my view, the term "conduct" under s. 5(1)(b) and (c) of the *MVDA* is broad enough to reasonably support the conclusion that the conduct of Prestige's officer and director was a basis upon which to revoke the registration of the car dealership. Conduct does not require evidence of deceit or even of wilful blindness. It encompasses any act or omission or course of behaviour that affords reasonable grounds to believe that the business will not be carried on in accordance with law, honesty and integrity.

[35] The Tribunal noted at page 9 of its decision that Lioubimova displayed a "clear failure which demonstrates, at the very least, inadequate supervision and control." She was the sole officer and director in a small office environment. There was evidence before the Tribunal that Lioubimova had personal knowledge of the background and history of all vehicles sold by the dealership and conducted a search for this information on the day Consumer A bought her car. The inspector testified that she believed that Lioubimova told her that she would compile a history report on every vehicle prior to being sold and that she gave a copy to the customers. She was clearly directly involved in the management of the business. Under Lioubimova's management, the corporate dealership was guilty of an offence under the *Business Practices Act*. Since Lioubimova was the sole officer or director and the "operating mind" of Prestige, a small office environment, and since she failed in her duties to effectively manage or supervise the dealership, her inadequate management and supervision afforded reasonable grounds for the belief that the dealership would not carry on business in accordance with the law and with honesty and integrity.

Fresh Evidence

[36] The Registrar moved to submit fresh evidence in this appeal that minutes of settlement had been agreed to in litigation relating to Consumer A: *Menon v. Prestige Toys Ltd.*, 158 A.C.W.S. (3d) 751 (Ont. Sup. Ct.), aff'd 168 A.C.W.S. (3d) 305 (Ont. C.A.). The decision refers to an affidavit by Lioubimova stating that she believed Ms. Menon was satisfied with the settlement and would take no further steps. The Registrar submits that this is fresh evidence of an admission of personal liability by Lioubimova.

[37] However, the mere fact of a settlement by Prestige Toys Ltd., or an affidavit by its officer and director, is not necessarily an admission of personal liability. Furthermore, the Tribunal decision refers to the settlement of the civil action and that Prestige Toys was taking the position that it did not have to honour it. The Registrar did not produce the Minutes of Settlement or the affidavit. Accordingly, the fresh evidence was previously available and would not have affected the outcome. It is not admissible.

Was the Tribunal unreasonable in failing to revoke the salesperson registration of Lioubimova?

[38] Lioubimova did not testify. No one testified on behalf of Prestige.

[39] There is no presumption that corporate wrongdoing is automatically attributable to the individual officer and director. The officer and director's conduct is a matter of evidence. However, Lioubimova's conduct as an officer and director should be assessed in the context of the operational circumstances, the conduct of the corporation, and her legal responsibilities as an officer and director. The Tribunal found that there was no evidence that Lioubimova was actively involved in any of the sales transactions before the Tribunal. The Tribunal found that there was no evidence that she personally knew of the legal contraventions and material misrepresentations entered into by her employees or that she personally took part in any of the improper or dishonest activity. The Tribunal held that the only evidence was limited to her apparent inability to manage the dealership so as to ensure its compliance with the Act and Regulation.

[40] There was evidence at this hearing that Lioubimova insisted that the Mercedes' history was disclosed to Consumer A and that Lioubimova conducted a "Carfax" search on the vehicle's history on the day it was sold to the customer. The Tribunal found that Lioubimova knew about the accident history of the cars sold to Consumers A and B. Lioubimova advised the inspector that she would consider the consumer's request to rescind the contract if the consumer could "prove" the vehicle had been in an accident. The inspector testified that she believed that Lioubimova told her that she would do a history on every vehicle prior to being sold and that she gave a copy to the customers.

[41] Although there was evidence before the Tribunal that Lioubimova had knowledge of both the circumstances and the transaction involving Consumer A, there was no analysis of her conduct. Furthermore, the evidence at the hearing disclosed that Lioubimova had provided documents to the inspector during the investigation that were false and did not match up with the original bills of sale provided to the customers.

[42] The Tribunal concluded, however, that there was no evidence of knowledge of the misrepresentations and insufficient evidence to conclude that her past conduct affords reasonable grounds for the belief she will not carry on the business of salesperson in accordance with the law, and with honesty and integrity.

[43] Although the Tribunal is not required to comment on every piece of evidence heard, there is a complete lack of analysis regarding evidence of Lioubimova's personal involvement to support the finding that she was not privy to improper or dishonest activity. Without a sufficiently articulated basis for the findings, meaningful appellate review is prevented.

[44] I am satisfied that the Tribunal failed to consider the evidence relevant to the issue of whether Lioubimova was personally implicated in the wrongdoing of which the corporation was found guilty. As a result, its conclusion that there was no evidence that

the sole officer and director had any personal involvement or knowledge of the corporation's wrongdoing was not reasonable in these circumstances.

Conclusion

[45] The appeal of the decision directing the Registrar to revoke the registration of Prestige Toys Ltd. is dismissed.

[46] The cross-appeal of the decision not to direct the Registrar to revoke the registration of Lioubimova is allowed; the decision is set aside and the matter is remitted to the Tribunal for a re-hearing by a different panel.

[47] The parties are agreed that costs should follow the event and that the appropriate quantum is $4000. Accordingly, the Registrar shall have its costs, fixed in the amount of $4000 inclusive of GST and disbursements.

Karakatsanis J.

Swinton J.

Low J.

Released: August , 2009

COURT FILE NO.: 302/07
DATE: 20090811

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SWINTON, LOW and KARAKATSANIS JJ.

B E T W E E N:

PRESTIGE TOYS LTD.

Appellant

- and -

REGISTRAR, MOTOR VEHICLE DEALERS ACT

Respondent

- and -

SVETLANA LIOUBIMOVA

Respondent in Cross Appeal

REASONS FOR JUDGMENT

KARAKATSANIS J.

Released: August 11, 2009

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ON THE
CONSTRUCTION OF STATUTES

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Ruth Sullivan

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ate in much the same way. They reflect persistent concerns singled out by courts when contemplating the consequences of applying legislation to particular facts. There can be significant overlap between the categories.

§10.27 To be successful, a claim that certain consequences will follow from a particular interpretation must be grounded in real possibility. Evidence is admissible to establish the truth of such a claim, but normally the courts rely on judicial notice in judging whether a claimed absurdity is convincing or "merely speculative". Courts are likely to reject an absurdity-based argument if the facts on which it depends are unlikely to occur or are unlike those at issue in the case.[46]

§10.28 ***Purpose is defeated.*** Statutory interpretation is founded on the assumption that legislatures are rational and competent agents. They enact legislation to achieve a particular mix of purposes, and each provision in the Act or regulation contributes to realizing those purposes in a specific way. An interpretation that would tend to frustrate legislative purpose or thwart the legislative scheme is likely to be labelled absurd.

§10.29 In *R. v. Proulx*,[47] for example, the Supreme Court of Canada had to determine whether a conditional sentence was a "sanction other than imprisonment" within the meaning of s. 718.2(e) of the *Criminal Code*. Even though conditional sentences were defined in the Code as a sentence of imprisonment, the court concluded they were not a "sanction [of] imprisonment" for purposes of s. 718.2(e). As Lamer C.J. explained, if imprisonment were here given its technical sense as set out in Part XXIII of the Code, it would "fly in the face of Parliament's intention in enacting s. 718.2(e) — reducing the rate of incarceration....":

> [I]f this interpretation of s. 718.2(*e*) were adopted, it could lead to absurd results in relation to aboriginal offenders. The particular circumstances of aboriginal offenders would only be relevant in deciding whether to impose probationary sentences, and not in deciding whether a conditional sentence should be preferred to incarceration. This would greatly diminish the remedial purpose animating Parliament's enactment of this provision, which contemplates the greater use of conditional sentences and other alternatives to incarceration in cases of aboriginal offenders.[48]

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46 See *Air Canada v. Ontario*, [1997] S.C.J. No. 66, 148 D.L.R. (4th) 193 (S.C.C.); *C.P. Airlines v. Canadian Air Line Pilots Assn.*, [1993] S.C.J. No. 114, [1993] 3 S.C.R. 724, at 743-45 (S.C.C.); *Union des employées et employés de service, section locale 800 c. Association démocratique des ressources à l'enfance du Québec (CSD) — Mauricie — Centre-du-Québec*, [2011] J.Q. no 19243, 2011 QCCA 2383, at paras. 46-47 (Que. C.A.), leave to appeal refused [2012] S.C.C.A. No. 72 (S.C.C.).

47 [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61 (S.C.C.).

48 *Ibid.*, at para. 92. See also *Cuthbertson v. Rasouli*, [2013] S.C.J. No. 53, 2013 SCC 53, [2013] 3 S.C.R. 341, at paras. 43, 51 (S.C.C.); *R. v. Middleton*, [2009] S.C.J. No. 21, 2009 SCC 21, [2009] 1 S.C.R. 674, at paras. 45-46 (S.C.C.); *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1

To avoid this absurd result, the Court interpreted the phrase "sanction other than imprisonment" to mean "sanction other than incarceration", an interpretation supported as well by the French language version of the provision.

§10.30 ***Irrational distinctions.*** A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one of the most frequently recognized forms of absurdity.

§10.31 In *Hills v. Canada (A.G.)*,[49] for example, a majority of the Supreme Court of Canada rejected an interpretation of the *Unemployment Insurance Act* partly because it made entitlement to unemployment insurance benefits depend on an arbitrary circumstance. The provision to be interpreted disqualified claimants for unemployment insurance if they were out of work because of a strike which they themselves were "financing". The issue was whether a claimant could be said to be "financing" a strike at his workplace because some of his union dues automatically went to an international strike fund from which the striking workers at his plant were paid. The majority wrote:

> Here ... it might be out of sheer convenience that claimant's union strike funds were handled by the international union. They could just as well have been administered by the union local to which appellant belonged or deposited in a bank or other financial institution. There is no doubt that in such case, the claimant would have been entitled to unemployment insurance benefits as neither he nor his union could have been held to have financed the strike of the other local of the union. Could the legislature really have intended disentitlement to be dependant upon such a trivial fact? I think not.[50]

§10.32 In *R. v. Paré*,[51] the Supreme Court of Canada was concerned with the meaning of the words "while committing" in s. 214(5)(b) of the *Criminal Code*. It classified as first degree murder any "murder ... when the death is caused by [a] person ... while committing an offence under section ... 156 (indecent assault on male)". The defendant argued that the words "while committing" meant that the homicide must be exactly simultaneous with the sexual offence. However, this argument was rejected because of the unacceptable consequences that would follow if exact simultaneity were required. Wilson J. wrote:

S.C.R. 652, at para. 28 (S.C.C.); *R. v. Alsager*, [2013] S.J. No. 736, 2013 SKCA 129, at paras. 48*ff.* (Sask. C.A.); *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2013] N.S.J. No. 606, 2013 NSCA 131, at para. 76 (N.S.C.A.); *Canada (Procureur général) c. Marier*, [2013] F.C.J. No. 159, 2013 FCA 39, at paras. 4-5 (F.C.A.); *Workers' Compensation Board of Saskatchewan v. Mellor*, [2012] S.J. No. 57, 2012 SKCA 10, at paras. 39-40 (Sask. C.A.), leave to appeal refused [2012] S.C.C.A. No. 196 (S.C.C.); *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, [2012] O.J. No. 815, 2012 ONCA 125 at para. 28*ff.* (Ont. C.A.), affd [2014] S.C.J. No. 36 (S.C.C.); *Keizer v. Slauenwhite*, [2012] N.S.J. No. 89, 2012 NSCA 20, at paras. 8 and 9 (N.S.C.A.), quoting the trial judge at para. 71.

49 [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

50 *Ibid.*, at 557-58, *per* L'Heureux-Dubé J.

51 [1987] S.C.J. No. 75, [1987] 2 S.C.R. 618 (S.C.C.).

> The first problem with the exactly simultaneous approach flows from the difficulty in defining the beginning and end of an indecent assault. In this case, for example, after ejaculation the respondent sat up and put his pants back on. But for the next two minutes he kept his hand on his victim's chest. Was this continued contact part of the assault? It does not seem to me that important issues of criminal law should be allowed to hinge upon this kind of distinction. An approach that depends on this kind of distinction should be avoided if possible.
>
> A second difficulty with the exactly simultaneous approach is that it leads to distinctions that are arbitrary and irrational. In the present case, had the respondent strangled his victim two minutes earlier than he did, his guilt of first degree murder would be beyond dispute. The exactly simultaneous approach would have us conclude that the two minutes he spent contemplating his next move had the effect of reducing his offence to one of second degree murder. This would be a strange result. The crime is no less serious in the latter case than in the former.... An interpretation of s. 214(5) that runs contrary to common sense is not to be adopted if a reasonable alternative is available.[52]

In both *Hills* and *Paré*, the absurdity consisted in making the fate of the parties turn on something that appeared to be foolish or trivial; there was no rational connection between the consequence and the key determining factor — in *Hills*, the place where union funds were deposited, in *Paré*, the two-minute pause.

§10.33 In *Berardinelli v. Ontario Housing Corp.*,[53] the Supreme Court of Canada had to decide whether s. 11 of Ontario's *Public Authorities Protection Act*, which imposed a short limitation period on actions against public authorities, applied to the defendant corporation in respect of all its activities or only those having a public dimension. Estey J. wrote:

> The Court is here confronted with at least two possible, but quite different, interpretations of s. 11. The one would impose on all actions involving the [defendant municipality] ..., however minor or miniscule, the protection of the limitation period established by s. 11. The imposition of this limitation period for this special class would have the direct result of producing two categories of housing units in the community: the one operated by persons having a statutory mandate to which a six-month limitation period would extend; and the other operated by a person without statutory authority to which the general limitation period would apply. Of course both housing projects would appear identical in fact to the attending public whose rights are directly affected by the distinction.[54]

To avoid creating "different conditions of owner liability for two apparently similar housing facilities,"[55] the Court opted for the other interpretation. In this

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52 *Ibid.*, at 631. See also *Re Rizzo and Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 39 and 41 (S.C.C.); *Fillion v. Degen*, [2005] M.J. No. 155, at para. 13 (Man. C.A.).

53 [1978] S.C.J. No. 86, [1979] 1 S.C.R. 275 (S.C.C.).

54 *Ibid.*, at 280.

55 *Ibid.*, at 283-84. For other examples of absurdity defined by irrational distinctions, see *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 35, 2012 SCC 35, at para. 29 (S.C.C.); *Canada v. Antosko*, [1994] S.C.J. No. 46, [1994] 2 S.C.R. 312, at para. 42 (S.C.C.); *Canada (Attorney General) v. Mossop*, [1993]

case, although there might have been grounds for treating public authorities differently from private entrepreneurs, the Court clearly judged them to be inadequate or inapplicable to these circumstances.[56]

§10.34 ***Misallocation and disproportion.*** A variation on irrational distinction occurs when an interpretation leads to an outcome in which persons deserving of better treatment receive worse treatment or vice versa. In *R. v. Wust*,[57] the Supreme Court of Canada had to determine whether the discretion to give credit for pre-sentencing custody conferred on a sentencing court by s. 719(3) of the *Criminal Code* applied to mandatory minimum sentences. Arbour J. wrote:

> If this Court were to conclude that the discretion provided by s. 719(3) ... was not applicable to the mandatory minimum sentence of s. 344(a), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders.... Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s. 344(a), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation ... that would reward the worst offender and penalize the least offender is surely to be avoided.[58]

Interpretations that result in a lack of fit between conduct and consequences may be rejected as absurd. In *R. v. Hinchey*,[59] for example, the issue was application

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S.C.J. No. 20, [1993] 1 S.C.R. 554, at 673, *per* Lamer J. (S.C.C.); *Slattery (Trustee of) v. Slattery*, [1993] S.C.J. No. 100, [1993] 3 S.C.R. 430, at 451-54 (S.C.C.); *Rawluk v. Rawluk*, [1990] S.C.J. No. 4, [1990] 1 S.C.R. 70, at 94-95 (S.C.C.); *McQueen v. Echelon General Insurance Company*, [2011] O.J. No. 4563, 2011 ONCA 649 (Ont. C.A.).

56 Compare *R. v. Biniaris*, [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381 (S.C.C.), where the Crown claimed that it was absurd to interpret the appeal provisions of the *Criminal Code* as granting an appeal from unreasonable convictions, but no corresponding appeal from unreasonable acquittals. The Court responded, at 402-03, by pointing out different policy considerations apply to appeals of convictions and appeals of acquittals, and therefore it was not irrational to treat them differently.

57 [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 (S.C.C.).

58 *Ibid.*, at para. 42. See *R. v. Arthurs*, [2000] S.C.J. No. 20, [2000] 1 S.C.R. 481, at 486 (S.C.C.), and *R. v. Arrance*, [2000] S.C.J. No. 21, [2000] 1 S.C.R. 488, at 492 (S.C.C.), dealing with the same issue. In these cases, the Court emphasized "the absurdity and the unfairness that results from an interpretation of the *Criminal Code* that precludes granting credit for time served prior to sentencing." See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] S.C.J. No. 68, [2003] 3 S.C.R. 228, at para. 76 (S.C.C.), where the appellant's attempt to rely on s. 18(2) of Quebec's *Charter of Human Rights and Freedoms* was rejected because the Court was "not satisfied that [by enacting s. 18(2)] the legislature intended to provide people convicted of a penal or criminal offence with more job security than accused persons." See *also Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] S.C.J. No. 72, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 27 (S.C.C.).

59 [1996] S.C.J. No. 121, [1996] 3 S.C.R. 1128 (S.C.C.).

of s. 121(1)(c) of the *Criminal Code*, which made it an offence for government employees to accept "a commission, reward, advantage or benefit of any kind". Cory J. wrote:

> The section could not have been designed to make a government clerk or secretary guilty of a crime as a result of accepting an invitation to dinner or a ticket to a hockey game from one known to do business with government.[60]

Along similar lines L'Heureux-Dubé J. wrote:

> My colleague is rightly concerned about this section imposing a criminal sanction for a benefit received which is so minimal it clearly does not warrant such a harsh reprisal. I agree that such an interpretation would clearly be absurd, and as such is not one which should be followed.[61]

The desire to avoid disproportionate results is also apparent in judicial applications of the *de minimus* principle.

§10.35 ***Contradictions and anomalies.*** From the earliest recognition of the golden rule, contradiction and internal inconsistency have been treated as forms of absurdity. Legislative schemes are supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labelled absurd.

§10.36 In *Canada (Attorney General) v. Public Service Alliance of Canada*,[62] for example, the issue was whether the Public Service Staff Relations Board was correct in treating persons who provided services to the federal government under long-term government contracts as "employees" within the meaning of the *Public Service Staff Relations Act*. A majority of the Supreme Court of Canada said no because treating these persons as employees would disrupt the labour relations scheme established through the joint operation of several federal Acts. Sopinka J. wrote:

> In the scheme of labour relations which I have outlined above there is just no place for a species of *de facto* public servant who is neither fish nor fowl. The introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.[63]

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60 *Ibid.*, at 1190.

61 *Ibid.*, at 1160-61. See also *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.), *per* Gonthier J. at 1082: "since the legislature is presumed not to have intended to attach penal consequences trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision."

62 [1991] S.C.J. No. 19, [1991] 1 S.C.R. 614 (S.C.C.).

63 *Ibid.*, at 633.

Sopinka J. went on to describe the confusion that would result if the suggested interpretation were accepted. The workers would be subject to contradictory terms and conditions of employment and contradictory bargaining regimes. Such basic matters as who would pay their salary and what deductions would be made at source would be unclear.[64] To suppose that such confusion was intended would be absurd.

§10.37 Interpretations are also labelled absurd if they create an inconsistency or anomaly when considered in the light of some other provision in the statute. In *Swan v. Canada (Minister of Transport)*,[65] for example, the court had to interpret s. 3.7(4) of the *Aeronautics Act* which empowered the Minister of Transport to "establish, maintain and carry out, at aerodromes, ... such security measures as may be prescribed by regulations of the Governor in Council or such security measures as the Minister considers necessary...". The Minister argued that under this provision he had an administrative power to establish security measures equal in scope to those which might be prescribed by the Governor in Council by regulation. Reed J. acknowledged that this interpretation was plausible on a hasty reading of the section. But she went on to say:

> Such a result does not, however, accord well with the other provisions of the Act. For example, s. 3.3(1) allows the Minister to subdelegate to members of the R.C.M.P. *or to any other person any* of his powers under the Act. It is hard to conclude that such a broad subdelegation of authority would have been prescribed if the Minister's powers under s. 3.7(4) were equal in scope to the regulation-making powers of the Governor in Council.[66]
>
> [Emphasis in original]

The interpretation favoured by the Minister was rejected because its implications, in light of other provisions in the Act, were unacceptable.

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64 *Ibid.*, at 633-34.

65 [1990] F.C.J. No. 114, 67 D.L.R. (4th) 390, at 409 (F.C.T.D.).

66 *Ibid.*, at 410. See *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.), where La Forest J. concluded at 141 that the words "Her Majesty" in s. 90(1) of the *Indian Act* did not refer to Her Majesty in Right of a province because if this interpretation were adopted it would be impossible to make any sense of s. 90(2); *McKibbon (Rodger, David) v. R.*, [1984] S.C.J. No. 8, [1984] 1 S.C.R. 131 (S.C.C.), where Lamer J. wrote at 155: "giving to those words the meaning suggested by appellant ... would lead to an absurdity.... Parliament could not have intended to abolish under s. 505(4) the power it had conferred upon the prosecutor under s. 504(b)."; *R. v. J.H.-D. (Y.C.J.A.)*, [2013] B.C.J. No. 1327, 2013 BCCA 295 (B.C.C.A.), where Chiasson J.A. wrote, at para. 32, that "a court will take into account anomalies, paradoxes and inconsistency created by an interpretation and, to a great degree, eschew them." See also *Keewatin v. Ontario (Natural Resources)*, [2013] O.J. No. 1138, 2013 ONCA 158, at para. 195 (Ont. C.A.), leave to appeal granted [2013] S.C.C.A. No. 215 (S.C.C.); *Dupuy c. Gauthier*, [2013] J.Q. no 4265, 2013 QCCA 774, at para. 50 (Que. C.A.); *Roggie v. Ontario*, [2012] O.J. No. 5476, 2012 ONCA 808, at paras. 52-53 (Ont. C.A.); *E.G. c. Reid*, [2009] J.Q. no 12582, 2009 QCCA 2086, at paras. 28-29 (Que. C.A.); *R. v. L.T.C.*, [2009] N.J. No. 269, 2009 NLCA 55, at para. 34 (Nfld. C.A.).

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

AND IN THE MATTER OF two Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Active Energy Inc. (Retailer Licence No. ER-2012-0045).

Ontario Energy Board
File No. EB-2017-0022

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